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GENERAL INDEX, TITLE, ETC.

TO THE

INDIAN LAW REPORTS,

MADRAS SERIES.

VOL. XXXVIII—1915.

JANUARY—DECEMBER.

Published under the Authority of the Governor-General in Council.

BY THE BOOK DEPOT BRANCH OF THE LEGISLATIVE DEPART-MENT OF THE BENGAL SECRETARIAT, CALCUTTA;
THE SUPERINTENDENT, GOVERNMENT PRESS, MADRAS;
THE SUPERINTENDENT, GOVERNMENT CENTRAL PRESS, BOMBAY;
AND THE GOVERNMENT BOOK DEPOT, ALLAHABAD

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NOTE TO THE BINDER.

Substitute these pages (1101 to 1104) *for* their corresponding ones in I.L.R., 38 Mad.—November Part.

I think that the suit is due to some confusion in the minds of the plaintiffs as to the applicability of the Hindu law of joint family property to Muhammadans. There is no allegation in the plaint that the parties agreed to retain the property which they inherited from Syed Oomer on his death undivided and to hold it as tenants in common such as appears in the case of *Abdul Kader* v. *Aishamma*(1). It has been argued that article 127 of the Limitation Act will apply, under which the plaintiff has twelve years from his exclusion from joint family property. I think it is perfectly clear that in Muhammadan law there is no such thing as joint family property. If the members of a Muhammadan family succeed to property on the death of a relation each of them takes a share of each item of the property; and the article of the Limitation Act which would apply to a suit for a share, would be article 123 which deals with a suit for a

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MOHIDEEN BEE v. SYED MEER SAHEB. —— BAKEWELL, J.

distributive share of the property of an intestate. In the case where one of the heirs has retained part of the inheritance in his possession, the suit must be brought within twelve years at the latest, after the debts of the intestate have been paid and the inheritance has become divisible among the heirs. In my opinion the suit is barred and must be dismissed with costs.

K.R.

ORIGINAL CIVIL.

Before Mr. Justice Bakewell.

JAMES RUSSEL McLAREN AND OTHERS (PLAINTIFFS),

v.

V. VEERIAH NAIDU AND OTHERS (DEFENDANTS).*

1915. November 9.

Limitation Act (IX of 1908), art. 183—Revivor of decree of Original Side of the High Court—Revival of decree on notice to one only of two judgment-debtors, not operating as revival against the other.

A revivor of a decree of the Original Side of the High Court made on an application for execution against one only of two judgment-debtors in the case does not keep the decree alive so as to enable the decree-holder to execute it against the other judgment-debtor after twelve years from the date of the decree.

The facts of the case sufficiently appear from the judgment.

Messrs. *Venkatasubba Rao* and *Radhakrishnayya* for the plaintiffs.

K. Ramachandra Ayyar for the second defendant.

BAKEWELL, J. JUDGMENT.—By a decree of this Court, dated 20th of February 1900, the two defendants in the suit were ordered to pay to the plaintiffs the sum of Rs 10,938-11-0 and interest thereon and costs. On the 24th February 1903, one of the plaintiffs in the suit presented an application for execution of this decree which prayed that notice under section 248 of the Code of Civil Procedure might issue to the first defendant to appear and show cause why execution of the decree should not issue and for attachment of a decree in another suit awarding costs to the first defendant. Notice was issued accordingly to the first defendant and on 3rd March 1903 an order was made granting leave to execute as prayed.

On the 25th February 1914 the transferee from the same plaintiff presented this application for execution of the decree, which states that the last order in execution is that of 3rd March

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* Civil Suit No. 203 of 1899.

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1103 and prays that the name of the transferee may be brought on record and leave to execute the decree against the second defendant be granted to him, and that notice may issue to the defendants. The second defendant appears upon notice issued on this application and objects that the application is barred by limitation by virtue of article 183 of the Limitation Act, 1908. This article prescribes a period of twelve years for an application to enforce a decree of a High Court in the exercise of its ordinary original civil jurisdiction, and provides that, when the decree has been revived, the twelve years shall be computed from the date of such revivor.

The English law is stated by Blackstone in the following passage:—"Writs of execution must be sued out within a year and a day after the judgment is entered; otherwise the Court concludes *prima facie* that the judgment is satisfied and extinct; yet, however, it will grant a writ of *scire facias* in pursuance of statute Westm 2–13 Edw. 1, c. 45, for the defendant to show cause why the judgment should not be revived and execution had against him; to which the defendant may plead such matter as he has to allege in order to show why process of execution should not be issued or the plaintiff may still bring an action of debt founded on this dormant judgment, which was the only method of revival allowed by the common law" (Commentaries, 15th Edition, volume 3. page 421). The writ recited the judgment and any change in the parties, and commanded the Sheriff to make known to the defendant or other person named in the writ that he should appear before the Court on a specified date to show cause why the plaintiff should not have execution of the judgment (Freeman on Execution, volume 1, pages 323 and 324). The form of notice under Order XXI, rule 22 of the Code, which corresponds with section 248 of the Code of 1882, contains substantially the same particulars (Appendix E, Form No. 7), and it has been held that the procedure under this section has taken the place of the former procedure by writ of *scire facias* in the Supreme Court, and that an order for execution after notice effects a revivor of a decree within the meaning of article 183: see *Dasoo Venkatesa Perumal Chetty* v. *Srinivasa Ranga Row*(1). Where there had been a change of parties subsequent to judgment, as in the case of the death of the judgment-creditor,

(1) (1910) I.L.R., 33 Mad., 157.

McLAREN v. VEERIAH NAIDU

BAKEWELL, J.

a writ of scire facias was necessary even within a year of the judgment, and it was held that a judgment in *scire facias* conferred a new right upon the executors—*Farran* v. *Beresford*(1) and *Farrell* v. *Gleeson*(2). Whether the judgment in *scire facias* conferred a new right when there had been *no* change of parties seems doubtful—*Farran* v. *Beresford*(1); but the writ should conform to the original judgment and should, therefore, be joint when the judgment is joint, and the latter should be revived against all the original defendants (Freeman on Execution, volume I, page 313). The procedure upon the writ therefore followed that in the action of debt against joint-debtors in which all should be joined and judgment against one extinguished the claim against another joint-debtor—*King* v. *Hoare*(3).

From the passage from Blackstone cited above it appears that a judgment-creditor had concurrent remedies by the writ of *scire facias* and the action of debt, and it is improbable that the judgments would have different effects.

The order of revivor in the present case was made without notice to one defendant and he had therefore no opportunity of appearing and objecting thereto, and it had no effect as against him or his property, except that, if it were carried out his co-debtor might obtain a right of contribution as against him. It seems to me that an *ex parte* order of this kind should not be held to affect the position of the second defendant in the absence of any direct authority.

In other Courts, where the prescribed period of limitation is very much less than in this Court, an application for execution made against one of several joint-debtors takes effect against them all (article 182); but there is no such provision for cases in which notice of the application is required. The fact that the legislature has expressly provided for one case of joint-debtors and has omitted to make the same provision for another case appears to me to show an intention to place the two cases on a different footing.

For these reasons I hold that the previous order in execution against the first defendant did not revive the decree as against the second defendant, and I dismiss this application with taxed costs.

N.R.

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(1) (1843) 10 Cl. & F., 319 at p. 334; s.c., 8 E.R., 764.
(2) (1844) 11 Cl. & F., 702; s.c., 8 E.R., 1269.
(3) (1844) 13 M. & W., 494.

CORRIGENDA, VOLUME XXXVIII.

Page 13, footnote, *for* App. *read* at p
" 19, (shortnote), line 13, *insert* the *before* reason.
" 23, line 12, *insert* ? *after* 1896.
" 25, (shortnote), line last but one, *after* not *read* the word as transferred.
" 28, line 17, *insert* " *after* Code
" 37, (shortnote), line 9, *for Gounden read Goundan.*
" " " " " 1903 " 1908.
" 39 (footnote), reference (1) *for* (1903) *read* (1908).
" 46, line 33, *for* तत्यशासमानाम् *read* तत्प्रत्यासमानाम्
" 65, " 6, *for Kanhamed read Kunhamed.*
" " (footnote), reference (6), *for* (1891) *read* (1901).
" 71, last line (brevier type) *for* insolven *read* insolvent.
" 98, (margin) *for* BEN ON *read* BENSON.
" 99, line 26, *for* the fullstop, (.) *substitute* a colon (:)
" 106, (shortnote), line 8, *for* (C.J. *Obiter*) *read* (WHITE C. J.:—*Obiter*).
" 221, (shortnote), line 8, *for* rateable *read* ratable.
" 231, line 9, *for Hedi, read Mehdi.*
" 236, (shortnote), last line but three, *for* 1890 *read* 1894.
" " " " " one " *Rajah* " *Raja.*
" 244, line 26, *for* This *read* this.
" 244, line 28, *for* Justice *read* justice.
" 245, " 5, *delete* the mark *between* the *and* sister.
" 246, " 18, *for* consideration *read* "considerations"
" 253, l
" "
" 254,
" 258, Last line but two, [illegible] in.
" " (footnote), reference (2), *insert* ? *between* the single brackets.
" 262, " " (1), *for* (1909) *read* (1910).
" 279, " " *insert* the opening single bracket —(— before 1871.
" 285, line 19, *for Whaley* and *Laing read Whaley* v. *Laing.*
" 291, last line but seven, *for* the *read* that.
" 292, line 31, *after* costs *insert* has.
" 297, (shortnote), last line, *after* debt *insert* to become.
" 299, close the ending paragraph with a rectangular bracket (]).
" 304, [illegible] delivered.
" 305, [illegible] *ad* 194.
" 334,
" 345, [illegible] *valad.*
" 375, (shortnote), line 19, for *Kœer* read *Koer.*
" 383, line 25, *after* (E) *insert* a colon (:) mark.
" 415, line 10, from below, *insert* a colon (:) mark *after* observed.
416, C.P.C., 568, cl. (*b*).?
" 421, line 34, *insert* Ayyar at *the end of the line.*
" 446, " 16, *delete* made.
" 447, " 7, for *Doed* read *Doe d.*
" 468, " 33, *for* General *read* The General.

Page 478, line 10, for *Hotchys* read *Hotley*.
(1886) 32 ch., 408.
„ 492, *insert* P. *Somasundaram* for *before P. Narayanamurti.*
„ *N. S. Narasimhachari* for *before V. Ramadoss.*
„ 497, line 24, *insert* a *after* or.
„ 32, *for* considered *read* concerned.
insert almost irrespective . . . office *between single brackets.*
„ 509 (shortnote), line 11, *for* 1912 *read* 112
„ 513, line 20, *for* a *read* in.
„ 520, last line of the reports *insert*) *before* relying.
„ 528, line 28, *insert* and *after* (1).
„ 536 (shortnote), line last but one, *for* 1888 *read* 1886.
„ 549, line 9, *after* (1) *insert* and.
„ „ „ 28, for *Gokal Dass* v. *Puranmal* read *Gokuldoss Gopaldoss* v. *Kambu Seochand.*
„ 554, *before G. S. Ramachandra Ayyar* for the petitioners *insert K. S. Jayarama Ayyar* for and *before T. R Venkatarama Sastriar* for the respondents *insert K P. Panchapagesa Ayyar* for.
„ 564, line 24, *for* नैष्ठिक *read* नैष्ठिक
„ 584, „ 9, *after* in *insert* 8.
„ 588 (footnote), *for* 1885 *read* 1886.
„ „ „ „ 1896 „ 1899.
„ 668, for *Kangayya* read *Kanagayya.*
„ 674, last line but eleven, *read the word before the word* before original *as* in.
„ 675, line 24, *for* declarasion *read* declaration.
„ 708, line 1, *for* his lordrhip *read* His Lordship.
„ 750, line 32, *insert* " *after* change.
„ 751, line 17, *insert* the *after* annuls, 167 Mass. (57 Am. St. Rep.).
„ 751, line 26, *for* drawyees *read* drawees
„ 765, „ 16, *delete* the opening single bracket before see.
„ „ „ 17, *for* the closing single bracket *substitute* in.
„ 806, „ 26, for (*Palmer* v. *Temple*) (1), *read* [*Palmer* v. *Temple* (1).]
„ 808, line 30, *for* has *read* was.
„ 811, „ 15, *for* ELDEN *read* ELDON.
„ 816, „ 36 and part of 37, *for* The *Lord Advocate* (with him Robert Munro, K.C., ... Ingram) *read The Lord Advocate* (*Robert Munro, K.C.*), *W. R. Sheldon* and *W. Ingram.*
„ 826, line 34, after *Bird* insert a ; (semicolon mark).
„ 1005, „ 5, for *infra* read *supra.*
„ 1018 (footnote), reference (2) *for* ad., *read* Mad.,
„ 1043, line 2, *for* plaintiffs *read* plaintiff.
„ „ „ 4, *for* appeal *read* petition.
„ 1099 (headnote) line last but one *after* if, *insert* a comma (,).
„ 1073, line 15, for *Moheri* read *Mohiri.*
„ 1146 (footnote) reference (6), *for* 1904 *read* 1913.
„ 1151, line 9, *for* अपे etc., *read* अप अनेकार्थत्वाकल्पनात् S. A. 78.
„ „ (footnote) reference (1) *for* D (small caps.) *read* C (small caps).



THE INDIAN LAW REPORTS,

MADRAS SERIES

CONTAINING

CASES DETERMINED BY THE HIGH COURT AT MADRAS AND BY THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL ON APPEAL FROM THAT COURT.

REPORTED BY

Privy Council J. V WOODMAN, *Middle Temple.*

High Court:
- PERCY R. GRANT (*Inner Temple*), *Senior Law Reporter.*
- C. MADHAVAN NAIR (*Middle Temple*), *Assistant Law Reporter.*
- S. VENKATACHARIAR (*Advocate*), K RAMACHANDRA AYYAR (*Vakil*), N RAJAGOPALACHARIAR (*Vakil*), *Junior Law Reporters*

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JUDGES OF THE HIGH COURT.

(1st January—31st December, 1915.)

CHIEF JUSTICE.

The Honourable Sir John Edward Power Wallis, *Kt.*, M.A. (Barrister-at-Law). (*Permanent from 16th February*, 1915.)

PUISNE JUDGES.

The Honourable Sir Chettoor Sankaran Nair, *Kt.*, B.A., B.L., C.I.E. (*On leave from 12th July*, 1915 *and resigned office on 2nd November*, 1915 *on appointment as member of the Executive Council of the Governor-General*).

The Honourable Mr. Abdur Rahim, M.A. (Barrister-at-Law). (*On deputation with the Royal Commission on the Public Services in India.*) (*Resumed office on 27th September*, 1915.)

The Honourable Sir William Bock Ayling, *Kt.*, I.C.S. (*On leave for 1 month preceding the summer vacation.*)

The Honourable Mr. Francis DuPre Oldfield, I.C.S. (*On leave from 9th August*, 1915.)

The Honourable Diwan Bahadur T. Sadasiva Ayyar, B.A., M.L.

The Honourable Mr. Victor Murray Coutts Trotter (Barrister-at-Law). (*Assumed charge on 11th February*, 1915.)

The Honourable Mr. Charles Gordon Spencer, I.C.S. (*On leave from 1st November*, 1915.)

The Honourable Mr. T. V. Seshagiri Ayyar, B.A., B.L. (*Permanent from 2nd November*, 1915.)

The Honourable Mr. Faiz Hasan Badruddin Tyabji, M.A. (Barrister-at-Law). (*Officiating.*) (*Ceased to officiate from 26th September*, 1915.)

The Honourable Mr. Alexander Lidderdale Hannay, I.C.S. (Barrister-at-Law). (*Ceased to officiate from 11th February*, 1915.)

APPELLATE CRIMINAL.

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Act I of 1876. A permanent lessee is not included in the term "owner" as used in section 2 of the Madras Assessment of Land Revenue Act (I of 1876) A permanent lessee is not a proprietor or owner under Regulation XXV of 1802 or the Madras Hereditary Village Offices Act (III of 1895). *Venkateswara Yettiappah Naicker* v *Alagoo Moottoo Servagaren* (1861) 8 M I.A., 327; *Hari Narayan Singh v. Sriram Chakaravarti* (1910) 37 I.A., 136; *Durga Prasad Singh* v. *Braja Nath Bose* (1911) 39 I A, 133 and *Kshetrabaro Bissoyi* v. *Sobhanapuram Harikristna Naidu* (1910) I.L.R, 33 Mad, 340, followed *Robert Fischer* v. *The Secretary of State for India in Council* (1899) I L R 22 Mad, 270 (P.C), distinguished. *Kamalammal* v. *Raju Naicker* (1896) I L R., 19 Mad., 308, distinguished.

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———— *of a money-decree of the Original Court—Decree reversed in appeal—*

Code (*Act XIV of* 1882), *sec* 583—lis pendens] A judgment-debtor, from whom the assignee of a money-decree has realized the decree amount in execution, is entitled to recover it back from him when the decree is after-

debtor had knowledge of the assignment before he lodged his appeal makes any difference Where the decree of the Appellate Court was the result of fraud and collusion between the judgment-debtor and the original decree-holder, it is possible that such a plea if made and proved would be a sufficient answer to a suit by the judgment-debtor against the assignee of the decree Money obtained under an invalid process of Court must be treated as money had and received to the use of the person from whom it was realized. A suit for restitution by the judgment-debtor was maintainable, where he had sought his remedy for restitution by an application made to the Court which executed the decree and it was on the objection of the defendant (assignee of the decree) that he was driven to institute the suit; the defendant cannot now be heard to say that the procedure to which he himself successfully objected was the proper procedure. *Settappa Goundan* v. *Muthia Goundan* (1903) I.L.R, 31 Mad., 208 and *Doraisami Ayyar* v. *Annasami Ayyar* (1900) I L.R., 23 Mad, 306, followed. *Tangi Joghi* v. *Hall* (1900) I L R., 23 Mad, 203, referred to. *Lalta Prasad* v *Sadiq Husen* (1902) I L.R., 24 All., 288, dissented from.

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Venkataramana Iyer v. Narasinga Rao .. (1915) I L.R , 38 Mad , 134

Autrefois acquit—Charge framed—Further inquiry ordered—Criminal Procedure Code (Act V of 1898), ss 253 (2), 350 and 437] Where a Magistrate framed charges against an accused person and was succeeded by another Magistrate who recommenced the case under section 350, Criminal Procedure Code, and upon examining the complainant, discharged the accused under section 253 (2), Criminal Procedure Code · *Held*, that the accused was *autrefois acquit* and that no further inquiry could be held into the case. *Per* AYLING, J —Where the proceedings recommended under section 350, are only an inquiry, they are recommenced as an inquiry; where they have developed into the trial stage they are recommenced as a trial, *i e*, proceedings in which a charge has been framed. The second Magistrate cannot ignore the charge framed by his predecessor, his order must be viewed as one of acquittal.

Sriramulu v. Veerasalingam .. ... (1915) I.L.R , 38 Mad , 585

AWARD—*Judgment and decree in accordance with award—Appeal—Civil Procedure Code (Act V of 1908), sch II, cls 15 and 16—Revision, nonmaintainability of—Civil Procedure Code (Act V of 1908), sec. 115, no formal petition necessary for revision under*] No appeal lies from a decree which is in accordance with an award except upon grounds mentioned in clause 16 (2) of the second schedule to the Civil Procedure Code (Act V of 1908) This was also the law under the old Civil Procedure Code (Act XIV of 1882) and it is *a fortiori* under the new Civil Procedure Code according to which an application could be made under clause 15 (c) to set aside an award on

CASES—*cont*

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——————, O II, RR 1, 2 AND 3—*Previous suit for declaration, dismissal of, for want of prayer for possession—Later suit for declaration and possession, maintainability of.*] The dismissal of a previous suit for a declaration of title to certain properties on the ground that the plaintiff was found entitled to possession is no bar to a suit for possession based on the same title as the causes of action, for which the allegations in the plaints must be looked to, are different in the two cases *Chand Kour* v. *Partab Singh* (1889) I.L.R., 16 Calc, 98 (P.C.), *Thrikaikat Madathil Raman* v. *Thiruthiyil Krishnen Nair* (1906) I.L.R., 29 Mad, 153, *Ramaswami Ayyar* v. *Vythinatha Ayyar* (1903) I.L.R., 26 Mad, 760, *Nonoo Singh Monda* v. *Anand Singh Monda* (1886) I.L.R., 12 Calc., 291, *Jibunti Nath Khan* v. *Shib Nath Chuckerbutty* (1882) I.L.R, 8 Calc., 819, and *Mohan Lal* v. *Bilaso* (1882) I.L.R, 14 All., 512, followed *Muthu Narayana Reddi* v. *Rayalu Reddi* (1896) 6 M L J, 51, and *Rangasami Pillai* v. *Krishna Pillai* (1899) I.L.R., 22 Mad, 259, not followed

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——————, O II, R 2—*Previous suit for specific performance of an agreement to sell—Decree for specific performance—Deed of conveyance obtained in execution—Subsequent suit for recovery of possession against the vendors—Suit not barred.*] Where the plaintiff, who had obtained in a previous suit a decree against the defendants for specific performance of an agreement to sell certain immoveable property to the plaintiff and had got a sale deed in his favour in execution of the decree, instituted the present suit for the recovery of possession of the lands from the defendants, *Held*, that the suit was not barred by Order II, rule 2 of the Civil Procedure Code (Act V of 1908) At the time the plaintiff brought the previous suit, the right to possession of the lands was not vested in him, as he acquired that right only on the execution of the deed of conveyance *Narayana Kaviraya*n v. *Kandasami Goundan* (1899) I.L.R., 22 Mad., 24, disapproved *Rangayya Goundan* v *Nanjappa Rao* (1901) I.L.R., 24 Mad., 491 (P.C.), explained. *Nathu valad Pandu* v. *Budhu valad Bhika* (1893) I.L.R., 18 Bom., 537, followed

Krishnammal v. *Soundararaja Aiyar* . (1915) I.L.R., 38 Mad., 698

——————, O. II, R 2—*Specific Relief Act (1 of 1877), sec 42—Suit for declaration—Previous decree between third parties—Plaintiffs not parties—Suit to declare that the decree is collusive and not binding on plaintiffs, if maintainable*] The plaintiffs sued for a declaration (1) that they were the owners of the suit properties as the rever-

the properties claimed in the present suit, though the defendants were in possession of them at the time of their previous suit The plaintiffs alleged that they came into possession of the properties subsequently to the previous suit. The defendants contended that the suit was barred under Order II, rule 2 of the Civil Procedure Code, and that the suit for a declaration that the decree passed in the suit between the first and the second defendants was collusive and not binding on the plaintiffs, was not maintainable. *Held*, that the present suit was not barred under Order II, rule 2 of the Civil Procedure Code *Held* further, that a suit for a declaration that a decree obtained by the first defendant against the second defendant was collusive and not binding on the plaintiffs was maintainable under section 42 of the Specific Relief Act

Nayanna v. *Sivanappa* .. .. (1915) I.L.R., 38 Mad., 1162

——————, O. II, RR. 2 and 4—*Previous suit for possession of lands only—Claim for past mesne profits, not included—Subsequent suit for the same, not barred—Cause of action for mesne profits different from that for possession of land.*] Claim for possession and claim

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for *mesne* profits are separate causes of action and have been always so treated under the Code of Civil Procedure. Where a plaintiff sued for possession of lands only when he might have joined in the same action claims for *mesne* profits and damages, it is open to him to bring a subsequent suit against the same defendants for the profits which became payable before the institution of the former suit and which might have been included in such suit. *Monohur Lall* v *Gouri Sunkur* (1883) I.L.R., 9 Calc., 283, *Tirupati* v *Narasimha* (1888) I.L.R., 11 Mad., 210, *Lalessor Babui* v *Janki Bibi* (1892) I.L.R., 19 Calc., 615 and *Gutta Saramma* v. *Maganti Raminedu* (1908) I.L.R., 31 Mad., 405, followed.

Ponnammal v *Ramamirda Aiyar* . . (1915) I.L.R., 38 Mad. (F.B.), 829

————————, O. XX, R. 7 —*See* LIMITATION

————————, O. XXI, R. 52, *enquiry under* —*See* RATABLE DISTRIBUTION

————————, O. XXI, R. 63 *Order in favour of the claimant—Alienation by the claimant subsequently—Suit by decree-holder subsequent to the alienation to set aside the order—Lis pendens, doctrine of, if applicable—Pendency of proceedings—Suit, a form of appeal—Alienee, joined as party after one year from the date of order, not a necessary party—No bar of limitation—Limitation Act (IX of 1908), sec. 22, cll. 1 and 2.*] A purchaser of property from a claimant, after an order has been passed in his (claimant's) favour but before a suit under Order XXI, rule 63 was instituted,

brought in the guise of original suits. *Phul Kumari* v *Ghanshyam Misra* (1908) I.L.R., 35 Calc., 202 (P.C.), followed *Veera Pannadi* v. *Karuppa Pannadi* (1909) 6 M.L.T., 154, *Harishankar Jebhai* v. *Naran Karsan* (1894) I.L.R., 18 Bom., 260, *Kishori Mohun Roi* v *Hursook Dass* (1888) I.L.R., 12 Calc., 696 and *Settappa Goundan* v *Muthia Goundan* (1908) I.L.R., 31 Mad., 268, referred to.

Krishnappa Chetty v. *Abdul Khader Sahib* . ... (1915) I.L.R., 38 Mad., 535

————————, O. XXI, R. 66—*Setting aside a sale—Material irregularity in publication of sale proclamation—Understatement of revenue due on the lands—Undervaluation of property—Statement of the same by the decree-holder—No objection by the judgment-debtor to the amount of Government revenue or valuation—Mistake of the judgment-debtor as to interest in the property sought to be brought to sale—Duty of Courts in India in conducting sales in execution—Mistake of judgment-debtor due to action of decree-holder—Rule of estoppel of judgment-debtor, no application—Right of auction-purchaser before and after confirmation of sale—No absolute right for confirmation of sale.*] Though it was not incumbent upon the Court to state the value of the property in a proclamation for sale, a materially incorrect statement of the revenue or of the value of the property where the value is stated would constitute an irregularity which if it caused substantial inj
have the sale set aside
to the statement of the
of the peshkash being oc
mistake of fact regarding what the Court intended to sell, the judgment-debtor should not be held to be estopped from objecting to the sale on the ground of material irregularity. A party who does not raise an objection to the proclamation which he ought to have raised is estopped from

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editor of a newspaper—Incapacity to perform—Propriety of dismissal for incapacity.] The directors of a company are agents of the company and trustees for the shareholders of the powers committed to them. A director

... paper and exercise a general supervision over the matter which is written for the paper or extracted as news. For this, certain literary and business qualifications are necessary. If he is absolutely incapable of performing these duties which the company

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necessary to constitute a trust); (*b*) the creation of a charge on immoveable property by the promisor or allocation by the promisor of the specific money in suit in favour of the plaintiff, (*c*) the creation of a settlement on marriage, in which the plaintiff may be beneficially entitled, as provided by section 23 of the Specific Relief Act. and (*d*) estoppel as against the promisor, owing to transactions between the plaintiff and the promisor *Khwaja Muhammad Khan* v *Husaini Begam* (1910) I.L.R., 32 All, 410 (P.C.) and *Debnarain* v *Ramasadhan* (1913) 17 C W N, 1143, s c. 16 I.L J., 669, distinguished

Iswaram Pillai v *Sonnivaveru Taragan* ... (1915) I.L R., 38 Mad., 753

——— ———*Stranger's right of suit on—Family settlement—Trust—Provision for nuptials of plaintiff, a daughter of the family—Her right of suit though not a party to the contract*] A person though not a party to a contract can sue to enforce the terms thereof if it be a family settlement by which some provision is made for him or her as a member of the family (*e g*) for maintenance or marriage, though the same is not made a charge upon the family properties *Iswaram Pillai* v *Taregan* (1915) 26 M.L.J, 127, distinguished. If the contract constitutes by its terms a trust in favour of the plaintiff, a stranger to the contract, a suit to enforce such trust is beyond the cognisance of a Court of Small Causes

Sundararaja Aiyangar v *Lakshmiammal* . (1915) I.L R, 38 Mad, 788

(INDIAN) CONTRACT ACT (IX of 1872), ss 39, 55, 64, 65, 73, 74 and 75—*Vendor and Purchaser—Right to recover deposit, 'forfeited' by terms of a contract to sell.*] *A* entered into a contract on 24th February 1903 with *B* for the [illegible]

forfeited if there was any delay on the part of the purchaser. It was also stipulated that the vendor was to execute the conveyance either in favour of the purchaser or those nominated by him In part performance of this contract a sale of a portion of the lands was effected in favour of *M* on the 28th March 1903 Just before the day for payment, *B* gave notice to *A* that if the sale was not completed on or before the agreed date, the contract would be avoided *A* failed to perform the contract before that date. Subsequently *B* sold the lands to third parties and realised Rs. 1,500 in excess [illegible]
formance [illegible]
by him [illegible]
ance but d[illegible]
Held, by t[illegible]
was not e[illegible]
74 of the I[illegible]
and a stipulation for its forfeiture in case of breach is not one by way of penalty. The law of India on this subject does not differ from the English law. A stipulation to forfeit 10 per cent of the consideration in case of breach is neither unreasonable nor extraordinary. A vendor can be given relief by way of rescission of contract and at the same time, in the absence of express stipulation to the contrary, may be allowed to retain the deposit *Howe* v. *Smith* (1884) L R., 27 Ch. D, 89 applied. *Per* WHITE, C.J.—(1) The last rule would apply *a fortiori*, when, as in this case, there is an express agreement to forfeit the deposit (2) Since the Judicature Acts, the question whether time is of the essence of the contract, must be govern[illegible]
in such cases, as here [illegible]
after the agreed date [illegible]
contract in this case.
consideration as the deposit is not made as part-payment but as security for the purpose of binding the bargain. *Per* SADASIVA AYYAR, J.—*A* was entitled to recover [illegible]
regards t[illegible]
applicable. [illegible]
penalty. [illegible]

Natesa Aiyar v *Appavu Padayachi* ... ... (1915) I.L.R., 38 Mad, 178

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an estate"] An inamdar of a portion of a village, where the inam consists only of some of the lands in a village granted by a zamindar after the permanent settlement, is a landholder under section 3, clause (5) of the Madras Estates Land Act, though the inam may not be an estate under section 3, clauses (2) (*d*) and (*e*) of the said Act A suit brought by such an inamdar for arrears of rent against a ryot is cognisable by a Revenue Court under the said Act The test which is decisive on the question of jurisdiction is whether the plaintiffs are landholders under the Act. The term "landholder" is wider than the expression "the owner of an estate," and includes every person entitled to collect the rents of any portion of an estate by virtue of any transfer.

Appalanarasimhulu v. *Sanyasi* .. ... (1915) I.L.R, 38 Mad., 33

————————————, SEC. 3—'*Ryoti land*'—'*Ryot*'—*Rent—Pasture land not ryoti land—Rent for pasturing, not 'rent' under the Act—Sections* 77 *and* 189 *of the Act—Suit for ejectment and recovery of pasture rent, cognisable, only by Civil Courts*] Land usually fit only for pasturing cattle and not for cultivation, i e, ploughing and raising agricultural crops is not 'ryoti' land, though it may have been 'old waste' and a tenant of such land is not a 'ryot' and any amount agreed to be paid for pasturing cattle is not 'rent' within the definitions of section 3 of the Madras Estates Land Act (I of 1908) hence a suit to eject such a tenant from the land or to recover the amount due for pasturage is cognisable only by a Civil Court and not by a Revenue Court, as the jurisdiction of Civil Courts exists in all cases where it has not been expressly taken away.

Raja of Venkatagiri v *Ayyapareddi* ... (1913) I.L R, 38 Mad., 738

————————————, SEC. 3, CLS 2 (*c*) AND (*d*), AND 5—*Landholder—Grantee of a portion of melvaram in an estate, a landholder—Cultivating tenant under the grantee, a ryot*] An alienee of a part of the melvaram due from the lands which form a part of an estate's ryoti lands is a "landholder" within the meaning of section 3, clause 5 of [illegible]

Venkanna v. *Sri Raja Rama Row* ... .. (1915) I.L.R, 38 Mad, 1155

————————————, SS. 3 (7), 6, 23 AND 153 AND 157—'*Old waste,' ejectment from—Onus of proving 'old waste' on landlord.*] A landholder claiming to eject a tenant under sections 153 and 157 of Madras Estates Land Act (I of 1908) on the ground that he is a non-occupancy ryot of 'old waste' is by section 23 of the Act bound to prove that the land is 'old waste' within the meaning of section 3, clause (7) of the Act If neither sub-class (1) nor the latter part of sub-clause (2) of the definition of 'old waste' would apply to the facts of the case, the first part of sub-clause (2) cannot be used to prove that the land is 'old waste' as that refers to a state of facts subsequent to the passing of the Act, and as section 6 of the Act vested in the tenant in possession occupancy right from the date of the passing of the Act in all ryoti lands not being 'old waste.'

Saravarayudu v. *Venkataraju* ... ... (1915) I L.R., 38 Mad., 459

————————————, SS. 3 (7), 153 AND 157—*Proviso to sec.* 153, *effect of—'Old waste,' tenant of—Ejectment from, grounds of.*] The combined effect of section 153 of the Madras Estates Land Act (I of 1905) even as amended to by section 8 of Madras Act IV of 1909, and of section 157 of the Estates Land Act is that a ryot of old waste cannot be ejected on the ground of expiry of a term of lease contained in a contract entered into before the Act came into force.

Atchaparaju v. *Raja V. G. Krishnayachendrulavaru* .. ..
(1915) I.L.R., 38 Mad., 163

————————————, SS. 77 AND 189—*See* (MADRAS) ESTATES LAND ACT (I OF 1908), SEC 3.

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the jurisdiction of the Revenue Courts. A tenant in possession after the expiry of his term, who has not been recognised by the landholder as a tenant subsequent thereto, is a trespasser within the meaning of section 163 of the Act, and consequently a suit in ejectment can be instituted against him in a Civil Court.

Ponnusamy Padayachi v. *Karuppudayan* .. . (1915) I L.R., 38 Mad., 843

————————, SEC 42, CL. 1, (*a*) AND (*b*), AND 2 —*Enhancement or alteration of rent—Lease-deed—Provision as to payment of rent on excess of area of lands found on measurement—No enhancement or alteration of rent—Previous order of Collector not required—Bengal Tenancy Act (VIII of* 1885), *ss* 52 *and* 188.] The proviso found in clause 2 of section 42 of the Madras Estates Land Act (*I* of 1908), which requires the order of a Collector before an enhancement of rent can be allowed, does not apply to the claim of a landholder who sues to recover arrears of *tirva* due under a lease-deed which contained a provision for payment of tirva at a specified rate on the excess lands found on measurement over the area specified in the lease-deed. It is only where the landlord wants to enhance the rent, basing his claim on the right granted and declared by section 42, clauses 1 (*a*) and (*b*), that he should obtain, under clause 2, the order of the Collector for such alteration of rent before he could claim the altered rent. *Dintarini Dasi* v. *L. P D. Broughton* (1896) 3 *C W N.*, 225 and *Ram Chunder Chuckrabutty* v. *Giridhur Dutt* (1892) I L.R., 19 Calc., 775, followed.

The Manager to the lessees of the Sivaganga Zamindari v. *Chambaram Chetti* (1915) I L R., 38 Mad., 524

————————, SEC. 53 (2)—*Distraint for a higher* ... s 53 (2) of the ... a suit to set ... mount legally ... the landlord. ... ibility of the

Raghunatha Row Sahib v *Vellamoonji Goundan* .. (1915) I.L.R , 38 Mad , 1140

————————, SEC 111, et seq —*Sale of holding under—Suit for declaration of its invalidity—Cognisable in a Civil Court*] A suit for a declaration that the sale of a holding under section 111 *et seq.* of the Madras Estates Land Act was void in consequence of the landholder's failure to apply ... section 115 of the Act is ... Sahib v. *Muthialu Chettiar* (1 ... *Muthusamy Mooppan* (1904) I ... v. *Sankarayya Reddiar* (1904 ... of the Act commented on.

Chidambaram Pillai v *Muthammal* .. (1915) I L.R., 38 Mad, 1042

————————, SEC. 153, PROVISO :—*See* (MADRAS) ESTATES LAND ACT (I OF 1908), ss 3 (7), 153 AND 157 . .. 163

————————, SEC 192—*Presentation of plaint to Head Clerk not authorized to receive—Limitation Act (IX of* 1908) *sec* ...

The Receiver of the Nidadavole and Medur Estates v. *Suraparazu* ... ... (1915) I.L.R., 38 Mad, 295

————————, SEC. 192—*Suit under section* 213—*Appellate decree—Second Appeal—Limitation Act* (*IX of* 1908), *sec.* 23—

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——— *by Zamindar to his wife and minor son*:—*See* TRANSFER OF PROPERTY ACT (IV OF 1882), SEC 10.

——— *of melvaram*:—*See* MADRAS ESTATES LAND ACT (I OF 1908), SEC. 8.

——— *of village composed of cultivated and waste lands, as inam*:—*See* MADRAS ESTATES LAND ACT (I OF 1908), SEC 8.

GRANTEES, *estate of*:—*See* TRANSFER OF PROPERTY ACT (IV OF 1882), SEC. 10.

GRANT, *inam—Grant of land, "besides poramboke," construction of*—Padugai *lands in Trichinopoly and Tanjore taluks, ownership of*—'Padugai, *meaning of.*]

river though it may not operate to give communal property such as burying-

Narayanasomi v *Kanniappa*,

of State v *Kaunapallee Venkata-*

Padugai land in Trichinopoly

level bank breadth of the river between the edge of the sandy stream bed and the high flood level bank. SADASIVA AYYAR, J—The grant of *poramboke* does not operate to give the grantee the bed of the river Meaning of the word '*Poramboke*,' considered

Secretary of State v. *Raghunatha Tathachariar* ... (1915) I.L R, 38 Mad., 108

GRANT OF HOUSE, *construction of* —See EASEMENT.

GROUNDS OF *ejectment of tenant of 'Old waste'*:—*See* (MADRAS) ESTATES LAND ACT (I OF 1908), SS 3 (7), 153 AND 157.

GUARDIAN—*Hindu father entrusting sons for custody and education in England to another person who defrays expense of their maintenance and education—Revocation of such authority and demand for sons to be restored to his custody—Suit to enforce demand in District Court—Questions to be determined in such a suit—Jurisdiction of the District Court—Guardians and Wards Act (VIII of 1890), sec. 9—'Ordinarily resident,' meaning of—Suit, not the appropriate procedure—Transfer of suit from the District Court to the High Court under clause 13 of the Letters Patent, 1865—Powers of the High Court in dealing with the suits so trasnferred—Mandatory order of the kind asked for, not to be made—What a Court of competent jurisdiction in India could do under the circumstances—Order declaring a guardian, when to be made—Guardians and Wards Act (VIII of 1890), sec. 19—Order declaring a guardian during respondent's life, propriety of.*] Among Hindus, as in England, the father is the natural guardian of his children during their

authority he thus confers is essentially a revocable authority, and if the welfare of his children require it, he can, notwithstanding any contract to the contrary, take such custody and education once more into his own hands. If however the authority has been acted upon in such a way as in the opinion of the Court exercising the jurisdiction of the Crown over infants to create associations or give rise to expectations on the part of the infants which it would be undesirable in their interests to disturb or disappoint, such Court will interfere to prevent its revocation. *Lyons* v. *Blenkin* (1821) Jac., 245, followed. The plaintiff (respondent) a Brahmin residing at Madras, and having only a small income, had been for many years a member of the Theosophical Society of which the defendant (appellant) was President. He had two sons born respectively on 11th May 1895 and 30th May 1898. In 1910 the appellant offered to take charge of his sons and defray the expense of their maintenance and education in England and at the University of Oxford The respondent accepted that offer, and by a letter to the appellant, dated 6th March 1910, authorized her to take charge and be guardian of his sons, who were thereafter in her custody and were eventually in February 1912 taken by her to England where she left them after making arrangements for giving them a course

holder of an impartible zamindari, died in 1868 without issue, leaving a widow *K*. Prior to his death, he executed a document authorizing her to adopt a son to him. On his death his brother *R* succeeded to the estate. Subsequently in 1870, *K* adopted *B* who recovered the zamindari from *R* by suit and died in 1906 without issue leaving a widow *R.M.* On the death of *B*, the son of *R* succeeded to the zamindari but died fifteen days after his accession; the first and second defendants were his sons. In 1907, *K* purporting to act under the power given by her husband, adopted the plaintiff as a son to her husband, while *R M.* the widow of *B* was alive. The plaintiff sued to recover the zamindari from the defendants The latter pleaded that the power to adopt given to *K* by *A* (her husband), did not authorize her to make a second adoption, that the existence *R* was a bar to the exercise of the power even if it was not exhausted by the first adoption and that the adoption, not having been made to the last male holder, was invalid *Held*,

last male owner is applicable to a joint Hindu family living under the Mitakshara law. *Sivajnanam Seriaigar v. Ramaswamy Chettiar* (1912) 22 M.L.J., 85, referred to *Per* SESHAGIRI AYYAR, J.—The canon of construction

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should be regarded as being general in its nature unless conditions havo been imposed or limitations placed upon it by him. Where the exercise of a power to make a second adoption will not result in creating a new line of succession but will only transfer the estate from one intermediate owner to

Madana Mohana v. Purushotama . . (1915) I.L.R., 38 Mad., 1105

——— *Contract by father to sell family lands—Suit for specific performance against father—Son added subsequently as defendant—No necessity for contract—Contract not binding on son—Plaintiff's right to conveyance from father of his share only—Partial performance, meaning of—Specific Relief Act (I of 1877), sec 15—Contract by a co-parcener to sell his share in family property, and contract to sell specific family property, distinction between*] The plaintiff sued for specific performance of a contract for sale of certain lands and for possession. The contract was entered into by the first defendant, the undivided father of the second defendant who was subsequently added as a party to the suit. The first defendant pleaded that the contract was vitiated by undue influence and was a hard bargain that ought not to be enforced against him. The second defendant pleaded that the contract was entered into by the first without any legal necessity and was not enforceable in law. It was found that there was no undue influence or hard bargain and that there was no necessity to enter into the contract. The plaintiff offered to pay the full consideration for a conveyance of the lands which were the separate property of the first defendant and of his interest in the family lands. *Held*, that the plaintiff was not entitled to a decree for specifio performance of the contract against the first defendant or the second defendant. *Per* SANKARAN NAIR, J.—A person is entitled to specific performance of a contract by a member of a Hindu family to sell his share

agrees to sell

ot be passed

Ramaraju v.

v. Sivarama

v. Vadlamudi

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KUDIVARAM, *right to* :—*See* (MADRAS) ESTATES LAND ACT (I OF 1908), SEC. 8, EXCEP., ETC.

——————:—*See* (MADRAS) ESTATES LAND ACT (I OF 1908), SEC 8, ETC.

KUDIVARAM RIGHT, *acquisition of* :—*See* (MADRAS) ESTATES LAND ACT (I OF 1908), SEC. 8, EXCEP

——————, *sale of* :—*See* LIMITATION ACT (IX OF 1908), SEC. 22, ETC.

——————.—*See* LIMITATION ACT (IX OF 1908), SEC. 88, EXCEP

(MADRAS) LAND ENCROACHMENT ACT (III OF 1905), SS. 3, 5 AND 14—*Penal assessment, levy of—Suit for declaration of title and recovery of penal assessment—Suit brought after six months from date of notice and levy of penal assessment—Suit barred—Limitation.*] Where the plaintiff brought a suit against the Secretary of State for a declaration of his title to certain immoveable property and for recovery of penal assessment levied from him by Government under section 5 of the Madras Act III of 1905, more than six months after the issue of notice and levy of the assessment from him, *Held*, that the suit for declaration of title as well as for recovery of penal assessment was barred under section 14 of the Madras Act III of 1905

Bhaskaradu v *Subbarayudu* .. .. (1915) I.L.R., 38 Mad., 674

LAND-HOLDER.—*See* (MADRAS) ESTATES LAND ACT (I OF 1908).

"LAND-HOLDERS" *wider than "Owner of an estate"* :—*See* (MADRAS) ESTATES LAND ACT (I OF 1908).

LAND-HOLDER, *a grantee of a portion of melvaram* :—*See* (MADRAS) ESTATES LAND ACT (I OF 1908), SS. 3, ETC.

LANDLORD AND TENANT—*Tenancy, determination of—Improvements, non-removal of during tenancy—Right to them or their value after determination of tenancy—Transfer of Property Act (IV of 1882), sec. 108(h)*] The plaintiff's husband took a house-site on lease from the predecessor in title of the first defendant in 1883. After 1883 and before 1st May 1898 the plaintiff built a house thereon to the knowledge of the landlord and the lease was renewed by the first defendant on 1st May 1898 in plaintiff's favour who thereby agreed to vacate the land on a month's notice. While the plaintiff was in possession under that lease, the first defendant filed a suit in ejectment in the Small Cause Court, Madras, and though the present plaintiff then set up the claim now advanced, viz., a right to the superstructure built by her or its value, she was ordered without the determination of the right set up by her, to deliver possession of the land on or before the 26th February 1907, and on her failure to do so the first defendant was put in possession on that date. On the 1st August following, the first defendant gave the plaintiff notice to remove the superstructure within a fortnight. [illegible]

[illegible]

to a reasonable time after the determination of the tenancy whether it is by act of parties or by the order of Court. *Held* by MILLER, J., that the tenant having been given ample time to remove the building after giving up possession through Court she was not entitled to any further time. *Per* WHITE, [illegible]

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pre-existing right of the tenant to compensation or to remove the building even after the termination of the tenancy if he is not given compensation The new leased having recognised the tenant's ownership in the house, the plaintiff's ownership thereto cannot be defeated by her failure to remove the house within a reasonable time and as such failure cannot effect a transfer of ownership; all that the landlord was entitled to was an option to retain the building and pay compensation for it or to restore the land to its

a contract to allow the removeable fixture to remain as such upon the land for the new term. *Imas Kani Rowthan* v *Nazarali Sahib* (1904) I L R., 27 Mad, 211, referred to. English and Indian Case Law on the subject considered.

Angammal v. Aslami Sahib (1915) I L.R, 38 Mad ,710

LESSOR AND LESSEE—*Assignment by lessee—Assignee's right to apportionment, as against lessor—Transfer of Property Act* (IV *of* 1882), *ss.* 36 *and* 108—*Apportionment in English Law—under Statute Law in England—under the English Common Law—Rent—Interest accrues de die in diem—English Statute Law,* [illegible]

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and the assignee, and the latter is bound to perform the covenants of the lease after the assignment Possession is not the ground of the assignee's liability but the privity of estate which is created by the assignment itself. It is settled law that the privity of estate between the lessor and the lessee's assignee is terminated by an assignment by the assignee of his interest to a third person On principle there seems to be no reason why an assignee should not be entitled to apportionment as between himself and the lessor, and why rent should not be deemed to accrue due from day to day as between them In England the Law of apportionment has long [illegible]

Kunhi Sou v *Mulloli Chathu* ... ... (1915) I.L.R., 38 Mad., 86

LESSOR AND LESSEE—*Forfeiture for non-payment of rent—Joint lessors—Separation of their ownership in the lands—Receipt by one of the joint lessors of his share of rent from the lessee—Right of the other joint lessor to enforce the forfeiture*—*No act done by the lessor previous to the institution of the suit to determine the lease—Election previous to suit, not necessary—Waiver—Transfer of Property Act* (IV *of* 1882), *sec.* 111, *cl* (*g*)—*Right of re-entry under the old English Common law.*] One of several joint lessors who had become separately entitled to his share of the lands leased, is entitled to enforce the forfeiture clause in the lease deed separately as regards his share of the lands. *Sri Raja Simhadri Appa Rao* v *Prattipati Ramayya* (1906) I.L.R., 29 Mad., 29, followed *Gopal Ram Mohuri* v. *Dhakeswar Pershad Narain* (1908) I.L.R., 35 Calc., 807, dissented from Mere breach by the lessee of a covenant involving forfeiture contained in a lease of lands executed for agricultural [illegible]

SADASIVA AYYAR, J. As the breach of the condition gives rise to a cause of action at once, there is strictly no question of election between two different rights but there is only an election whether the lessor is to retain the right created by the breach or to give up the right The retention requires no definite physical act while the waiver does.

Korayelu v *Narayana* ... ... (1915) I.L.R., 38 Mad., 445

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(F.B.), explained and distinguished. *Gajjala Veerayya* v *Gajjala Gangamma* (1912) M W.N., 912, *Abinash Chandra Mazumdar* v. *Harinath Shaha* (1905) I L R, 32 Calc., 62 at p 71 and *Govinda Pillai* v *Thayammal* (1905) I.L.R., 28 Mad., 57, followed. *Per* SADASIVA AYYAR, J.—Consent to an alienation by the next reversioner and a ratification of past alienations stand on the same footing. Effect of attestation by a reversioner to a female's alienation considered

Narayana v *Rama* ... ... (1915) I.L R., 38 Mad., 396

————————, ARTS. 142 AND 144:—*See* MUTT, HEAD OF.

————————, ART. 146-A:—See MUNICIPAL COUNCIL.

the decree-holder for an adjournment to enable him to produce records or evidence necessary to effectively conduct the execution proceedings further is an application to get an order in aid of execution. *Sheshdasacharya* v *Bhimacharya* (1912) 14 Bom. L R, 1201, *Haridas Nanabhai* v. *Vithaldas Kisandas* (1912) I.L.R., 36 Bom., 638, *Pitam Singh* v. *Tota Singh* (1847) I L R, 29 All, 301 and *Kunhi* v. *Seshagiri* (1882) I.L R., 5 Mad., 141, referred to.

Abdul Kader Rowther v. *Krishnan Malaval Nair* . (1915) I.L.R., 38 Mad., 695

————————, *ss. 7 and 8 and art 44—Alienation by guardian of property of two wards, members of an undivided Hindu family—Suit by both more than three years after elder's majority but within three years of the*

by limitation not only as regards the elder brother's share but also in respect of the younger brother's though the latter attained his majority within three years prior to the institution of the suit.

Doraisami Serumadan v *Nandisami Saluvan* ... (1915) I L.R, 38 Mad., 118

————————(**IX OF 1908**), ARTS 48 AND 49—*Suit for goods misappropriated—Indian Contract Act* (*IX of* 1872), *ss* 108 *and* 178.] One *K* took a jewel of the plaintiff in May 1907, to find a purchaser for it, stating that he would settle the price in the presence of the plaintiff, but instead of doing so, *K* in June 1907 pledged it with the third defendant who *bona fide* lent, on its security Rs. 175 Plaintiff came to know of *K's* conversion in 1900 and sued in 1911 for the jewel or its value, the third defendant and the widow and son of *K* who died at the end of 1907. *Held*, that article 48 and not 49 of the Limitation Act (IX of 1908), was applicable and that the suit was not barred by limitation *Held*, also that the *bona fides* of the third defendant does not preclude the plaintiff from recovering the jewel without paying the third defendant the amount of loan. Effect of sections 108 and 178 of the Indian Contract Act, considered.

Seshappier v. *Subramania Chettiar* ... ... (1915) I.L R., 38 Mad., 783

————————, ARTS 62 AND 97—*Sale of land by one having a voidable title and putting purchaser in possession thereunder—Dispossession*

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Subbaroya v. *Rajagopala* ... ... (1915) I.L R., 38 Mad., 887

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——————, ART. 120—*Pre-emption, right of—Knowledge of sale, essential for the article to apply*] In a suit by an *attidar* to enforce his right of pre-emption, the right to sue cannot be said to arise unless the plaintiff has the necessary knowledge of the sale. Such a right can only be exercised when the *attidar* knows first of all that the property is sold or attempted to be sold to another person and what the terms on which it is proposed to be sold are. Without such knowledge he is not in a position to elect. *Ramasami Pattar* v. *Chinnan Asari* (1901) I.L.R., 24 Mad., 449 and *Kurri Veerareddi* v. *Kurri Bapireddi* (1906) I.L.R., 29 Mad., 336 (F.B.), distinguished. *Cheria Krishnan* v. *Vishnu* (1882) I.L.R., 5 Mad., 198, *Vasudevan* v. *Kesharan* (1884) I.L.R., 7 Mad., 309 and *Ammotti Haji* v. *Kunhayen Kutti* (1892) I.L.R., 15 Mad., 480, commented on.

Mammali v. *Kunhipakki Haji* ... ... (1915) I.L.R., 38 Mad., 67

—————— ART. 142. *See* HINDU LAW.

——————, *arts.* 164 *and* 181 *of the Second Schedule*—Ex parte *decree, setting aside of—Defendant dead after decree*— [illegible], *to set aside ex* [illegible] *[af]ter decree—Civil* [illegible] [dec]ree was passed [illegible] decree, and an [illegible] [o]f the deceased [illegible] [th]e decree. *Held,* that article 164 and not article 181 of the Limitation Act (IX of 1908) applied to the case and that the application was barred. On the true construction of article 164 of the Limitation Act read with section 146 of the Code of Civil Procedure (Act V of 1908), the word "defendant" in article 164 is wide enough to indicate the executor of the original defendant, though the executor may not have been brought on the record when the application was made. *Ganoda Prasad Roy* v. *Shib Narain Mukerjee* (1902) I.L.R., 29 Calc., 33, referred to.

Venkatasubbaiyer v. *Krishnamurthy* .. .. (1915) I.L.R., 38 Mad., 442

——————, ART. 183—*Reviver of decree of Original Side of the High Court—Revival of decree on notice to one only of two judgment-debtors not operating as revival against the other.*] A reviver of a decree of the Original Side of the High Court made on an application for execution against only one of two judgment-debtors in the case does not keep the decree alive so as to enable the decree-holder to execute it against the other judgment-debtor after twelve years from the date of the decree.

Mc Laren v. *Veeriah Naidu* ... ... (1915) I.L.R., 38 Mad., 1102

——————, SCH. II, ARTS. 29, 62 AND 120—*Attachment of debt—Wrongful seizure of moveable property—Suit by claimant to the debt against the decree-holder—Article, applicable.*] Neither attachment of a debt nor voluntary payment of it into Court, constitutes seizure of moveable propety under legal process within the meaning of article 29 of the Limitation Act. A suit by a claimant to the debt attached against the decree-holder to whom the amount of the debt was paid is governed by either article 62 or 120. *Narasimha Rao* v. *Gangaraju* (1908) I.L.R., 31 Mad., 431, distinguished.

Yellammal v. *Ayyappa Naick* ... ... (1915) I.L.R., 38 Mad., 972

——————, SCH. II, ART. 131—*Suit to recover sums due* [illegible] [Schedu]le II of [illegible] under [illegible] [ad]ministration [illegible] arrears [illegible] as to any [illegible]

Zamorin of Calicut v. *Achutha Menon* ... .. (1915) I.L.R., 38 Mad., 916

——————, SEC. 4, ARTS. 74, 75, 80 AND 120 —*See* LIMITATION

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favour of a stranger Hence, such a tenant is entitled under section 5 of the Act to the value of improvements effected by him even as against a purchaser in execution of the decree under a mortgage. Section 5 of the Act does not confine the tenant's right to improvements only as against his lessor.

Kanaran v. *Chirutha* ... . . (1915) I.L R., 38 Mad, 954

MANDAMUS OR INJUNCTION—*Whether an appropriate remedy to remove new additions to a building* —*See* MADRAS CITY MUNICIPAL ACT (III OF 1904).

MAPPILLAS OF NORTH MALABAR—*Law applicable—Question of fact—Custom, requisites of a valid—Judicial notice—Reasonableness or legality—Question of law—Custom derogating from the Muhammadan law—Madras Civil Courts Act (III of 1873), sec 16*] The law applicable to the parties to a suit is the law which the parties as a matter of fact by their customs and usages have adopted, not the law which the Courts by a consideration of the [illegible] r religious books or [illegible] e adopted. If that [illegible] policy is of such a [illegible] inciples underlying [illegible] t they should give effect to it. *Jammya* v *Diwan* (1901) I.L R., 23 All., 10, *Muhammad Ismail Khan* v. *Lala Sheomukh Rai* (1902) 17 C.W.N., 97 and *Harbae* v. *Sonabae* [illegible] able and must apply to matters which the written law has left undetermined, and the majority at least of any given class of persons must look upon it as binding and it must be established by a series of well-known, concordant, and, on the whole, continuous instances The question whether an alleged rule of conduct can be enforced at all or whether it is uncertain or opposed to public policy or unreasonable is one of law and may be considered irrespective of the question whether the custom actually exists. *Moult* v *Halliday* (1898) 1 Q B , 125, followed. Section 16 of the Madras Civil Courts Act discussed

Kunhambi v. *Kalanthar* ... ... (1915) I.L.R., 38 Mad, 1052

MARRIAGE, *solemnized before the expiry of six months, etc.* —*See* INDIAN DIVORCE ACT (V OF 1869), SEC 57.

MEANING OF *agreement or memorandum of agreement meaning of*:—*See* INDIAN STAMP ACT (II OF 1899), SEC. 57. "*Easements, advantages, appurtenances held and enjoyed as part of the house*":—*See* DEED, CONSTRUCTION OF

——— "*Holds office*" —*See* (MADRAS) DISTRICT MUNICIPALITIES ACT (IV OF 1884), SS. 53 AND 60.

——— '*owner*' *under* (*Madras*) *Assessment of Land Revenue Act* (*I of* 1876), *sec* 2:—*See* HINDU LAW

———, "*Padugai*":—See PRE-EMPTION, CONTRACT OF

———, *partial performance*.—*See* HINDU LAW.

———, *rights to sue*:—*See* CIVIL PROCEDURE CODE (ACT V OF 1908), SS 92 AND 93.

———, *single transaction*:—*See* ATTORNEY.

——— *Tarazhi*:—*See* MALABAR LAW.

———, *Vesting of property in a co-parcener*:—*See* HINDU LAW.

MELVARAM, *grant of*:—*See* (MADRAS) ESTATES LAND ACT (I OF 1908), SEC. 8.

MELVARAMDAR, *right of, to trees in case of lands which were topes at the inam settlement*.—*See* INAM REGISTER.

MELVARAMDARS, *receiver of* —*See* LIMITATION ACT (IX OF 1908), SEC. 22.

MEMORANDUM OF AGREEMEMT, AGREEMENT OR. *meaning of*—*See* INDIAN STAMP ACT (II OF 1899), SEC. 57.

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and his son—Estoppel of mortgagor—Suit not maintainable against the son—Transfer of Property Act (IV of 1882), sec 53—Subsequent creditors, if included.] The plaintiff sued on a mortgage bond executed by the first defendant during his minority in favour of the third defendant who transferred it to the fourth defendant who again transferred it to the plaintiff. After attaining majority the first defendant executed a settlement transferring all his property to his mother and his wife on behalf of his minor son, the second defendant, stipulating only for maintenance for himself. The first defendant after attaining majority, had endorsed payments on the mortgage-deed and attested the transfer of the same by the third defendant to the fourth defendant It was found by the lower Appellate Court that the settlement was intended to be operative but that it was executed by the first defendant with intent to defeat and delay his creditors. It was also found that there was no fraud or misrepresentation by the minor as to his age when he borrowed on the mortgage The plaintiff contended that the first defendant was bound to refund the amount advanced on the mortgage to the third defendant, and that he was consequently a creditor entitled to set aside the settlement The first defendant admitted the plaintiff's claim The second defendant, who contested the suit, preferred the Second Appeal. *Held*, where a minor has obtained money by misrepresenting his age, that amounts to fraud, and he may be made to [illegible]

the first defendant during the suit, his endorsement of payments on the mortgage and his attestation of the transfer-deed could not give the plaintiff the right to set aside the settlement as against the second defendant *Quaere* —Whether subsequent creditors are included under section 53 of the Transfer of Property Act *Per* SADASIVA AYYAR, J —A person does not actually become a subsequent or prior creditor by reason of the estoppel of the debtor. An estoppel cannot overrule a plain provision of law. The statutory provision that a minor is incompetent to incur a contractual debt cannot be overruled by an estoppel

Vaikuntarama Pillai v. Authimoolam Chettiar ... (1915) I.L.R., 38 Mad., 1071

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———————————————, SS. 40 AND 79—*Madras Forest Act (V of 1882), offence under—Justification, plea of, not available.*] The plea of justification provided by section 79 of the Indian Penal Code (XLV of 1860) is available only for an offence punishable by the Penal Code and [illegible] and hence the belief [illegible] t exculpate him from [illegible] Madras Forest Act. [illegible] issented from. *In re* [illegible]

Re *Lewis* . ... (1915) I.L.R., 38 Mad., 773

———————————————, SEC. 86, *interpretation of—Drunkenness—Knowledge and intent*.] *Per* AYLING, J.—Ordinary drunkenness makes no difference to the knowledge with which a man is credited and if an accused knew what the natural consequences of his act were he must be presumed to have *intended* to cause them. *Per* TYABJI, J.—Section 86, Indian Penal Code, must be construed strictly. It provides that the intoxicated person shall be dealt with as if he had the same *knowledge* as he would have had if he had not been intoxicated, but it does not provide that he shall be dealt with as if he had the same *intent*.

Re *Mandru Gadaba* .. .. (1915) I.L.R., 38 Mad., 479

———————————————, SS. 188 AND 269—*Epidemic Diseases Act (III of 1897), ss. 2 and 3—Local Government, delegation of powers to—Regulations under the Act—Rule 104 of the Regulations ultra vires of the Local Government.*] A delegation under rule 104 by the Collector to a Divisional Officer of the power to call upon people to evacuate

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——— ———————, *of an agreement to sell previous suit for* :—*See* CIVIL PROCEDURE CODE (ACT V OF 1908), O. II, R. 2.

———————, *suit for* :—*See* HINDU LAW.

SPECIFIC RELIEF ACT (I OF 1877), SEC. 15 :—*See* HINDU LAW.

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(INDIAN) STAMP ACT (II OF 1899), SCH. I, ART. 48 —*See* ATTORNEY.

——— ——— ——— ——— SEC. 2 (17) AND ARTS 40 AND 64—*Mortgage-deed—Hypothecation, letter of, accompanying a bill of exchange.*] Where a document ran as follows —"The executant being desirous of carrying on her deceased husband's business of which she is now the owner declares a trust in favour of the Bank of Madras in respect of machinery, plant, fixture and furniture and stock in trade in consideration of advances of money to be made by the Bank from time to time not exceeding in all Rs 4,50,000 for the purpose of financing the business All such advances carry interest at the rate of 6 per cent per annum The trustee has got full power to use, employ, sell or exchange or otherwise deal with the trust property in the ordinary course of business but should make good the property that may be sold with other goods of a similar nature and value, any goods so substituted shall be included in the security. The trustee may retain in his hands the sum of Rs 20,000 annually in trust to pay and apply the same in payment of sums advanced by the Bank." *Held*, that the document created a trust in express language in respect of the machinery, etc, in or upon the business premises of the firm and that the object of the instrument was to give the Bank some rights by way of security and it was a mortgage deed for the purpose of the Stamp Act. *Reference under Stamp Act, sec* 46 (1888) I.L.R, 11 Mad, 216, referred to. *Semble* :—The document is not a letter of hypothecation within the meaning of the exemption in article 40 *Obiter* :—A fiscal enactment should be construed strictly and in favour of the subject

The Secretary to the Commissioner of Salt, Abkari and Separate Revenue, Revenue Board, Madras v *Mrs Orr* ... ... (1915) I.L R., 38 Mad, 646

———————, ART 5, SCH. I, SEC 57 :—*See* INDIAN STAMP ACT (II OF 1899)

——————— SEC 57, *reference under—Article 5, schedule I—Agreement or memorandum of agreement—Meaning of—Proposal or offer in writing—Parol acceptance—Whether proposal or offer in writing requires to be stamped—Advance of loan or written declaration by a party as to his property—Entry in register of the declaration—Whether stamp necessary*] Where it appeared on the evidence as to the course of business of a bank, that the bank advanced loans on promissory notes payable on demand or otherwise, but before advancing money it required the borrower to make a declaration [illegible] to the property [illegible] the entry of the [illegible] "memorandum [illegible] article 5 of the [illegible] ming that on the signing of the declaration, there was "a proposal" or an "offer," a written proposal or a written offer does not become subject to stamp duty by reason of subsequent acceptance which is not in writing. *Carlill* v. *The Carbolic Smoke Ball Company* (1892) 2 Q.B, 484. *Chaplin* v. *Clarke* (1849) 4 Ex Rep, 403 and *Clay* v *Crofts* (1851) 20 L.J., Com. Law, 361, followed] *Quære* Whether the entry in the register amounted to a proposal or offer in writing.

The Secretary to the Commissioner of Salt, Abkari and Separate Revenue, v *The South Indian Bank, Ltd, Tinnevelly* ... (1915) I.L.R., 38 Mad., 349

STANDING COMMITTEE, *whether a special tribunal or independent body* :—*See* MADRAS CITY MUNICIPAL ACT (III OF 1904)

STATUTE LAW IN ENGLAND, *apportionment under* :—*See* LESSOR AND LESSEE.

——— IN INDIA, NO :—*See* LESSOR AND LESSEE.

STATUTES :—*See* LIMITATION.

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——————————————, SEC. 10—*Hindu Law—Grant, deed of, for maintenance and other expenses—Grant by zamindar to his wife and minor son—Estate of grantees—Restraint on alienation—Lease for fifteen years by mother as guardian, if void, or voidable by minor—Repudiation by zamindar as natural guardian, mere act of, if sufficient—Suit to set aside—Decree in such suit necessary—Suit by guardian—Dismissal for default, effect of—Suit by lessee for rent—Objection by tenants as to validity of lease.*]

thereafter The zamindar, the father and natural guardian of the minor, sued to set aside the lease but the suit was dismissed in consequence of the zamindar's default in obeying an order of the Court to appear in person. The plaintiff, as the lessee of the lands, sued to recover *melvaram* due to him from the defendants who were the ryots but did not join the minor grantee as a party to the suit. The defendants contended that the lease to the plaintiff was not valid and that the plaintiff was not entitled to recover rent from them *Held* (on a construction of the deed), that both the mother and the minor son obtained under the grant an estate in the property and were tenants-in-common during the lifetime of the mother after which the son was to hold the whole property. The provisions against the alienation contained in the deed of grant were absolute restraints on alienation and were void *under section 10 of the Transfer of Property Act* and under the Hindu Law The lease for fifteen years granted to the plaintiff by the mother acting as guardian of her minor son, even if it was beyond the powers of a guardian, was not void against the minor but only voidable by him The party who is entitled to avoid a transaction may do so by an un-

tiff was entitled to recover rent from the defendants under the lease.

Muthukumara Chetty v. *Anthony Udayar* .. (1915) I L.R., 38 Mad, 867

——————————————, SEC. 52—Lis pendens—*Contentious suit, meaning of—Friendly suit, no contest—Plea of* lis pendens *not taken in the written statement—Point of Law—Plea permitted after remand*] The words "contentious suit" in section 52 of the Transfer of Property Act (IV of 1882) are used in contradistinction to a friendly suit in which there is no contest. Every suit other than such a friendly suit, by its origin and nature, falls within the definition of a contentious suit. *Jogendra Chunder Ghose* v. *Fulkumari Dassi* (1900) I.L.R, 27 Calc, 77, followed *Krishna Kamini Debi* v. *Dino Mony Chowdhurani* (1904) I.L.R, 31 Calc., 658 and *Upendra Chandra Singh* v *Mohri Lal Marwari* (1904) I.L.R, 31 Calc, 745, dissented from. *Faiyaz Husain Khan* v. *Prag Narain* (1907) I.L.R, 29 All, 339 (P.C)., referred to. A point of law such as *lis pendens* which was argued before the first court and which required no further facts than those already on record must be considered by the Appellate Court though the defendants did not plead it in the written statement

Kathir v. *Maremadissa* ... ... (1915) I.L.R., 38 Mad., 450

——————————————, SS. 36 AND 108:—*See* LESSOR AND LESSEE

——————————————, *See* MORTGAGE.

——————————————, SEC. 53.—*See* MORTGAGE BY MINOR.

——————————————, SEC. 55 (2):—*See* SALE-DEED

——————————————, SS 60 AND 91—*Redemption, suit for, by the owner of a portion of the equity of redemption—Mortgagee*

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INDIAN LAW REPORTS

MADRAS SERIES.

APPELLATE CIVIL.

Before Mr. Justice Sundara Ayyar and Mr. Justice Sadasiva Ayyar.

KONDA REDDI (PLAINTIFF), APPELLANT, 1912. August 22 and 30

v.

RAMASAMI REDDI AND FOUR OTHERS (DEFENDANTS), RESPONDENTS.*

Easements Act (V of 1882), sec 15—Essentials for the acquisition of an easement—Adverse enjoyment in assertion of ownership, can create a right of easement

If a person walks along the land of another for the beneficial enjoyment of other land, and if the enjoyment of the other's land does not amount to exclusive possession, there is no reason why his walking along the land without the permission of the true owner and in the assertion of a right to walk should not create in favour of the enjoyer a prescriptive right of easement, simply because, he mistakenly supposes that he is the owner of the land or asserts that his act of enjoyment is sufficient to give him the ownership by prescription.

The mere claim of the higher right of ownership would not prevent a person from acquiring the lesser right of easement provided he could show that he asserted certain rights of enjoyment over the land in question for the benefit of another land belonging to him.

Section 15 of the Easements Act does not require that the *title* should be claimed as an easement, but only requires that the *enjoyment* should possess two properties, viz. (i) that it must be as of right without interruption and (ii) that it must be as an easement The first quality is intended to show that enjoyment by license or under a contract which would not amount to a grant of an easement, would be ineffectual to create a right by prescription. The other quality is that the enjoyment should be as an easement, and not that it should be in the assertion of a claim of an easement.

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* Second Appeal No. 1461 of 1910.

KONDA v. RAMASAMI.

Narendra Nath Barari v. *Alhoy Charan Chattopadhya* (1907) I.L.R., 34 Calc., 51 (F.B.), referred to.

Chunilal Fulchand v *Mangaldas Goverdhandas* (1892) I.L.R., 16 Bom., 592, commented on.

SECOND APPEAL against the decree of H. MOBERLY, the District Judge of South Arcot, in Appeal No. 344 of 1909 preferred against the decree of K. S. VENKATACHALA AYYAR, the District Munsif of Tindivanam, in Original Suit No. 622 of 1908.

The facts of the case appear fully from the judgment.

T. R. Venkatarama Sastri for the appellant.

The Honourable Mr. *L. A. Govindaraghava Ayyar* and *V. V. Neelameghachariar* for the fourth respondent.

SUNDARA AYYAR AND SADASIVA AYYAR, JJ

JUDGMENT.—The suit in this case was to establish the plaintiff's right to an easement of way over certain land belonging to the defendants, to remove the wall constructed by the defendants which the plaintiff alleged obstructed his right of way and to restrain the defendants from interfering with his right of way. The defendants denied the right alleged by the plaintiff. The District Munsif found it established by the evidence adduced in the case. The plaintiff had instituted a previous suit, Original Suit No. 651 of 1899, in which he claimed the site along which he now asserted a right of way, as belonging to him in proprietary right. That suit failed. The Court that tried that suit expressed an opinion in its judgment that the evidence showed that the plaintiff was entitled not to the ownership of the land but to an easement of right of way. As the plaintiff did not claim any relief with respect to an easement, that suit was dismissed. The District Judge has reversed the District Munsif's judgment. He says: "The evidence of plaintiff in the present case shows that he has not been enjoying the right of way as an easement;" and he refers to the deposition of the plaintiff in which he said that he still asserted that he had been long walking along the way in the assertion of a right of ownership. Then the District Judge says: "A man cannot acquire a right of way over his own land as an easement. Evidence of immemorial user adduced in support of a right founded on ownership does not, when the right is negatived, tend to establish an easement." The plaintiff who has preferred the Second Appeal contends that this proposition of law is wrong.

KONDA v. RAMASAMI.

SUNDARA AYYAR AND SADASIVA AYYAR, JJ.

We took time to consider our judgment and we have arrived at the conclusion that the appellant's contention must be upheld. By adverse enjoyment, *i.e.*, by enjoyment without a lawful right, a person may acquire either an estate in property belonging to another or an incorporeal right of certain kinds. In the former case it may be either an absolute estate or a limited estate. If the adverse enjoyment amounts to exclusive possession of the land of the true owner, then in the absence of evidence to the contrary the trespasser would acquire the absolute ownership of the property. It would be open to the real owner to show that he did not while in adverse enjoyment assert the right to hold the lands as absolute owner but asserted only a lesser right such as that of a lessee or a mortgagee or a life-tenant. In that case the *animus possidendi* of the adverse enjoyer would determine the title which he would acquire by prescription. It might also be open to the real owner to say that only an easement right was asserted by the person in adverse enjoyment, and in that case the right acquired would be only an easement. It is the adverse enjoyment or enjoyment without a lawful right that gives right to a title by prescription. No doubt if the enjoyment was not adverse but by license of the real owner, then no right would be acquired. Now if a person walks along the land of another for the beneficial enjoyment of another land and if the enjoyment of the other's land does not amount to exclusive possession, there seems to be no reason why his walking along the land without the permission of the true owner and in the assertion of a right to walk should not create in favour of the enjoyer a prescriptive right of easement, simply because, he mistakenly supposes that he is the owner of the land or asserts that his act of enjoyment is sufficient to give him the ownership by prescription. Reliance is placed for the respondent on the language of section 15 of the Easements Act. It lays down that for acquiring a right of easement the right of way must be enjoyed by a person claiming title thereto, as an easement, and as of right and without interruption for the statutory period. Now the punctuation shows that title need not be claimed as an easement. The enjoyment is required to possess two properties, viz., that it must be as of right without interruption and it must be as an easement. The first quality is intended to show that enjoyment by license or under a contract which would not

KONDA v. RAMASAMI

SUNDARA AYYAR AND SADASIVA AYYAR, JJ.

amount to a grant of an easement, would be ineffectual to create a right by prescription. Then the other quality is that the enjoyment should be as an easement. The section does not say that the enjoyment should be in the assertion of a claim of an easement. Illustration (b) to the section explains what is meant by "as an easement." It is as follows :—

" . . . the plaintiff shows that the right was peaceably and openly enjoyed by him for twenty years. The defendant proves that for a year of that time the plaintiff was entitled to possession of the servient heritage as lessee thereof and enjoyed the right as such lessee The suit shall be dismissed, for the right of way has not been enjoyed 'as an easement' for twenty years." The illustration shows that the 'expression as an easement' is put in to show that unity of title or possession during the period of the twenty years or a portion thereof, makes the possession useless to create a right of easement. The appellant has referred us to *Narendra Nath Barari* v. *Abhoy Charan Chattopadhya*(1). There the plaintiff claimed a right of ownership of a certain land and if the facts he would prove would not amount to that, he claimed to be entitled to a right of easement.

GEIDT, J , observes, "In a case like the present a plaintiff may very well allege *bonâ fide* 'I believe the land to be mine, but I may be unable to prove it, if I should fail to prove it I can at any rate prove that I have been using the right of way as an easement uninterruptedly and as of right for over twenty years.' There appears to me no reason in principle why a claim like this in the alternative should not be tried, or why the plaintiff should be forced first to bring a suit to establish his right of ownership, and if that fails, then to bring a suit to establish the right of easement." It is of course impossible to prove an *animus* to hold the land as owner and at the same time in virtue of a right of easement. The judgment of the Calcutta High Court is inconsistent with the view that the claimant of a right of easement should prove that he asserted during his easement a limited right of easement as opposed to ownership. The Court held in that case that the claim in the alternative was sustainable.

The District Judge refers in his judgment to the decision of the Bombay High Court in *Chunilal Fulchand* v. *Mangaldas*

(1) (1907) I L R., 34 Calc., 51 (F.B.).

KONDA v. RAMASAMI.

SUNDARA AYYAR AND SADASIVA AYYAR, JJ.

Goverdhandas(1), where the observation is to be found that "evidence of immemorial user adduced in support of a right founded on ownership, does not, when that right is negatived, tend to establish an easement." It is not quite easy to understand what exactly the learned Judges who were parties to that judgment meant It is of course true that evidence of immemorial user in support of a right founded on ownership will not by itself tend to establish an easement. In order that an easement may be acquired it must be shown that the user was for the beneficial enjoyment of another land. If the learned Judges meant to say that the assertion of ownership during the period of user would make the acquisition of an easement right impossible, then with all deference to them we are unable to agree with that view. The mere claim of the higher right of ownership would not prevent a person from acquiring the lesser right of easement provided he could show that he asserted certain rights of enjoyment over the land in question for the benefit of another land belonging to him. We do not think the District Judge has really decided the question whether the plaintiff exercised the right to pass over the defendant's land as of right and without interruption for twenty years for the beneficial enjoyment of other land belonging to him as required by section 15 of the Easements Act. We shall therefore reverse the decree and remand the appeal for fresh disposal according to law. The cost of this Second Appeal will abide the result.

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(1) (1892) I L R., 16 Bom, 592.

APPELLATE CIVIL.

Before Mr. Justice Sundara Ayyar and Mr. Justice Sadasiva Ayyar.

1912. September 4 and 11.

BASAWESWARASWAMI BY DHARMAKARTHA A. PANCHAPPA AND ANOTHER (PLAINTIFFS), APPELLANTS,

v.

THE BELLARY MUNICIPAL COUNCIL AND THE SECRETARY OF STATE FOR INDIA IN COUNCIL (DEFENDANTS), RESPONDENTS.*

Municipal Council—Adverse possession against—Nature of adverse possession—Right to a pial—Pial over a drain—Right of municipality to street, drains, etc—Nature of the right—Right of Government—Adverse possession against Government—Length of possession—Pial, an encroachment or obstruction to drain, street, etc.—Right of municipality to remove encroachment, even when right to site of pial barred—No injunction against Municipal Council against right to remove obstruction—The Madras District Municipalities Act (IV of 1884)—*Indian Limitation Act (XV of* 1877), *art.* 146-*A—Amending Act (XI of* 1900)*—Declaration.*

A person can acquire a title to the site of a pial over a drain in a street vested in a Municipality by adverse possession against the municipality for the prescriptive period, which was 12 years before the article 146-A of the Indian Limitation Act (XV of 1877) was passed in 1900 under Act XI of 1900.

The right of a Municipal Council to the street and the drains is not a mere right of easement but is a special right of property in the site previously unknown to law but created by statute.

Although it is not open to the municipality to give up the rights of the public by any act of their own, that would not affect the capacity of a person in adverse possession to acquire rights which would affect the public

The question whether possession has been adverse or not does not depend upon the needs or requirements of the owner but on the character of the occupation of the person in possession

Fugitive or unimportant acts of possession would not be sufficiently effective to make the possession adverse

Even if the Municipal Council had no right to the possession of the space above the drain but only a right of user for the discharge of its functions with respect to the drains, still the plaintiff as the person in possession of the pial would have a right to it against all but the true owner which was the Government in this case, but as against the Government the plaintiff had not established a title as he had not been in adverse possession for sixty years.

Although the plaintiff had acquired a title to the site of the pial by adverse possession as against the Municipal Council, the right of the latter to the drain under the pial had not been affected, and the Council was entitled to remove the

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* Second Appeals Nos. 1331 and 1334 of 1910.

pial as an encroachment or obstruction under section 168 of the Madras District Municipalities Act.

The prayer of the plaintiff for an injunction against the Municipal Council could not therefore be granted, nor could the prayer for a declaration of title be granted, as it was only incidental to the substantial relief asked for, namely, an injunction which was refused.

Sundaram Ayyar v. *The Municipal Council of Madura* (1902) I.L.R., 25 Mad., 635, followed.

Rolls v. *Vestry of St. George the Martyr, Southwark* (1880) 14 Ch. D., 785 at pp. 795 and 796, *Municipal Council of Sydney* v. *Young* (1898) A.C., 457 and *Midland Railway* v. *Wright* (1901) 1 Ch., 738, referred to.

SECOND APPEALS against the decrees of N. LAKSHMANA RAO, the Subordinate Judge of Bellary, in Appeals Nos. 2 and 18 of 1907, respectively, preferred against the decrees of T. VARADARAJULU NAYUDU, the District Munsif of Bellary, in Original Suits Nos. 185 and 174 of 1905.

This is a suit by the owner of a house situated in a street in Bellary for a declaration of his right to a pial over a drain in the street and for restraining the Municipal Council of the town from removing it. The Secretary of State for India in Council was made a supplemental defendant to the suit. The plaintiff's case was that the site of the pial belonged to him and had been enjoyed by him for more than sixty years, and that the Council had no right to cause its removal. The Council denied the plaintiff's right to the pial and the Secretary of State set up his ownership to the site. The issues raised the question as to how long the pial was in existence and whether the plaintiff acquired a title to the site of the pial by adverse possession and whether the Council had any right to demolish it. Both the lower Courts found that the street was dedicated to the public by the Government, that the houses were built on sites originally belonging to the Government, that the lands over which the pial stood was not part of the plaintiff's house, that the pial was constructed about the year 1883 or 1884, that prior to its construction there were loose slabs of stone which were used by the plaintiff for the purpose of vending various articles, but that the Municipal servants used to remove the slabs when necessary for the purpose of repairing the drain. The Municipal Council issued a notice, dated 11th October 1904, to the plaintiff to remove the pial on the ground that it was an encroachment, a projection or an obstruction. Hence the plaintiff brought this suit for a declaration of his title and injunction against Municipal

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Council. The lower Courts dismissed the suit holding that the plaintiff had not acquired a title by adverse possession. The plaintiff preferred a Second Appeal to the High Court.

J. C. Adam for the appellant.

The Honourable Mr. *L. A. Govindaraghava Ayyar* for the first respondent.

The Honourable Mr. *T. V. Seshagiri Ayyar* for the second respondent.

SUNDARA AYYAR, J.

SUNDARA AYYAR, J.—This is a suit by the owner of a house in Bellary for a declaration of his right to a pial and for restraining the Municipal Council of the town from removing it. At the instance of the Municipal Council the Secretary of State for India in Council was made a party to the suit. The plaintiff's case was that the pial belonged to him and that the Municipal Council had therefore no right to remove it as it threatened to do. The Council denied the plaintiff's right to the site of the pial, and the Government set up its ownership to the site. The issues framed in the suit raised the questions, how long the suit pial was in existence, whether the plaintiff acquired a prescriptive title to the site of the pial if he was not the original owner, and whether the Municipality was entitled to demolish it.

Both Courts have found that the street was dedicated to the public by the Government. The houses were built on sites originally belonging to Government which it gave to the people when they were compelled to remove from houses occupied by them within the fort of Bellary.

The lower Courts also found that the land over which the pial stands was not part of the plaintiff's house. These findings are binding on us in Second Appeal. It has also been found by the lower Courts that the pial was constructed about the year 1883 or 1884, that prior to its construction there were loose slabs of stone which were used for the purpose of vending various articles but that the municipal servants used to remove these slabs when necessary for the purpose of repairing the drain. It was argued before us that the plaintiff's possession must be taken to date from the time when the loose slabs were in existence; but having regard to the fact that the slabs used to be removed when the municipality wished to do so it is not possible to regard the plaintiff's possession as having been effective until the present pial was constructed in 1883.

If the Municipality had the right to the space above the drain up to the portion occupied by the plaintiff, its right to possession was not disturbed, in an effective manner by the use of the loose slabs of stone. From 1883, however, the plaintiff must be taken to have obtained effective and exclusive possession of the pial. The learned pleader for the Municipal Council argued that this possession was not adverse to the Municipality, inasmuch as, for the purposes of its functions, it was not necessary for the Municipality to use the site of the pial. This contention I am entirely unable to accept. According to the decision in *Sundaram Ayyar* v. *The Municipal Council of Madura*(1) the street, which on the findings must be taken to include the drain, was vested in the Municipality for the purposes for which the Council was constituted Their right was not a mere right of easement according to the view adopted by the learned Judges who decided that case, but was a special kind of property in the site previously unknown to the law but created by statute. This was also the view adopted by JAMES, L.J., in *Rolls* v. *Vestry of St. George the Martyr, Southwark*(2). See also the judgment of LORD MORRIS in *Municipal Council of Sydney* v. *Young*(3). *Sundaram Ayyar* v. *The Municipal Council of Madura*(1) regards a Municipal Council as having a right both to the surface of the street and to a portion of the soil beneath and the space above so far as would be necessary for the discharge of its functions as the authority bound to maintain, protect and repair the road. If then the Municipality was the owner of the site occupied by the pial in 1883 it must be taken to have been dispossessed by the plaintiff when he constructed the pial. Its right to possession would be extinguished when according to the Limitation Act in force a suit for possession instituted by it became barred.

As the law stood before 1900 the time within which the Municipality could institute such a suit was twelve years. In 1895 or 1896, therefore, the Municipal Council's right to the site of the pial became extinguished; and the rights of the public incidental to their right of way also became extinguished according to the view taken in *Sundaram Ayyar* v. *The*

(1) (1902) I.L.R., 25 Mad., 635. (2) (1880) 14 Ch. D., 785 at pp. 795 and 798.
(3) (1898) A.C. 457.

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Municipal Council of Madura(1). Although it was not open to the Municipality to give up the rights of the public or to affect the right of way possessed by the public by any act of their own, that would not affect the capacity of a person in hostile possession to acquire rights which would affect the public. See the judgment of BYRNE, J., in *Midland Railway* v. *Wright*(2). A similar principle applies in other cases. Thus a trustee cannot alienate trust property except in certain circumstances, but a person can acquire a right by limitation to trust properties by adverse possession. Similarly the trustees' office itself is *extra commercium* but the right to it may be acquired by limitation. Mr. Govindaraghava Ayyar drew attention to an observation of BENSON, J., in *Sundaram Ayyar* v. *The Municipal Council of Madura*(1), in support of his argument that the possession of the plaintiff was not adverse to the Municipality so long as the Council did not require the site for the discharge of its functions. But the question whether possession was adverse or not does not depend on the needs or requirements of the owner, but on the character of the occupation of the person in possession. It may no doubt be held that fugitive or unimportant acts of possession would not be sufficiently effective to make the possession adverse and that the license of the owner may be implied in such cases. But I cannot conceive what could be more effective occupation than building up the pial and occupying it exclusively. It must be taken to be now well established that although the soil may be in one person, another person may be the owner of a building above the soil, and that the right to occupy a portion of space above the soil may be acquired by limitation. See Lightwood's Time Limit on Actions, pages 17 and 18 and *Laybourn* v. *Gridley*(3). In *Midland Railway* v. *Wright*(2) it was held that the right to surface land over a tunnel could be acquired by prescription. In *Bevan* v. *The London Portland Cement Company Limited*(4), it was held that the right to a tunnel itself could be acquired by adverse possession. A similar view was held in *Mohanlál Jechand* v. *Amratlál Bechardas*(5) by a bench of which WEST, J. was a member. It must therefore be held that as against the Municipal Council the plaintiff acquired a right to

(1) (1902) I.L.R., 25 Mad., 635.
(2) (1901) 1 Ch., 738.
(3) (1892) 2 Ch., 53.
(4) (1892) 67 L.T., 615.
(5) (1879) I.L.R., 3 Bom., 174.

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the pial by limitation on the expiration of twelve years from 1883 or 1884. I must observe that the view taken in *Sundaram Ayyar* v. *The Municipal Council of Madura*(1) that the right of a Municipal Council by virtue of streets vesting in it includes the right of possession was not questioned by any of the parties during the arguments. If the Municipal Council had no right to the possession of the space above the drain but only a right of user for the discharge of its functions with respect to the drain, the plaintiff's position, would even then not be worse, for as the person in possession of the pial he would have a right to it as against all but the true owner, namely Government in this case; and the Municipal Council would have no right to interfere with his possession or to demolish the pial. So far, then, as the right of ownership is concerned, the plaintiff's right must be taken to be established as against the Municipality. As against Government, however, the plaintiff has not succeeded in establishing a title. The presumption of title arising from possession is of no use to the plaintiff in this case; because it has been found that the ownership of the site of the drain belonged to Government before the plaintiff took possession of the site of the pial. Until 1883 either the Government or the Municipality must be taken to have been in legal possession of the site, and the plaintiff has not been in possession for a period of sixty years so as to acquire a title by limitation as against Government.

The next question is whether the plaintiff is entitled to an injunction restraining the Municipal Council from removing the pial. That question depends on the construction of section 168 of the District Municipalities Act. The right of the Municipal Council to the drain has not been affected by the acquisition of title to the pial by the plaintiff. According to section 168 the Municipality is entitled to "cause any projection; encroachment or obstruction made against or in front of any land in any public street to be removed or altered as they think fit." Now the pial must be regarded as an obstruction made in land in the public street. As it appears that the pial is only three feet above the drain, it must be regarded as an obstruction of the drain in the street. The right of the Municipal Council to remove an obstruction does not depend on its title or right to the possession

(1) (1902) I.L.R., 25 Mad., 635

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of it, as is clear from clause (3) of section 168, which entitles a person lawfully erecting an obstruction to reasonable compensation for the removal. The right to remove is given in the interests of the public to prevent encroachment on public roads and is not dependant on the Municipal Council's ownership The injunction must therefore be refused. No claim was made in the plaint for compensation, nor does it appear whether the pial itself had been removed at the date of the suit; it does not even appear whether it has been removed now. It was argued by Mr. Seshagiri Ayyar who appeared for Government that the Municipal Council had received the sanction of Government for the removal of the pial and had therefore the right to remove it, but the Municipality did not set up the plea that its act was justified by the orders of Government Nor does it appear in what capacity, if at all, Government sanctioned the removal. I consider it somewhat extraordinary that after allowing the plaintiff to construct and occupy his pial for nearly a quarter of a century, the Municipality should claim to remove it without any compensation; and I take leave to doubt whether the Government would sympathise with and authorise such conduct on the part of the council As the prayer for a declaration of title was only incidental to the substantial relief asked for, namely injunction, no declaration can be granted in this suit, as against the Municipality. The Second Appeal must therefore be dismissed with second respondent's costs.

SADASIVA AYYAR, J.

SADASIVA AYYAR, J.—The plaintiff is the appellant before us The finding of the Lower Court is that he has been in possession of the pial in front of his house for only twenty-five or thirty years before the suit. This pial is built so as to cover the Municipal drain and is three feet high from the road level, the drain being $1\frac{1}{2}$ feet in width The lower Appellate Court found that the plaintiff has not acquired a prescriptive title to the land over which the pial in question projects, either against the Bellary Municipal Council in whom the street and the drain site were vested or against the Government and hence dismissed plaintiff's suit which was brought for an injunction against the Bellary Municipal Council to restrain them from removing the pial as an encroachment on the drain and road.

I shall first shortly consider the question whether the drain and road over which the pial is built belong to the Municipal

Council or the Secretary of State or both. In *Municipal Commissioners of Madras* v. *Sarangapani Mudaliar*(1) COLLINS, C.J. and PARKER, J., state as follows.—" The English maxim 'once a highway, always a highway' is based on the theory that the property in a highway is in the owner of the soil subject to an easement in favour of the public. In the case before us this legal fiction peculiar to English Law cannot arise, for there is no question of any easement whatever. *The street itself and the soil thereof is vested in the municipality in trust for the public.* Both are united in the same person, *i.e.*, in the proprietor ;" and then they held that the defendant acquired a perfect title to a part of the road site which had been encroached upon by him more than twelve years before the suit brought by the Municipal Commissioners of the City of Madras to eject him from the encroached site. In that case, the learned Judges further stated that "when the Crown has once ceded property to an individual or corporation, the grantee of the property stands in respect of the property granted in the same position as any other proprietor," *i.e.*, they clearly held that the Government lost all right *of proprietorship in the street and the drain sites adjoining the street after they had once vested it in the municipality.* Next we come to *Sundaram Ayyar* v. *The Municipal Council of Mudura*(2), where BHASHYAM AYYANGAR, J., dissented from the above decision in *Municipal Commissioners of Madras* v. *Sarangapani Mudaliar*(1), and introduced all the fine distinctions known to English Law and held that the Municipal Council did not become by the vesting of the street and the drains in it the full owner of the site or soil over which the street exists, that it did not own the soil from the centre of the earth *usque ad coelum* and that it had only the right to manage and control the surface of the soil and so much of the soil below and of the space above the surface as was necessary to enable it to adequately maintain the street as a street. With the greatest deference I might be permitted to express some regret that the complications known to English Law were thus introduced into this presidency through this judgment of BHASHYAM AYYANGAR, J. The result has been as pointed out by that very learned Judge himself that there sprang

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(1) (1896) I.L.R., 19 Mad., 154, App. 156. (2) (1902) I.L.R., 25 Mad., 635.

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up a sort of divided ownership between the Municipal Council and the Secretary of State, that there has been introduced different periods of limitation as against the Municipal Council and as against the Secretary of State and that further "the curious result" of the new article 146-A of the Limitation Act XI of 1900 would be that on the expiration of thirty years from the date of dispossession of the municipality, the Crown will have the land freed from the burden of the highway both the municipality and the man who had been in possession adversely to the municipality losing all their rights. However, it is probably now too late to go back on these distinctions which were based upon the view of the English and Scotch Law that the soil of public highways is presumed to be in the conterminous proprietors and that they merely allow the public to impose a servitude upon the highway, a view which need have no place in a country in which porambokes, streets, streams, waters, etc., almost invariably belong to Government till a private person is able to acquire a title by grant or prescription.

The plaintiff has acquired the right as against the municipality in the present case to have the pial fixed over to the drain site by enjoyment for twelve years (which was the period for the perfection of title by prescription even against a municipality before the Amending Act of 1900 was passed), for, his adverse possession against the municipality of this stratum of space at the height of 3 feet over the level of the drain began about 1880 and the twelve years' possession was completed in 1892; *Mohanlál Jechand* v. *Amratlal Bechardás* (1) and *Rathinavelu Mudliar* v. *Kolandavelu Pillai*(2); but so far as the Government is concerned, he has not had possession for sixty years before suit and hence his title against Government has not been perfected.

Now, even in the case of the municipality though plaintiffs' title to the stratum of space at the three feet height above the drain covered by the pial has been acquired by prescription the municipality has, under section 168 of the District Municipalities Act, 1884, clause (i), power to cause projections, encroachments or obstructions in any public street to be removed and the

(1) (1879) I.L.R., 3 Bom., 171. (2) (1906) I.L.R., 29 Mad., 511.

definition of "street" under section 3, clause (27), includes the drain space on either side of the street. There can be no doubt that though the municipality may not have vested in it the right to the space up to the sky over the drain and street, it must have had such a right at least up to a height of about twelve feet over the level of the street in order that it might properly exercise its powers of repairing, widening and altering cleaning and doing other duties in connection with the street and the drain. The pial is therefore clearly an encroachment, a projection and an obstruction in the street. They have the right accordingly to remove it and this suit for an injunction against their removal of such projection was rightly dismissed by the Lower Appellate Court. I would therefore confirm its decree though not on the grounds on which the Lower Court based its decision. The appellant must pay the costs of the second respondent, the Secretary of State. Second Appeal No. 1334 of 1910 follows.

APPELLATE CIVIL.

Before Mr. Justice Sundara Ayyar and Mr. Justice Sadasiva Ayyar.

K. L. C. T. CHIDAMBARAM CHETTY (PETITIONER), APPELLANT,

1912 September 3.

v.

V. V. R. NAGAPPA CHETTY AND EIGHT OTHERS (COUNTER-PETITIONERS NOS 1, 2, 4 TO 10), RESPONDENTS.*

Provincial Insolvency Act (III of 1907), ss 15, 16, 18, 19, 20, 22, 46 and 52—Official Receiver's order dismissing insolvency petition—No appeal direct to High Court—Practice—No interference in revision where other remedy open.

No appeal lies under section 46, clause (2) of the Provincial Insolvency Act to the High Court from the order of an Official Receiver dismissing an insolvency petition; but an appeal against orders passed by the Official Receiver lies, under section 22, only to the District Court. The language of section 22 read with section 52, clause (2) shows that such right of appeal is not confined to orders made under sections 18, 19 and 20, but extends to all orders of the Receiver.

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* Appeal Against Order No. 206 of 1910.

CHIDAMBARAM v. NAGAPPA.

Obiter: An Official Receiver invested with the powers mentioned in clause (*a*) of section 52 (1) has the power to dismiss an insolvency petition under section 15.

The Court will not interfere under section 115, Civil Procedure Code, in a case where other adequate remedy was open.

APPEAL against the order of T. S. RAMASWAMI AYYANGAR, the Official Receiver, Madura, in Insolvency Petition No. 5 of 1910, in Insolvency Petition No. 2 of 1909 on the file of the District Court of Madura.

The appellant filed his petition in insolvency in the District Court, Madura. The District Court transferred the petition for disposal to the Official Receiver, who presumably had been invested with the powers specified in section 56, clause (1) of the Provincial Act. The Official Receiver held an enquiry, and finding that the petitioner had suppressed his accounts and had also entered into colourable transactions with a view to screen property from the creditors, dismissed the insolvency petition.

The petitioner appealed direct to the High Court.

C. S. Venkatachariar for the appellant.

The Official Receiver has no jurisdiction to dismiss the petition. Section 52, clause (*a*), enables him only to pass orders of adjudication. Section 22 gives a right of appeal only in the case of orders comprised under section 18, 19, or 20. In any case this appeal ought to be treated as revision petition under section 115, Civil Procedure Code.

K. S Krishnaswami Ayyangar for *T. Narasimha Ayyangar* for the respondent. I take a preliminary objection. There is no right of appeal to the High Court in this case. The appeal has been preferred under section 46, clause (2) of Act III of 1907, which provides for an appeal only against certain orders by the District Court. The order in this case having been passed by the Official Receiver, section 46, clause (2), will not apply. The Official Receiver has been empowered under section 52, and clause (2) thereof makes his orders and acts, orders and acts of the District Court subject to the appeal to the Court, which is the District Court. Section 22 gives to the Court ample powers to correct all wrong orders of the Official Receiver. The appellant not having appealed to the District Court, cannot maintain this appeal in this Court.

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SUNDARA AYYAR AND SADASIVA AYYAR, JJ.

JUDGMENT.—A preliminary objection is taken to this appeal. The appeal is preferred under section 46, clause (2) of Act III of 1907. The order appealed against was passed by an Official Receiver appointed under the Provincial Insolvency Act. Section 22 of the Act provides for an appeal to the District Court against the orders of the Receiver. Under section 52 of the Act the High Court has the power to direct that the Official Receiver shall have power to hear insolvency petitions, to examine the debtor and to make orders of adjudication. It is not denied, and we presume it is the fact, that the High Court has directed that the Official Receiver in this case should have that power. It is contended that the power given under this section would not entitle the Official Receiver to dismiss an insolvency petition. Clause (a) of section 52 (1) invests the Official Receiver with the same powers (to hear insolvency petitions, to examine the debtor and to make orders of adjudication) in any matters in respect of which jurisdiction is given to the Court by the Act. The sections relating to the procedure to be followed at the hearing of an insolvency petition by the Court give power to the Court to dismiss the petition (see section 15) in certain cases. Section 16 then provides that, where a petition is not dismissed under section 15, the Court shall make an order of adjudication, unless the debtor is able to propose any composition or scheme which shall be accepted by the creditors and approved by the Court.

There can be no doubt that the Official Receiver should follow the same procedure and his power to adjudicate is only in cases where the petition is not dismissed. There can be no reasonable doubt, we think, that he has the power to dismiss the petition. However this may be, section 22 gives a right of appeal to the District Court against all orders of the Official Receiver. It is contended that the right of appeal is only given against the orders comprised in sections 18, 19 and 20. We are unable to accept this contention. The language of section 22 is quite wide and we think that clause 2 of section 52 also shows that the appellate power given to the Court extends to all orders of the Receiver. As the proper course to be adopted by the appellant before us was to appeal to the District Court and as no provision is made in the Act for appeals to this Court directly against the orders of the Receiver, this appeal must be dismissed.

CHIDAMBARAM v. NAGAPPA. — SUNDARA AYYAR AND SADASIVA AYYAR, JJ.

We are then asked to treat this appeal as a petition under section 15. Some power of revision is given to the High Court by section 46 of the Insolvency Act in favour of a person aggrieved by an order of the District Court. Assuming that, notwithstanding section 46, we have also powers under section 115 of the Civil Procedure Code in this case, and assuming that the Official Receiver's order can be regarded as an order by a Court subordinate to this Court, we still must decline to interfere, as there was other adequate remedy open to the appellant.

We dismiss the appeal with costs.

APPELLATE CIVIL.

Before Mr. Justice Sundara Ayyar and Mr. Justice Sadasiva Ayyar.

1912. August 28 and 29, and September 4.

SYED IBRAHIM SAHIB (SECOND DEFENDANT), APPELLANT,

v.

ARUMUGATHAYEE AND ANOTHER (PLAINTIFF AND FIRST DEFENDANT), RESPONDENTS.*

Mortgage—Prior and puisne mortgages—Sale to prior mortgagee after creation of a puisne mortgage—Prior mortgage kept alive to what extent—Prior mortgagee whether entitled to charge interest after date of sale—His claim for necessary repairs and municipal taxes, whether allowable—Practice—Appeal—Transfer of Property Act (IV of 1882), ss. 65, 72 and 101—Madras District Municipalities Act (IV of 1884), sec. 103—Doors and windows not moveable property.

When, after the creation of a *puisne* mortgage, the mortgagor sells the property to the prior mortgagee with possession, the prior mortgage is kept alive as against a puisne incumbrancer in the circumstances mentioned in section 101 of the Transfer of Property Act, but not against the owner, whose equity of redemption has been purchased by the prior incumbrancer.

The prior mortgagee is not entitled to claim interest on his mortgage after the date of his sale, against the *puisne* mortgagee; the effect of the sale is this: that what was enjoyed by the prior mortgagee till sale as compensation for the amount of the usufructuary mortgage he agreed subsequently to enjoy in consideration of the whole price, and he cannot therefore claim any further compensation from the date of sale, for any portion of the price.

Where by the terms of the mortgage deed, the mortgagor personally covenanted to pay the municipal taxes himself, the mortgagee who pays the

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* Second Appeal No. 411 of 1911.

SYED IBRAHIM SAHIB v. ARUMUGATHAYEE.

same, cannot add it to the mortgage amount and recover it from the puisne mortgagee either under section 65, clause (c) or under section 72, Transfer of Property Act as money spent for the preservation of the property as the doors and windows of a house are not moveable property and could not have been seized under section 103 of the District Municipalities Act before its amendment in 1899.

The cost incurred by the prior mortgagee after the sale, for necessary repairs to the property, viz, for restoring a room that had fallen are recoverable, as all rights incidental to the mortgage must subsist with the mortgage right itself, and the prior mortgagee is consequently entitled to add all moneys to the principal amount which he would be entitled to do under section 72 of the Transfer of Property Act, if the sale had not taken place.

There is nothing to prevent the appellant from attacking only a portion of the decree by paying court fee only thereon, although reason for the attack might cover the whole decree.

SECOND APPEAL against the decree of F. H. HAMNETT, the District Judge of Madura, in Appeal No. 191 of 1910, presented against the decree of K. V. DESIKACHARIYAR, the Principal District Munsif of Madura, in Original Suit No. 393 of 1908.

The facts are fully set out in the judgment.

The second defendant preferred this Second Appeal.

K. V. Krishnaswami Ayyar for the appellant.

K. N. Ayya for the first respondent.

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JUDGMENT.—The plaintiff's suit in this case is to enforce payment of the amount due to her on two mortgages executed by the first defendant's father in July 1891. Of these the first, Exhibit C, is a usufructuary mortgage for Rs. 500. The second, Exhibit D, is a simple mortgage for Rs. 200. On the 4th September 1896 a sale-deed was executed by the first defendant's father in plaintiff's favour. The consideration Rs. 900 for the sale-deed was made up of Rs. 700, the principal amounts due on the two mortgages, Rs. 130, the interest on the simple mortgage bond, Rs. 55, the amount due to plaintiff for municipal tax which the vendor had covenanted to pay by the terms of the usufructuary mortgage-deed and certain sundry amounts which he had borrowed from the plaintiff and Rs. 15 paid in cash. The second defendant had obtained from the vendor a mortgage of the same property in 1893. He instituted a suit on it in 1905, brought the properties to sale and purchased them. The present plaintiff was the second defendant in that suit. The decree directed the sale of the property subject to the plaintiff's prior encumbrances.

The plaintiff claimed to recover in this suit as due to her under her [mortgages Rs. 830, the amount due up to the 4th

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September 1896 as fixed in the sale-deed, Exhibit E, and Rs. 300 for interest subsequent to that date up to the 17th July 1908, the date of the plaint. She also claimed Rs. 98-5-4, the total amount of municipal tax paid by her for the property and Rs. 171-10-8 for repairs and improvements made by her.

The second defendant alleged that the plaintiff was not entitled to recover anything, contending that her mortgage rights over the property were destroyed by her purchase in the year 1896 and that she was not in law entitled to recover anything either on account of municipal assessment or repairs and improvements.

Both the lower Courts have held that the mortgages must be regarded as kept alive as against the second defendant. The District Munsif allowed the interest claimed on the simple mortgage bond up to the date of plaint and further interest from the date of plaint to the date fixed for payment at 1½ per cent. per mensem, the rate stipulated in Exhibit D. He disallowed the amount claimed for municipal assessment and repairs and improvements. On appeal the District Judge held that the plaintiff was entitled to add the amount paid by her for municipal assessment and also the amount spent by her for restoring a room which had fallen down. The amount added to the Munsif's decree for the expenses of the repairs was Rs. 128-6-0.

In Second Appeal the liability for Rs. 830 which was fixed as the principal and interest due on the mortgages on the date of the plaintiff's sale-deed is not objected to; but the remainder of the decree is impeached.

A preliminary objection has been taken by the learned vakil for the respondent on the ground that the liability for the debt not being resisted in Second Appeal and the appeal being valued only with respect to the interest decreed from the date of Exhibit E (the sale-deed) the appellant is not entitled to attack the decree for the interest on the debt subsequent to the sale-deed. In the memorandum of Second Appeal the grounds taken urge the second defendant's non-liability to the plaintiff for anything on the footing of her mortgages. But the appellant did not want to impeach in this Court the plaintiff's right to recover the amount found due on the date of Exhibit E. The preliminary objection is not sustainable. There is nothing to prevent the appellant from attacking only a portion of the decree, although

the reason for the attack might cover the whole decree. The objection must therefore be disallowed.

The question whether the plaintiff's mortgages were destroyed by the sale (Exhibit E) was argued at the bar. A distinct argument was also urged on the point whether the plaintiff can claim interest subsequent to Exhibit E. It is unnecessary to decide whether the right under the mortgages is altogether destroyed, as the appellant's contention with regard to the claim for interest must be upheld on a point which is consistent with the mortgages being alive as against the appellant. The respondent contends that section 101 of the Transfer of Property Act is applicable to the case, and that the encumbrances under the mortgages C and D must be taken to have continued to subsist as against the appellant after the date of Exhibit E as their subsistence was for the plaintiff's benefit, and that she is therefore entitled not only to the principal but also to the interest which Exhibit D gave her according to its terms. The appellant argues that section 101 is not applicable and that, even if on the principle underlying that section the plaintiff is entitled to have the benefit of the encumbrances as against the second defendant, she is not entitled to the interest. And he draws attention to a passage in Dr. Rash Behary Ghose's work on Mortgages in which the learned author says that the Transfer of Property Act does not expressly provide for a case where the payment of the charge is contemporaneous with the purchase of the equity of redemption. It is unnecessary to consider whether the case comes within the express language of section 101 or not, as the conclusion to be come to on the question of the plaintiff's right to subsequent interest would be the same whether the language of section 101 itself would be applicable or only the principle recognized in that section. The section declares that the charge or encumbrance existing before the purchase of the property by the owner of the charge or encumbrance shall be extinguished unless its continuance would be for his benefit. The encumbrance is kept alive as against a puisne encumbrancer in the circumstances referred to in the section. It does not of course continue against the owner whose equity of redemption the encumbrancer has purchased. Beyond declaring that the encumbrance will subsist where it is for the benefit of the encumbrancer the section does not state what the exact rights on the encumbrance would be

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after the date of the purchase. Suppose a first mortgagee takes a further mortgage on the property for the amount due on his first mortgage after the execution of a second mortgage in favour of a third party by the mortgagor, and suppose further that according to the terms of the substituted mortgage the rate of interest agreed upon is less than that fixed in the previous mortgage instrument. It is quite clear that although the first mortgagee may claim priority for his mortgage as against the second mortgagee notwithstanding its merger in the substituted mortgage instrument, he cannot be entitled to the higher rate of interest fixed in his first mortgage deed as he agreed under the substituted mortgage to receive a less rate from that date. The rule embodied in section 101 is one which in equity and justice should be enforced to protect the rights created under the first mortgage and the question in each case is what is the measure of protection which equity and justice require to be given. Now on the date of Exhibit E, the plaintiff agreed with her mortgagor to take the property for the price agreed upon according to that exhibit. She thenceforward enjoyed the property in lieu of the price she gave for it, although she was previously in possession of it as usufructuary mortgagee under Exhibit C. What was enjoyed by her till then as compensation for the amount advanced on the usufructuary mortgage, she agreed subsequently to enjoy in consideration of the whole price fixed on Exhibit E. She cannot therefore claim any further compensation from that date for any portion of the price. See *Umes Chunder Sircar* v. *Zahur Fatima*(1). If for instance, she took a fresh mortgage instead of a sale-deed and gave up all claim to future interest, her covenant to that effect would be binding on her in a suit against the second mortgagee quite as much as it would bind her against her mortgagor himself. No case expressly deciding this point was cited on either side, but we observe that in several cases where priority was allowed for a previous mortgage on the ground that it was not extinguished no interest after the date of merger as against the previous owner of the equity of redemption was allowed. See *Gangadhara* v. *Sivarama*(2), *Seetharama* v. *Venkatakrishna*(3) and *Vanmikalinga Mudali* v. *Chidambara*

(1) (1891) I.L.R., 18 Calc., 164 at p. 181 (P.C.) (2) (1885) I.L.R., 8 Mad., 246
(3) (1893) I.L.R., 16 Mad., 94

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Chetty(1). Where a previous mortgage was merged in a subsequent one, interest was allowed as against a puisne encumbrancer only at the rate stipulated in the substituted mortgage. See *Chetwynd* v. *Allen*(2), and *Mohesh Lal* v. *Bawan Das*(3), *Syamalarayudu* v. *Subbarayudu*(4), cited for the respondent is not in point as it does not appear that the plaintiff in that case was in possession of the property enjoying it in consideration of the amount paid by him to discharge the prior encumbrance. We must therefore disallow the amount of Rs. 300 awarded to the plaintiff for interest subsequent to the date of Exhibit E when the second defendant became the purchaser of the property, *i.e*, the 24th March 1903 [4th September 1896.]

The next question argued in Second Appeal relates to the plaintiff's claim for the amount paid by her for municipal tax. According to the provisions of Exhibit C the usufructuary mortgage deed, the mortgagor the first defendant in this suit agreed to pay all municipal taxes himself. The plaintiff's right with respect to the taxes was under the personal covenant entered into by the mortgagor. It is unnecessary to consider whether taxes due to a municipality would come within the expression "charges of a public nature" which the mortgagee in possession is bound to pay under clause (c) of section 76 of the Transfer of Property Act and the mortgagor is bound to pay when the mortgagee is not in possession under clause (c) of section 65. In this case the mortgagee notwithstanding her being in possession was not bound to pay the municipal tax as the mortgagor expressly covenanted to pay it. The obligation of the mortgagor was not under clause (c) of section 65 of the Act, but under his covenant. The tax does not come under the expenses which the mortgagee is entitled to incur under section 72 and add to the principal money due under the mortgage instrument, as the payment was not required either for the preservation of the property or for the protection of the mortgagor's title to it. It may be observed that the District Judge is wrong in supposing that the doors and windows of a house could be sold as moveable property of the mortgagor. Section 103 of the District Muncipalities Act before its amendment in 1899 allowed the seizure only of moveable property in the

(1) (1906) I L R, 29 Mad., 37.
(2) (1899) 1 Ch., 353.
(3) (1883) I L.R., 9 Calc., 961 (P.C).
(4) (1898) I.L.R., 21 Mad., 143.

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possession of the occupier where he was the defaulter. The plaintiff was not the defaulter in this case. Covenants entered into by the mortgagor cannot be enforced against a puisne encumbrancer nor can the doors and windows of the house regarded as moveable property. See *Peru Bepari* v. *Renuo Maifarash*(1), *Queen-Empress* v. *Shaik Ibrahim*(2), and *Purushottama* v. *Municipal Council of Bellary*(3).

We must therefore disallow the amount awarded for municipal tax.

With respect to the award of Rs. 128 for the costs incurred by the plaintiff in making repairs, it is not contended before us that the repairs were not of such a character as would entitle a mortgagee to reimbursement; but it is argued that the plaintiff did not spend the amount as mortgagee but as purchaser of the property as the repairs were made after the date of Exhibit E. No doubt the plaintiff had become the purchaser in 1896, but the contention, though it looks plausible, is not entitled to succeed. As the mortgage subsisted after the purchase, the plaintiff must be held entitled to add all monies to the principal amount which she would be entitled to do under section 72 if the sale did not take place. All rights incidental to the mortgage must subsist with the mortgage right itself. If the prior mortgagee spends money for preservation of the property from destruction, forfeiture or sale, it would be inequitable to hold that the puisne encumbrancer should have the benefit of the expenditure incurred for that purpose without paying for it. The value of the property over which the puisne encumbrancer is entitled to a charge is enhanced by the expenditure and he cannot claim the benefit of the expenditure without making payment for it. The objection to the award for the repairs must be disallowed.

The result is that this Second Appeal must be allowed except with regard to the award for repairs. The decree of the District Judge will be modified as indicated above.

Both parties will pay and receive proportionate costs in all the Courts.

The time for redemption will be extended to three months from this date.

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(1) (1885) I.L.R., 11 Calc., 164. (2) (1890) I.L.R., 13 Mad., 518.
(3) (1891) I.L.R., 14 Mad., 467.

APPELLATE CIVIL.

Before Mr. Justice Sundara Ayyar and Mr. Justice Sadasiva Ayyar.

SANKARARAMA IYER (DEFENDANT), PETITIONER,

1912. September 2 and 9.

v.

R. PADMANABHA IYER (PLAINTIFF), RESPONDENT.*

Civil Procedure Code (Act V of 1908), sec. 24—Small cause suit instituted in a Subordinate Court—Transfer by the District Judge to a District Munsif's Court—Order directing trial as an original suit—Subsequent transfer by the District Judge to another District Munsif's Court—Decree by the latter—Appeal against such decree to the District Court—Transfer of appeal to the Subordinate Court—Decree on appeal by the Subordinate Court—Revision to the High Court—Appeal to the District Court incompetent—Decree of the Subordinate Court set aside as without jurisdiction—Provincial Small Causes Courts Act (IX of 1887), ss. 27, 32, 33 and 35—Small Cause Court—Court invested with powers of a Small Cause Court—Character of Court trying a small cause suit on transfer—Civil Procedure Code (Act V of 1908), ss. 7 and 24.

Where a suit, which was instituted as a small cause suit in a Subordinate Judge's Court, was transferred by the District Court to a District Munsif's Court for trial as an original suit, and was again transferred to another District Munsif's Court for trial and disposal,

Held, that the decree passed by the latter District Munsif's Court was the decree of a Court of Small Causes, and no appeal lay to the District Court against such decree.

A Court invested with the powers of a Court of Small Causes is a Court of Small Causes within the meaning of section 24 of the Code of Civil Procedure (Act V of 1908), though the suit was not transferred to such Court immediately from a Court of Small Causes.

PETITION under section 115, Civil Procedure Code (Act V of 1908), praying the High Court to revise the decree of A. S. BALASUBRAMANIAM, the acting Subordinate Judge of Tuticorin, in Appeal No. 156 of 1908, preferred against the decree of S. SUBBIAH SASTRIAR, the District Munsif of Tinnevelly, in Original Suit No. 132 of 1907.

The plaintiff in this case originally instituted the present suit as a small cause suit on the file of the Subordinate Judge's

* Civil Revision Petition No. 686 of 1910.

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possession of the occupier where he was the defaulter. The plaintiff was not the defaulter in this case. Covenants entered into by the mortgagor cannot be enforced against a puisne encumbrancer nor can the doors and windows of the house regarded as moveable property. See *Peru Bepari* v. *Renuo Maifarash*(1), *Queen-Empress* v. *Shaik Ibrahim*(2), and *Purushottama* v. *Municipal Council of Bellary*(3).

We must therefore disallow the amount awarded for municipal tax.

With respect to the award of Rs. 128 for the costs incurred by the plaintiff in making repairs, it is not contended before us that the repairs were not of such a character as would entitle a mortgagee to reimbursement; but it is argued that the plaintiff did not spend the amount as mortgagee but as purchaser of the property as the repairs were made after the date of Exhibit E. No doubt the plaintiff had become the purchaser in 1896, but the contention, though it looks plausible, is not entitled to succeed. As the mortgage subsisted after the purchase, the plaintiff must be held entitled to add all monies to the principal amount which she would be entitled to do under section 72 if the sale did not take place. All rights incidental to the mortgage must subsist with the mortgage right itself. If the prior mortgagee spends money for preservation of the property from destruction, forfeiture or sale, it would be inequitable to hold that the puisne encumbrancer should have the benefit of the expenditure incurred for that purpose without paying for it. The value of the property over which the puisne encumbrancer is entitled to a charge is enhanced by the expenditure and he cannot claim the benefit of the expenditure without making payment for it. The objection to the award for the repairs must be disallowed.

The result is that this Second Appeal must be allowed except with regard to the award for repairs. The decree of the District Judge will be modified as indicated above.

Both parties will pay and receive proportionate costs in all the Courts.

The time for redemption will be extended to three months from this date.

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Where a suit, which was instituted as a small cause suit in a Subordinate Judge's Court, was transferred by the District Court to a District Munsif's Court for trial as an original suit, and was again transferred to another District Munsif's Court for trial and disposal;

Held, that the decree passed by the latter District Munsif's Court was the decree of a Court of Small Causes, and no appeal lay to the District Court against such decree.

A Court invested with the powers of a Court of Small Causes is a Court of Small Causes within the meaning of section 24 of the Code of Civil Procedure (Act V of 1908), though the suit was not transferred to such Court immediately from a Court of Small Causes.

PETITION under section 115, Civil Procedure Code (Act V of 1908), praying the High Court to revise the decree of A. S. BALASUBRAMANIAM, the acting Subordinate Judge of Tuticorin, in Appeal No. 156 of 1908, preferred against the decree of S. SUBBIAH SASTRIAR, the District Munsif of Tinnevelly, in Original Suit No. 132 of 1907.

The plaintiff in this case originally instituted the present suit as a small cause suit on the file of the Subordinate Judge's

* Civil Revision Petition No. 686 of 1910.

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Court of Tuticorin. The District Court transferred the suit under section 24 of the Civil Procedure Code (Act V of 1908) to the District Munsif's Court of Srivaikuntam and directed by its order that the suit should be tried as an original suit. The said suit was again transferred by the District Court to the Court of the Additional District Munsif of Tinnevelly for trial and disposal. The last-mentioned Court passed a decree dismissing the suit. The plaintiff preferred an appeal to the District Court against the said decree. The appeal was transferred to the Subordinate Judge's Court of Tinnevelly for disposal. The respondent (defendant) took an objection that the appeal was not competent, as the decree was under section 24, clause (4) of the Civil Procedure Code (Act V of 1908), passed by a Court of Small Causes. The Subordinate Judge overruled the objection and reversed the decree of the District Munsif and passed a decree on the merits in favour of the plaintiff. The defendant preferred a Civil Revision Petition to the High Court under section 115 of the Code of Civil Procedure against the decree of the Subordinate Judge.

T. R. Ramachandra Ayyar for the petitioner.

S. Srinivasa Ayyar for the respondent.

SUNDARA AYYAR, J.

SUNDARA AYYAR, J.—The question for decision in this Civil Revision Petition is whether an appeal lay to the District Court of Tinnevelly from the judgment of the Additional District Munsif of Tinnevelly in Original Suit No. 132 of 1907. The Subordinate Judge to whom the appeal was transferred for disposal states that the suit was originally instituted in the Subordinate Judge's Court of Tuticorin as Small Cause Suit No. 1484 of 1906; from that Court it was transferred to the District Munsif's Court of Srivaikuntam. The order of transfer contained a direction that the suit should be tried as an original suit along with another suit. It was again transferred from the latter Court to the Additional District Munsif's Court of Tinnevelly. The Additional District Munsif dismissed the suit and the plaintiff preferred an appeal to the District Court. A preliminary objection was taken before the Subordinate Judge that the appeal did not lie as the decision of the Additional District Munsif must be taken to have been that of a Small Cause Court. The Subordinate Judge overruled this objection. Now

section 24, clause (4) of the Civil Procedure Code, lays down: "The Court trying any suit transferred or withdrawn under this section from a Court of Small Causes shall, for the purposes of such suit, be deemed to be a Court of Small Causes." The first clause of the section authorises the District Court to transfer the suit to any Court subordinate to it and competent to try or dispose of the same. That the District Munsif's Court of Srivaikuntam and the Additional District Munsif's Court of Tinnevelly were both Courts competent to dispose of the suit cannot be doubted. The argument for the appellant is that by virtue of clause 4 of the section the decision of the Tinnevelly Additional Munsif was the decision of a Court of Small Causes and consequently under section 27 of the Small Cause Courts Act no appeal lay from his decision. It is first argued for the respondent that the transfer to the Tinnevelly Additional District Munsif's Court was from the Srivaikuntam Court and that that Court was not a Court of Small Causes within the meaning of section 24 of the Civil Procedure Code and that the Tinnevelly Munsif could not therefore be said to have tried a suit transferred from a Court of Small Causes. It is no doubt the fact that the Srivaikuntam Munsif had not been invested with jurisdiction to try small cause suits of the value of this suit. But there are two answers to the respondent's argument. One is that under clause 4 of section 24 of the Civil Procedure Code the Srivaikuntam Court was a Small Cause Court with respect to this suit when it was transferred to it from the Subordinate Judge's Court of Tuticorin. The argument that it would become a Small Cause Court only at and *for the purpose of the trial cannot be upheld. If this contention* be sound in what capacity could the Srivaikuntam Court pass orders in the suit before the trial? It cannot be said that it could do so except as the Court trying the suit. The other answer is that the clause does not say that the transfer should be immediately from a Court of Small Causes, and the suit while pending in the Additional District Munsif's Court of Tinnevelly may be said to have been one transferred from the Subordinate Judge's Court of Tuticorin. The construction contended for by the respondent would be hardly in accordance with the object of clause 4 which is to provide for the trial as a Small Cause Court of suits which are transferred from Courts of Small Causes. All this is of course on the assumption that the Subordinate Court of

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Court of Tuticorin. The District Court transferred the suit under section 24 of the Civil Procedure Code (Act V of 1908) to the District Munsif's Court of Srivaikuntam and directed by its order that the suit should be tried as an original suit. The said suit was again transferred by the District Court to the Court of the Additional District Munsif of Tinnevelly for trial and disposal. The last-mentioned Court passed a decree dismissing the suit. The plaintiff preferred an appeal to the District Court against the said decree. The appeal was transferred to the Subordinate Judge's Court of Tinnevelly for disposal. The respondent (defendant) took an objection that the appeal was not competent, as the decree was under section 24, clause (4) of the Civil Procedure Code (Act V of 1908), passed by a Court of Small Causes. The Subordinate Judge overruled the objection and reversed the decree of the District Munsif and passed a decree on the merits in favour of the plaintiff. The defendant preferred a Civil Revision Petition to the High Court under section 115 of the Code of Civil Procedure against the decree of the Subordinate Judge.

T. R. Ramachandra Ayyar for the petitioner.

S. Srinivasa Ayyar for the respondent.

SUNDARA AYYAR, J.

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section 24, clause (4) of the Civil Procedure Code, lays down: "The Court trying any suit transferred or withdrawn under this section from a Court of Small Causes shall, for the purposes of such suit, be deemed to be a Court of Small Causes." The first clause of the section authorises the District Court to transfer the suit to any Court subordinate to it and competent to try or dispose of the same. That the District Munsif's Court of Srivaikuntam and the Additional District Munsif's Court of Tinnevelly were both Courts competent to dispose of the suit cannot be doubted. The argument for the appellant is that by virtue of clause 4 of the section the decision of the Tinnevelly Additional Munsif was the decision of a Court of Small Causes and consequently under section 27 of the Small Cause Courts Act no appeal lay from his decision. It is first argued for the respondent that the transfer to the Tinnevelly Additional District Munsif's Court was from the Srivaikuntam Court and that that Court was not a Court of Small Causes within the meaning of section 24 of the Civil Procedure Code and that the Tinnevelly Munsif could not therefore be said to have tried a suit transferred from a Court of Small Causes. It is no doubt the fact that the Srivaikuntam Munsif had not been invested with jurisdiction to try small cause suits of the value of this suit. But there are two answers to the respondent's argument. One is that under clause 4 of section 24 of the Civil Procedure Code the Srivaikuntam Court was a Small Cause Court with respect to this suit when it was transferred to it from the Subordinate Judge's Court of Tuticorin. The argument that it would become a Small Cause Court only at and for the purpose of the trial cannot be upheld. If this contention be sound in what capacity could the Srivaikuntam Court pass orders in the suit before the trial? It cannot be said that it could do so except as the Court trying the suit. The other answer is that the clause does not say that the transfer should be immediately from a Court of Small Causes, and the suit while pending in the Additional District Munsif's Court of Tinnevelly may be said to have been one transferred from the Subordinate Judge's Court of Tuticorin. The construction contended for by the respondent would be hardly in accordance with the object of clause 4 which is to provide for the trial as a Small Cause Court of suits which are transferred from Courts of Small Causes. All this is of course on the assumption that the Subordinate Court of

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Tinnevelly which was invested with the powers of a Small Cause Court was a Court of Small Causes within the meaning of section 24 of the Civil Procedure Code. The most important contention of the respondent is that the Subordinate Judge's Court of Tinnevelly cannot be regarded as a Court of Small Causes It is of course not disputed that that Court was not a Small Cause Court constituted under the provisions of Act IX of 1887 by the authority competent to constitute Small Cause Courts under that Act. It was invested with small cause jurisdiction by the Government of Madras under section 28 of the Madras Civil Court's Act. The respondent argues that clause 4 directs to be deemed as Courts of Small Causes only Courts trying suits transferred from what are strictly Small Cause Courts and not from Courts invested with small cause jurisdiction. The point for decision is, can the Subordinate Judge's Court of Tuticorin be regarded as a Small Cause Court within the meaning of section 24 of the Civil Procedure Code. Mr. Srinivasa Ayyar who has argued the case ably and very fully for the respondent has drawn our attention to section 7 of the Civil Procedure Code and to Order L where the code speaks specifically of Courts invested with small cause jurisdiction along with Small Cause Courts and he argues that therefore section 24 when it speaks of Small Cause Courts cannot be taken to include Courts invested with small cause jurisdiction but not constituted as Small Cause Courts. Now there can be no doubt that one object of providing in section 24, clause 4, that a Court trying a suit transferred from a Small Cause Court shall be deemed a Small Cause Court is to make the decision of the Court final in the same manner as the decision of the Court from which the suit was transferred would be. The finality of the decisions of a Small Cause Court is enacted by section 27 of the Provincial Small Cause Court's Act. Section 24 of the Civil Procedure Code must clearly be read with the provisions of the Provincial Small Cause Court's Act. Now turning to the latter Act, section 32 extends to Courts invested with small cause jurisdiction various provisions applicable to Small Cause Courts, viz., the classes of suits over which jurisdiction is to be exercised, the exclusion of the jurisdiction of other Courts in those suits, the practice and procedure applicable to Small Cause Courts, and the finality of the decrees and orders passed by those Courts, etc. Section 35 of the Provincial Small Cause Courts

Act like section 7 of the Civil Procedure Code refers to cases where a Court of Small Causes *or* a Court invested with the jurisdiction of a Court of Small Causes, has from any cause ceased to have jurisdiction with respect to a case, and it makes provision as to which Court is to have jurisdiction in such cases. If the matter has stood here, there would be very much force in the respondent's objection that the mere investiture of a Court with Small Cause powers would not make it a Small Cause Court. But section 33 provides that "a Court invested with the jurisdiction of a Court of Small Causes, with respect to the exercise of that jurisdiction, and the same Court, with respect to the exercise of its jurisdiction in suits of a civil nature which are not cognizable by a Court of Small Causes, shall, for the purposes of this Act, and the Code of Civil Procedure, be deemed to be different Courts." It is difficult to give a proper meaning to this section except by interpreting it as laying down that a Court, invested with small cause jurisdiction becomes for the purpose of its cognisance of suits which it is competent to try as small cause suits, a Small Cause Court. This is clear from the expression "for the purposes of this Act and the Code of Civil Procedure." What can be the meaning of saying that a Court invested with small cause jurisdiction is different from itself trying regular suits for the purposes of the Small Cause Courts Act except that it is to be regarded as a Small Cause Court? The Civil Procedure Code makes certain sections of the Code not applicable to Small Cause Courts. The reference to the Civil Procedure Code is evidently to make the excepted sections of the Civil Procedure Code inapplicable to Courts invested with small cause jurisdiction. The respondent's vakil was invited to mention any object that this section could have in view if it was not to make Courts invested with small cause jurisdiction Small Cause Courts. He was not able to make any suggestion that we could accept. It is true that section 32 would, strictly speaking, be unnecessary on this interpretation of section 33 and that the reference to Courts invested with small cause jurisdiction in section 35 might also be said to be unnecessary. But apparently the Legislature considered it better to mention specifically Courts invested with small cause jurisdiction in section 35 and to provide expressly in section 32 for the rules of procedure and finality of decisions and the other provisions of that section

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applying to Courts invested with small cause jurisdiction. At any rate it seems to me impossible to give due effect to section 33 unless it is regarded as making Courts invested with small cause jurisdiction Small Cause Courts. On this construction of section 33 there can be no doubt that the Subordinate Judge's Court of Tuticorin in exercising small cause jurisdiction must be regarded as a Small Cause Court. So far as the reason for the rule laid down in section 24 is concerned, there is no ground for distinction between a transfer from a Court of Small Causes and a Court invested with small cause jurisdiction. The decisions of both classes of Courts are final. The object of clause 4 of section 24 is to give finality also to the decision of the Court to which the suit is transferred. Section 24 admittedly has the effect of giving the finality of a Small Cause Court judgment to decisions of Courts not constituted Small Cause Courts. If this could be done with respect to suits transferred from Small Cause Courts it is difficult to see why it should not be done also with respect to those transferred from Courts invested with small cause powers. It may be as pointed out in *Dulal Chandra Deb* v. *Ram Narain Deb*(1), a grave thing to take away the right of appeal where the Legislature has not considered the desirability of investing any particular Court with small cause jurisdiction but the gravity applies equally to cases where the transfer is from Small Cause Courts. Rightly or wrongly the Legislature has thought it proper to give finality to the decisions not only of Small Cause Courts and Courts invested with small cause jurisdiction but to the decisions of a third class of Courts, viz., of Courts to which a suit of small cause nature is transferred in certain cases. The exact scope of such cases is immaterial in considering the gravity of what is done by the Legislature. *Dulal Chandra Deb* v. *Ram Narain Deb*(1) no doubt contains a strong dictum in respondent's favour. The exact point in the case was whether when a Munsif having small cause jurisdiction was succeeded by one having no jurisdiction an appeal would lie from the decision of the latter who tried the suit on the regular side. There can be no doubt that section 24 would have no application to such a case and an appeal would lie. *Ramchandra* v. *Ganesh* (2) is undoubtedly in respondent's favour. But although

(1) (1904) I.L.R., 31 Calc., 1057. (2) (1899) I.L.R., 23 Bom., 382.

sections 32 and 35 are commented on in that judgment no reference is made to section 33. It may be observed that *Dulal Chandra Deb* v. *Ram Narain Deb*(1) also makes no reference to that section. *Mangal Sen* v. *Rup Chand*(2) which followed an earlier Allahabad decision is on the other hand in appellant's favour. These are really the only decisions in point. In *Bhagvan Dayálji* v. *Bálu*(3), WEST, J., observed that a Court exercising small cause jurisdiction by special investiture of powers and the same Court exercising its ordinary original jurisdiction may be regarded as two different Courts. *Akshay Kumar Shaha* v. *Hira Ram Dosad*(4) cited for the appellant is not really in point as the learned Judges there decided the case on a consideration of section 32 of the Act only. The view adopted by the Allahabad Court appears to be the right one. Another question arises for decision in consequence of the order of the District Court transferring the suit from the Subordinate Judge's Court of Tuticorin to the Srivaikuntam Court directing the latter Court to try it as an original suit. Having regard to section 24 of the Civil Procedure Code it had apparently no power to do so. It was suggested during the arguments that the order of transfer should therefore be regarded as wholly void. But this does not appear to be the correct view to be taken. The District Judge in making the direction must be taken to have acted in excess of his jurisdiction. He had power to transfer the suit; but he had no jurisdiction in doing so to order that the suit should be tried on the regular side contrary to the provision in section 24 of the Civil Procedure Code that the Court trying a suit transferred from the Small Cause Court shall be deemed to be a Small Cause Court. The direction to try it as a regular suit must be regarded as invalid but it does not affect the order of transfer itself. See Bailey on Jurisdiction, volume I, section 29. The decision of the Additional Munsif was therefore that of a Small Cause Court under section 24 of the Civil Procedure Code and no appeal lay to the Subordinate Judge's Court. The decree of the Subordinate Judge therefore must be reversed and that of the Additional District Munsif restored with costs here and in the Appellate Court.

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(1) (1904) I.L.R., 31 Calc., 1057.
(2) (1891) I.L.R., 13 All., 324.
(3) (1884) I.L.R., 8 Bom., 230.
(4) (1908) I.L.R., 35 Calc., 677.

SANKARARAMA v. PADMANABHA — SADASIVA AYYAR, J.

SADASIVA AYYAR, J.—Mr. Srinivasa Ayyar who argued the respondent's case with great learning, acuteness and fairness has brought forward all the available arguments and the two propositions enunciated by him are (*a*) that a Court trying a suit transferred not from a Court of Small Causes in the technical sense but from a Subordinate Judge's Court merely invested with small cause powers is not itself a Small Cause Court whose decision is not subject to appeal, (*b*) that even if the District Munsif Court of Srivaikuntam to which the suit was transferred be a Small Cause Court, the Tinnevelly Additional District Munsif's Court, to which there was a further transfer and which actually tried the suit was not a Court of Small Causes. I am clear after hearing the whole matter elaborately discussed that the Legislature intended to take care that a suit originally and properly instituted as a small cause suit should not lose that nature even if it be tried by another Court afterwards by reason of transfer proceedings When section 33 of the Provincial Small Cause Courts Act says that a Court invested with small cause jurisdiction shall be a different Court from itself when it is exercising its ordinary civil jurisdiction it could only mean that such Court shall be deemed to be a Small Cause Court different from an ordinary Civil Court. The observations in *Dulal Chandra Deb* v. *Ram Narain Deb*(1) and *Ramchandra* v. *Ganesh*(2) ignore this section 33 and the effect of these decisions is rather to criticise the policy of the Legislature found in section 24, clause 4 of the Civil Procedure Code, than to follow its plain provisions as is done in *Mangal Sen* v. *Rup Chand*(3). As regards the argument that the trying Court did *not get its jurisdiction by an immediate transfer from the Court* in which the suit was originally instituted as a small cause suit, section 24, clause 4, does not say that the Court trying any suit transferred or withdrawn from a Court of Small Causes and *which shall be deemed therefore to be a Small Cause Court* should also be a Court to which the transfer had been made immediately from the Small Cause Court in which the suit was originally instituted. This contention therefore also fails. The appeal was therefore heard by the Subordinate Judge without

(1) (1904) I.L.R., 31 Calc., 1057. (2) (1899) I.L.R., 23 Bom., 382
(3) (1881) I.L.R., 13 All., 324.

jurisdiction and his decree must be reversed and that of the Additional District Munsif restored with costs.

SANKARARAMA *v.* PADMANABHA.

SADASIVA AYYAR, J.

APPELLATE CIVIL.

Before Mr. Justice Sundara Ayyar and Mr. Justice Sadasiva Ayyar.

1912. September 26 and October 2.

S. APPALANARASIMHULU AND ANOTHER (PLAINTIFFS), APPELLANTS,

v

M. SANYASI AND THREE OTHERS (DEFENDANTS), RESPONDENTS.*

Madras Estates Land Act (I of 1908)—Inamdar and ryot—Suit for rent in a Revenue Court—Revenue Court, jurisdiction of—Landholder under section 3, clause (5)—Estate—Section 3, clauses (2) (d) and (e)—Section 189 and schedule A, No 8—"Landholders" wider than "owner of an estate."

An inamdar of a portion of a village, where the inam consists only of some of the lands in a village granted by a Zamindar after the permanent settlement, is a landholder under section 3, clause (5) of the Madras Estates Land Act, though the inam may not be an estate under section 3, clauses (2) (d) and (e) of the said Act.

A suit brought by such an inamdar for arrears of rent against a ryot is cognisable by a Revenue Court under the said Act.

The test which is decisive on the question of jurisdiction is whether the plaintiffs are landholders under the Act.

The term "landholder" is wider than the expression "the owner of an estate," and includes every person entitled to collect the rents of any portion of an estate by virtue of any transfer.

SECOND APPEAL against the decree and judgment of A. L. HANNAY, the District Judge of Vizagapatam, in Appeal No. 272 of 1910, presented against the order of P. C. DUTT, the Sub-Collector of Parvatipuram in J. Dis. No. 679 of 1910.

The plaintiffs brought this suit in the Court of the Sub-Collector of Parvatipuram for arrears of rent against the defendants who were the ryots of the suit lands. The plaintiffs claimed to be the inamdars of the suit lands which were admitted to be a *darimilla* inam, *i.e.*, an inam subsequent to the permanent

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* Second Appeal No. 1219 of 1911

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settlement of lands in a village in the Sangam Valasa Zamindari. The lower Courts rejected the plaint on the ground that the Revenue Court had no jurisdiction to entertain the suit, holding that the lands were not an estate within the meaning of section 3, clause 2 of the Estates Land Act. The plaintiffs preferred this Second Appeal to the High Court.

B. Narasimheswara Sarma for the appellants.

P. Narayanamurthi for the respondents

SUNDARA AYYAR AND SADASIVA AYYAR, JJ.

The JUDGMENT of the Court was delivered by SUNDARA AYYAR, J.—The question for decision in this case is whether the Sub-Collector was right in holding that the Revenue Court had no jurisdiction to entertain the suit which was one for rent against a ryot by the proprietor of certain inam lands in a village in the Sangam Valasa Zamindari. The inam was admittedly one granted by the Zamindar subsequent to the permanent settlement. The view taken by the Sub-Collector and by the District Judge on appeal is that the plaintiffs are not landholders within the definition of that word in section 3, clause (5) of the Estates Land Act, and a suit for rent by them is therefore not one coming within the purview of section 189, and No. 8 of schedule A of the Act. The reason given by the lower Courts is that the land in question is a minor inam and therefore not an "estate" as defined by clause (2) of section 3. It has evidently been assumed by them that the plaintiffs cannot be landholders if the land is not an "estate." The definition of an "Estate" includes specifically two classes of inams by sub-clauses (*d*) and (*e*). Sub-clause (*d*) refers to a village of which the land revenue alone has been granted in inam to a person not owning the kudivaram thereof provided the grant has been made, confirmed, or recognised by the British Government, or any separated part of such village. Sub-clause (*e*) relates to any portion consisting of one or more villages (of an estate) which is held on a permanent under-tenure. The inam in question consists only of some lands in a village and not of a village or of one or more villages of the "estate" of Sangam Valasa and is clearly therefore not an estate within the definition of that word. The fact that the inam was granted subsequently would not necessarily show that it is not an estate if it consisted of one or more villages, as sub-clause (*e*) would include an inam granted by a Zamindar provided it consists of one or more

villages, for it would then be a portion of the Zamindar's estate held on a permanent under-tenure. Sub-clause (*d*) relates to a village which has ceased to be part of a zamindari, and sub-clause (*e*) relates to an inam which being granted by the proprietor of the zamindari and held under him has not ceased to be a portion of the zamindari. Although it is clear that the land in question is not an estate that is not sufficient to show that the suit is not cognisable by the Revenue Court. For the test which is decisive on the question of jurisdiction is whether the plaintiffs are landholders. That word is defined as follows in clause (5) of section 3. "Landholder" means a person holding an estate or part thereof and includes every person entitled to collect the rents of the whole or any portion of the estate by virtue of a transfer from the owner or his predecessor in title, or of any order of a competent Court, or of any provision of law. The plaintiff is undoubtedly a person entitled to collect rents of a portion of the estate of Sangam Valasa. There is no reason why the holder of an under-tenure should not be held to be a person entitled to collect rents of a portion of the estate out of which the under-tenure is carved. The under-tenure holder if he is liable to pay kattubadi to the Zamindar is such a person holding under him and entitled to collect the rents of a portion of the zamindari as a lessee or a usufructuary mortgagee of the whole or of a portion of the zamindari. If the tenure holder is not bound to make any payment to the Zamindar for his tenure he will then be a person owning a part of the estate and as *such would come within the meaning of landholder. It* is clear that the term "landholder" is wider than "the owner of an estate." No doubt the word "rent" is defined as "whatever is lawfully payable in money, in kind, or both," to a landholder for the use or occupation of land in *his* estate for the purpose of agriculture," but the expression "his estate" cannot be taken to involve that only what is payable to the owner of the estate can be regarded as rent for the definition would then exclude what is payable to a lessee or a usufructuary mortgagee. The definition of landholder clearly includes every person entitled to collect the rents of any portion of an estate by virtue of any transfer. The plaintiffs by reason of the transfer of the lands in question from the Zamindar as an under-tenure are persons entitled to collect the rent of the land. They must therefore be

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held to be landholders and the suit for rent by them against the defendants is one cognizable by the Sub-Collector. This view is in accordance with the judgment of ABDUR RAHIM, J., in *Suryanarayana* v. *Ballayya*(1), who upheld the view taken by the Subordinate Court of Cocanada although no reasons are stated in the judgment.

The decrees of the lower Courts must therefore be reversed and the suit remanded to the Court of First Instance for disposal according to law. No objection to jurisdiction was raised by the defendants. In the circumstances all costs up to date must abide the result of the trial.

APPELLATE CIVIL.

Before Mr. Justice Abdur Rahim and Mr. Justice Sadasiva Ayyar.

1912. May 3, September 24 and October 2.

B. GOVINDAPPA (PLAINTIFF), APPELLANT,

v.

B. HANUMANTHAPPA (FIRST DEFENDANT), RESPONDENT.*

Assignee of a money-decree of the Original Court—Decree reversed in appeal—Assignee not a party to the appeal—Money realised by assignee in execution—Application by judgment-debtor for restitution—Objection by assignee to application—Suit by judgment-debtor against assignee—Fraud and collusion between judgment-debtor and original decree-holder, effect of—Civil Procedure Code (Act XIV of 1882), sec. 583—lis pendens.

A judgment-debtor, from whom the assignee of a money-decree has realised the decree-amount in execution, is entitled to recover it back from him when the decree is afterwards reversed in appeal even if the assignee of the original decree was not brought on the record in the appeal.

Neither the fact that the assignment was made before the appeal was filed nor the fact that the judgment-debtor had knowledge of the assignment before he lodged his appeal makes any difference.

Where the decree of the Appellate Court was the result of fraud and collusion between the judgment-debtor and the original decree-holder, it is possible that such a plea if made and proved would be a sufficient answer to a suit by the judgment-debtor against the assignee of the decree.

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(1) Civil Revision Petition No. 895 of 1910.

* Second Appeal No. 187 of 1911.

Money obtained under an invalid process of Court must be treated as money had and received to the use of the person from whom it was realised.

A suit for restitution by the judgment-debtor was maintainable, where he had sought his remedy for restitution by an applicati n made to the Court which executed the decree and it was on the objection of the defendant (assignee of the decree) that he was driven to institute the suit, the defendant cannot now be heard to say that the procedure to which he himself successfully objected was the proper procedure.

Seltappa Gounden v. *Muthia Goundan* (1903) I.L.R., 31 Mad., 268, and *Doraisami Ayyar* v. *Annasami Ayyar* (1900) I.L R., 23 Mad., 306, followed.

Tangi Joghi v *Hall* (1900) I L R., 23 Mad, 203, referred to

Lalta Prasad v *Sadiq Husen* (1902) I L R., 24 All., 288, dissented from

SECOND APPEAL against the decree of N. LAKSHMANA RAO, the Subordinate Judge of Bellary, in Appeal No. 73 of 1908, preferred against the decree of C. V. SAMPATH AYYANGAR, the Acting District Munsif of Hospet, in Original Suit No. 32 of 1908.

Govindappa, who is the plaintiff in the present suit which has given rise to the present appeal, was the judgment-debtor in a previous suit (Original Suit No. 135 of 1905), which was brought against him by one Basavva on a promissory-note executed by Govindappa in favour of one Adivayya. Basavva brought the said suit (Original Suit No. 135 of 1905) alleging that Govindappa really owed money to her and at her instance executed that pro-note in favour of Adivayya who was also a defendant in that suit. Basavva obtained a decree in her favour in the Original Court against Govindappa. Basavva transferred the said decree in Original Suit No. 135 of 1905 to Hanumanthappa, who is the first defendant in the present suit. Subsequent to the assignment of the decree, Govindappa filed an appeal against the decree in Original Suit No. 135 of 1905 but did not make the assignee a party to his appeal. When the appeal was pending, the assignee Hanumanthappa executed the decree in Original Suit No. 135 of 1905 as Basavva's assignee and, having realised the decree-amount, received it from Court on furnishing security under the orders of the appellate Court, the second defendant in the present suit having stood surety for him. Subsequently the appeal was disposed of in favour of Govindappa (the present plaintiff), and the decree in Original Suit No. 135 of 1905 was reversed. Govindappa moved the first Court in execution for an order for restitution under section 583 of the Civil Procedure Code (Act XIV of 1882), but the application was

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disallowed on objection taken by Hanumanthappa. Hence this regular suit (Original Suit No. 32 of 1908) was brought by Govindappa against Hanumanthappa (the assignee of the decree) and his surety as the first and second defendants. The District Munsif decreed the suit in favour of the plaintiff, but the decree was reversed on appeal by the Subordinate Judge. The plaintiff preferred this second appeal.

Mr. *T. V. Muthukrishna Ayyar* for the appellant.

The Honourable Mr. *L. A. Govindaraghava Ayyar* for the respondent.

ABDUR RAHIM, J.

ABDUR RAHIM, J.—This Second Appeal raises the question whether a judgment-debtor from whom the assignee of a money-decree has realised the decretal amount in execution is entitled to recover it back from him when the decree is afterwards reversed in appeal, if the assignee of the original decree was not brought on record in the appeal. I may mention that it is not necessary to consider the question whether the plaintiff could and should have sought his remedy for restitution by an application made to the Court which executed the decree, for he did make such application and it was on the objection of the defendant that he was driven to institute the present suit and the defendant cannot now be heard to say that the procedure to which he himself successfully objected was the proper procedure.

Upon the merits what is urged in support of the judgment of the Subordinate Judge who has decided against the plaintiff's claim is that he not having impleaded the present defendant who had obtained an assignment of the decree of the first Court as a respondent in the appeal against the decree, the decree of the appellate Court cannot bind him because it might be that the decision of the appellate Court was the result of collusion between the present appellant and the original decree-holder, the assignor of the defendant. Now no such fraud was ever pleaded and it is possible that if it was pleaded and proved that that would be a sufficient answer to the suit. But in the absence of fraud it is difficult to see why the decree of the appellate Court should not bind a person who has chosen to obtain an assignment of the decree of the first Court. It is not contended that a judgment-debtor wishing to appeal against the decree is bound to make the assignee of the decree a party to his appeal though it might

be open to him to apply for an order to that effect. The judgment-debtor's right of appeal is in no way affected by any intermediate assignment of the first Court's decree. The assignee himself might apply to be brought on record in the appeal and if he chose to leave the conduct of the appeal to the decree-holder it does not stand to reason that it should be open to him to question the decree that may be passed by the appellate tribunal. It is the decree of the latter Court that is the final decree in the case, being in substitution of the original decree and the doctrine of *lis pendens* clearly applies to an intermediate assignment of the original decree. The fact that the assignment was made before the appeal was filed cannot make any difference in this respect [see *Settappa Goundan* v. *Muthia Goundan*(1)] nor for reasons already stated, the fact that the judgment-debtor had knowledge of the assignment before he lodged his appeal.

On behalf of the respondent much reliance is placed on *Lalta Prasad* v. *Sadiq Husen*(2) which is certainly a decision directly in his favour. On the other hand the appellant cites in support of his contention the authority of *Tangi Joghi* v. *Hall*(3). With all respect to the learned Judges who decided the former case we are unable to accept their view of the law. The main reasoning on which that ruling is based seems to be that because in case the judgment-creditor himself had executed the decree of the first Court and made over the money realised to a third person, the judgment-debtor who succeeded in appeal could not follow the money in the hands of that third person. It must be held that where the assignee of the decree himself realised the decree in execution the judgment-debtor would have no cause of action against him when the original decree is reversed in appeal. In my opinion the two cases are not based on the same legal considerations. Money is not ear-marked property and therefore in the first case there is no principle of law according to which it can be followed in the hands of a third person. But the other case is quite different. *Here one person by a compulsory* process of Court obtains money from another and it is afterwards declared by a superior tribunal that the original process was unjustified. It seems to me that money so obtained under an invalid process of Court must be treated as money had and

(1) (1908) I.L.R., 31 Mad., 268. (2) (1902) I.L.R., 24 All., 288.
(3) (1900) I.L.R., 23 Mad., 203.

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received to the use of the person from whom it was received. That is the principle on which the doctrine of restitution which underlies section 583 of the Civil Procedure Code of 1882 rests. The decision in *Tangi Joghi* v. *Hall*(1) in my opinion supports the distinction which we have drawn between a case where the act complained of and in respect of which restitution is sought was done by the agency of the Court and a case where such act was independent of any process of Court. There is no doubt that the property of which restitution was sought in the Madras Court was immoveable property, but the principle of the decision is, to my mind, equally applicable in cases like the present. That principle is well expressed in the observations of an American Court cited by the learned Judges in *Dorasami Ayyar* v. *Annasami Ayyar*(2). But the cases have no application when the party seeking to be restored to the possession has been wrongfully dispossessed by the agency of the Court. He does not stand in the position of the actor in a suit who seeks the aid of a Court to regain any possession lost by his own negligence or misfortune. On the contrary he is out of possession only because the Court has wrongfully put him out, and whoever is in is there only because the Court has wrongfully made room for him to get in . . . The plaintiff, in my opinion, is entitled to restitution. The decree of the lower Appellate Cour must therefore be reversed and that of the District Munsif restored with costs in this Court and in the lower Appellate Court.

SADASIVA AYYAR, J.

SADASIVA AYYAR, J.—I entirely agree and I do not think that I can usefully add any words of my own.

(1) (1900) I L R, 23 Mad, 203 (2) (1900) I L R., 23 Mad, 306.

APPELLATE CIVIL.

Before Sir Ralph Sillery Benson, Officiating Chief Justice, and Mr. Justice Sankaran Nair.

VALLI AMMAL (PLAINTIFF), APPELLANT,

1912. October 1 and 8.

v.

THE CORPORATION OF MADRAS (DEFENDANT), RESPONDENT.*

Madras City Municipal Act (III of 1904) —"Final," meaning of in section 287 (3) —Standing Committee, whether special tribunal, or independent body—New additions to building—Whether mandamus or injunction, appropriate remedy to remove them.

The plaintiff, as the owner of house and premises No 36 in Singana Chetty street in the City of Madras, obtained permission from the Municipality of Madras City to execute certain repairs therein. The President being of opinion that under cover of the permission granted, she had made considerable additions and alterations, made a provisional order under section 287, clause (1) of the Madras City Municipal Act (III of 1904), directing their removal and subsequently confirmed that order under clause (2) of section 287. An appeal by the plaintiff to the Standing Committee having proved ineffectual, she filed a suit in the City Civil Court for the issue of a perpetual injunction restraining the Corporation from demolishing the alleged additions

Held, that when a right and an infringement thereof are alleged, a cause of action is disclosed, and unless there is a bar to the entertainment of a suit, the ordinary Civil Courts are bound to entertain the claim , and that a suit for injunction will therefore lie.

Held, further that the Standing Committee cannot be held to be an independent body or a special tribunal authorised to settle finally disputes as between the tax-payers or house-owners and the Corporation of which they are the members.

Instance of "special tribunal," pointed out.

Bhaishankar v. The Municipal Corporation of Bombay (1907) I.L R., 31 Bom, 604, referred to.

Held also, that the word "final" in section 287 refers to proceedings before the Corporation and is intended to bar an appeal from the Standing Committee to the general body of Commissioners, but not to shut out the jurisdiction of the Courts. The suit was properly brought against the President as he was acting on behalf of the Corporation.

Bholaram Chowdhry v. Corporation of Calcutta (1909) I.L.R., 36 Calc., 671 distinguished.

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* City Civil Court Appeal No 5 of 1911.

VALLI AMMAL v. THE CORPORATION OF MADRAS.

APPEAL against the decree of C. V. KUMARASWAMI SASTRIYAR, the City Civil Judge, Madras, in Original Suit No. 553 of 1910—Suit for an injunction.

The facts are fully set out in the judgment.

V. Ramesam for *T. R. Venkatarama Sastriyar* and *K. Narasimha Ayyar* for the appellant.

T. V. Seshagiri Ayyar for *K. Srinivasa Ayyangar* and *P. Duraiswami Ayyangar* for the respondent.

SYNSON, OFFG. C.J., AND SANKARAN NAIR, J.

JUDGMENT.—The plaintiff is the owner of house and premises No. 36, Singana Chetty street, within the Municipality of Madras. She applied for and obtained permission from the officer competent to grant the same, to carry out certain repairs to her house in April 1909. The President of the Corporation was of opinion that, taking advantage of this permission granted to her, she had made other considerable alterations and additions to her house and ground without his sanction, and he accordingly made a provisional order under section 287, clause (1) of the Madras City Municipal Act III of 1904, requiring her to remove those alleged additions. That provisional order was afterwards confirmed by him under section 287, clause (2) of the Act. The plaintiff appealed against it to the Standing Committee who declined to interfere. Her case is that there were no additions or alterations as stated by the President but that the four rooms which have been ordered to be demolished had been in existence for more than 20 years, and that, therefore, neither the President nor the Corporation was entitled to ask her to demolish the same on the ground alleged. She, therefore, prays for an injunction to restrain the defendant, the Corporation of Madras, from demolishing these four rooms.

It is necessary at this stage to notice only the following plea advanced in paragraph (3) of the written statement:—"The order of the Standing Committee referred to in paragraph (4) of the plaint filed herein having become final under section 287 (3) of the Act, the suit is not maintainable against the defendant Corporation at all; and the plaintiff has misconceived her remedy if any."

The City Court Judge held that the plaintiff was not barred from bringing the suit on the ground that the Standing Committee had confirmed the order of the President, but he held that the suit for an injunction in his Court is not the proper remedy

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BENSON, OFFG. C.J., AND SANKARAN NAIR, J.

and that the plaintiff should apply to the High Court by way of *mandamus*, and for this position he relied upon the decision in *Bholoram Chowdhry* v. *Corporation of Calcutta*(1). This is an appeal from his judgment.

The case referred to does not support the proposition that the proper remedy is by way of *Mandamus*. The question for decision in that case was not whether an injunction or a *Mandamus* was the proper remedy nor did the judge decide that a suit for an injunction will not lie to restrain the Corporation from committing an act which is improper or illegal.

Mr. Seshagiri Ayyar, however, has argued two other questions in support of the decree of the Lower Court. His first contention is that, the Standing Committee having confirmed the order of the President that these buildings ought to be demolished, no suit will lie at all as section 287, clause (3), says that such order is final. It is rightly conceded that if the President of the Municipal Corporation issues an order to demolish a building on the ground that it is a new building constructed against the provisions of the Act but as a matter of fact the building is not one so constructed but is an old building, then the plaintiff has a grievance for which there should be a remedy. When a right and an infringement thereof are alleged, a cause of action is disclosed and unless there is a bar to the entertainment of such a suit, the ordinary Civil Courts are bound to entertain that claim. In this case it is not alleged that there is any express provision of law to the effect that no such suit shall lie. What is contended is that there is a bar by implication, because section 287 says that the decision of the Standing Committee shall be final.

It is no doubt true that, where a special tribunal has been created or empowered to afford redress, it has been held that there is an implied prohibition against a suit being filed in the ordinary Courts. This Act itself furnishes an instance of such a tribunal. All complaints, for instance, in respect of any tax or toll are first to be heard and decided by the President and two Commissioners, and against an order so passed by them there is an appeal to the Magistrates, who may refer the matter to the High Court for their decision and are bound to do so whenever

(1) (1909) I.L.R. 36 Calc., 671.

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a question of law is involved; and the Magistrates are required to dispose of the case in conformity with the terms of the order of the High Court. This is a special tribunal empowered to deal with these questions and its decisions on such questions have been held to be final by this Court. See also *Bhaishankar* v. *The Municipal Corporation of Bombay*(1). The question then for decision is whether the Standing Committee is a special tribunal empowered to deal with this question finally. The Standing Committee is composed of the President and eight members. These eight members are all Commissioners of the Corporation. Their powers are defined by certain sections of the Act. [See sections 17, 20 and 286.] They form in fact a part of the Corporation and they carry out the duties of the Corporation in accordance with the provisions laid down by the Act. They cannot be held to be an independent body authorised to settle finally disputes between the tax-payers or house-owners and the Corporation whose members they are and of which they form part. We are therefore of opinion that they cannot be treated as a tribunal to decide such claims.

We take it that the word " final " in section 287 refers to proceedings before the Corporation, and is intended to bar an appeal from the Standing Committee to the general body of the Commissioners, not to shut out the jurisdiction of the Courts. It was also argued before us that the plaintiff was wrong in bringing this suit against the Corporation, that her remedy, if any, is against the Standing Committee and for this contention the decision in *Bholoram Chowdhry* v. *Corporation of Calcutta*(2), was relied upon; but that was a suit brought for the purpose of compelling the Corporation to do an act which, according to the Act, it was the duty of the Standing Committee to perform and therefore it was held that the suit should have been brought against the Standing Committee. It has no application to the present case. In this case the President was acting on behalf of the Corporation. We disallow this contention. We set aside the decree of the lower Court and direct the judge to restore the suit to his file and proceed to dispose of it in accordance with law. The appellant is entitled to the costs of this appeal. The costs hitherto incurred in the lower Court will be provided for in the final decree.

(1) (1907) I.L.R., 31 Bom., 604. (2) (1909) I.L.R., 36 Calc., 671.

APPELLATE CIVIL.

Before Mr. Justice Sundara Ayyar and Mr. Justice Sadasiva Ayyar.

KAMALA BAI (PLAINTIFF), APPELLANT,

1912. October 8.

v.

BHAGIRATHI BAI (DEFENDANT), RESPONDENT.*

Hindu Law—Succession—Maiden's property—Preferential heir

One Sitabai who became entitled to Rs. 3,000, under an insurance policy on the death of her father, died unmarried; and the plaintiff, the sister of her mother, sued for a declaration that the defendant who was the step-mother of the deceased Sitabai was not her heir under the Hindu law and that she as the maternal aunt of the deceased was her lawful heir and entitled to the amount that was held in deposit in Court

Held, that the plaintiff was not entitled to succeed in preference to the defendant.

The sapindas, both of the father and the mother, in the text of Mitakshara, must refer to the same persons as the mother becomes a member of the father's family on her marriage

Tukaram v. *Narayan Ramchandra* (1912) I L R., 36 Bom , 339, *Janglubai* v. *Jetha Appaji* (1903) I L R., 32 Bom., 409 and *Dwarka Nath Roy* v *Sarat Chandra Singh Roy* (1912) I.L.R., 39 Calc , 319, followed

The rule that female gotraja sapindas do not inherit as agnate relations taking the rank which they would be entitled to if their claims were based on sapinda relationship has been enforced with regard to succession to male's property.

Balamma v. *Pullayya* (1895) I.L R , 18 Mad., 168 and *Thayammal* v *Annamalai Mudali* (1896) I.L R , 19 Mad , 35, referred to

The rule that in the case of succession to sridhanam property, a daughter inherits as sapinda where the succession has to be traced through the father or the husband, applies also to the case of a wife or widow.

Manja Pillai v. *Sivabhagiathachi* (1911) 21 M.L J., 851, applied.

SECOND APPEAL against the decree of V. VENUGOPAL CHETTI, the District Judge of South Canara, in Appeal No. 131 of 1910, preferred against the decree of T. V. ANANTAN NAYAR, the Subordinate Judge of South Canara, in Original Suit No. 73 of 1909.

Suit for a declaration.

One Brahmawar Sarvothama Row insured his life in the Sun Life Assurance Company of Canada for the benefit of his minor daughter Sitabai who was the daughter born to him by his first

* Second Appeal No 217 of 1912.

KAMALA v. BHAGIRATHI.

wife Singarabai, the sister of the plaintiff. The said Sarvothama Row died on 6th June 1902 after paying the first premium; and the amount of the policy, Rs. 3,000, became payable to his minor daughter who died subsequently in March 1903. On the application by the defendant who is the widow of Sarvothama Row and the step-mother of the said Sitabai, the District Court ordered a succession-certificate to be issued to defendant on her furnishing security and as it was not furnished by the defendant, the amount was held in deposit in Court. Hence the plaintiff sued for a declaration that the said amount devolved by inheritance upon her as the heir of the deceased Sitabai.

B. Sitarama Rao for the appellant.

K. Yagnanarayana Adiga for the respondent.

SUNDARA AYYAR AND SADASIVA AYYAR, JJ.

The JUDGMENT of the Court was delivered by SUNDARA AYYAR, J.—The plaintiff in this case claims the property sued for as the maternal aunt of a deceased maiden of a Hindu family. The defendant is the step-mother of the maiden. The question for decision is whether the plaintiff is entitled to preferential rights over the defendant. The Bombay High Court held in *Tukaram* v. *Narayan Ramchandra*(1) and *Janglubai* v. *Jetha Appaji*(2), that in default of both the mother and the father a maiden's property goes to the husband's sapindas. The same view was accepted by the Calcutta High Court in *Dwaraka Nath Roy* v. *Sarat Chandra Singh Roy*(3), though in that case there was no contest between the relations of the mother and of the father. In the Mitakshara there are no express texts dealing with the succession to the property of a maiden in default of the mother and the father, the text stopping with succession to the parents, the words 'parents' being interpreted to mean the mother and then the father. But in the case of the property of a childless married woman the succession is carried further down. It is stated that the property goes to the parents and in default तत्प्रयासन्नानाम् which may be interpreted to mean 'to their sapindas' as Mr. Sitarama Row contends. The Viramitrodaya does not deal specifically with the succession to a maiden's property at all but provides for the succession to the property of a childless married girl in terms similar to those used in the Mitakshara We see no reason for not accepting the view of

(1) (1912) I L R, 36 Bom, 339. (2) (1908) I L.R, 32 Bom, 409.
(3) (1912) I L.R., 39 Calc, 319.

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the Bombay High Court, that the sapindas, both of the father and mother, must be understood to mean the same persons as the mother becomes a member of the father's family on her marriage. In this view the defendant, as the wife of the deceased maiden's father, would be a nearer heir than the plaintiff But Mr. Sitarama Row contends that the father's widow could not inherit his property as a sapinda. He relies on the prevalent rule that female *gotraja sapindas* do not inherit as agnate relations taking the rank which they would be entitled to if their claims were based on sapinda relationship. With regard to the succession to a male's property this rule, no doubt, has been enforced in this Court. See *Balamma* v. *Pullayya*(1) and *Thayammal* v. *Annamalai Mudali*(2). But in the case of succession to *sridhanam* property a daughter has been held to be entitled to inherit as sapinda where the succession has to be traced through the father or the husband. See *Manja Pillai* v. *Sivabhagiathachi*(3). We see no reason why we should not adopt the same view with regard to the wife. Moreover, there is much support in the Mitakshara for the view, that a widow inherits her husband's property as his sapinda being one half of the husband's body.

We therefore agree with the District Judge that the plaintiff is not entitled to succeed in preference to the defendant and we dismiss the Second Appeal with costs.

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(1) (1895) I.L.R., 18 Mad., 168. (2) (1896) I.L.R., 19 Mad., 35.
(3) (1911) 21 M.L.J., 851.

APPELLATE CIVIL—FULL BENCH.

Before Sir Ralph Sillery Benson, Kt., Officiating Chief Justice, Mr. Justice Sankaran Nair and Mr. Justice Sundara Ayyar.

1912. August 14, September 19, and October 14.

T. KRISHNAN NAIR AND ELEVEN OTHERS (PLAINTIFFS), APPELLANTS,

v.

T. DAMODARAN NAIR AND THIRTEEN OTHERS (DEFENDANTS), RESPONDENTS.*

Malabar Law—Marumakkattayam tarwad—Females' self-acquisition, descent of, to her own heirs and not to tarwad—Tavazhi, meaning of.

The self-acquisitions of a female member of a Marumakkattayam tarwad do not lapse on her death to her tarwad, but descend to her tavazhi, which will be her issue if she has any, and in the absence of the issue will be her mother and her descendants.

Tavazhi defined

Govindan Nair v *Sankaran Nair* (1909) I L.R., 32 Mad., 351 (F.B), distinguished.

Ummanga v. *Appadorai Patter* (1911) I.L.R., 34 Mad , 387, overruled.

SECOND APPEAL against the decree of T. V. ANANTAN NAIR, the Subordinate Judge of South Malabar at Palghat in Appeal No. 516 of 1910, preferred against the decree of A. NARAYANAN NAMBIAR, the District Munsif of Palghat, in Original Suit No. 43 of 1910.

The following facts are taken from the Order of Reference by SUNDARA AYYAR and SADASIVA AYYAR, JJ., to the Full Bench :—"The properties, the subject matter of this suit belonged "to one Narayani Ammah, a member of a Nair tarwad "following the Marumakkattayam law, as her self-acquisition. "On her death (without any issue) defendants Nos. 1 to 8, some of "the members of her tavazhi, applied for a succession-certificate "authorizing them to collect some debts due to her and an order "was passed granting them a certificate. This suit was instituted "by the members of the tarwad to which Narayani Ammah "belonged for a declaration that they were the heirs of Narayani "Ammah entitled to the certificate and for a decree setting aside "the order passed on the petition for the succession certificate "and the certificate, if any, actually obtained by defendants

* Second Appeal No. 477 of 1911.

"Nos. 1 to 8. Their case is that on the death of Narayani "Ammah her self-acquisitions lapsed to the whole tarwad and "were not inherited by the members of tavazh These members "are described by the District Munsif as being her mother, "brothers, sisters and sisters' children. The plaintiff's are more "distant relatives. The District Munsif relying on the decision in "*Govindan Nair* v. *Sankaran Nair*(1), held that Narayani "Ammah's properties were inherited by the members of her "tavazhi as being nearer heirs than the other members of the "tarwad. On appeal, the Subordinate Judge affirmed the "District Munsif's Judgment."

Plaintiffs therefore preferred this Second Appeal.

C. V. Anantakrishna Ayyar for the appellants.

C. Madhavan Nayar for the respondents Nos. 1 to 12.

The other respondents did not appear in person or by pleader.

SUNDARA AYYAR AND SADASIVA AYYAR, JJ.

ORDER OF REFERENCE TO A FULL BENCH.—After stating the facts above set out, the Order of Reference ran as follows:— He (the Subordinate Judge) says: "Whatever may have been the archaic law of Malabar as administered by the Courts in Malabar in years gone by, it is beyond question that the custom of the country in recent times in South Malabar has recognized the tavazhi of a female member as the lawful heir to her self-acquired property. The old theory of Marumakkattayam inheritance is distinctly in accordance with this present day consciousness of the Malayali community and this is clear from the writings of early British observers of Malabar institutions and from the opinions expressed by competent authorities who have had to judicially declare the principles of Malabar law. This custom of inheritance by the tavazhi to the self-acquired property of a female member has met with judicial recognition in South Malabar and is in accordance with the true theory of Malabar law and consonant to reason and principle. This rule has not been broken in upon by the Full Bench ruling in *Govindan Nair* v. *Sankaran Nair*(1) so far as succession to the self-acquired property of a female is concerned. In the case of property acquired by a female her tavazhi means, in case she dies issueless, her mother and her mother's descendants in the female line. So long as there are members of this description

(1) (1909) I.L.R., 32 Mad., 351 (F.B.)

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in her tavazhi, the succession cannot devolve upon the tarwad." The plaintiffs have preferred this Second Appeal. Mr. Anantakrishna Ayyar admits that the decision in *Govindan Nair* v. *Sankaran Nair*(1) is against him, but he has brought to our notice a Judgment of another Division Bench of this Court reported in *Ummanga* v. *Appadorai Patter*(2) where it was held that the self-acquired property of a female member of a Marumakkattayam tarwad would lapse to the whole tarwad on her death. The contest there was between the tarwad and the sons of the female member. The decision in *Ummanga* v. *Appadorai Patter*(2), though reported later was really *the earlier decision* in point of time. SANKARAN NAIR, J., was a party to both Judgments. But the learned Chief Justice who was a party to *Ummanga* v. *Appadorai Patter*(2) adhered to the view in *Govindan Nair* v. *Sankaran Nair*(1) so far as the self-acquisition of a male member was concerned and was apparently prepared to do so with regard to the acquisitions of a female member also. The question whether the self-acquisition of a female would lapse to the whole tarwad or descend only to her nearest heirs was not referred to the Full Bench in *Govindan Nair* v. *Sankaran Nair*(1). With regard therefore to the self-acquisition of a female there is a direct conflict of view between *Ummanga* v. *Appadorai Patter*(2) and *Govindan Nair* v. *Sankaran Nair*(1). We consider it desirable therefore to have an authoritative pronouncement on the question whether the self-acquisitions of a female member of a Marumakkattayam tarwad would on her death lapse to the tarwad of which she dies a member, or whether they would descend to her nearest heirs or her tavazhi. We *accordingly refer the question for the opinion of a Full Bench.*

This Second Appeal coming on for hearing, the Court expressed the following opinion :—

C. V. Anantakrishna Ayyar for the appellants.

C. Madhavan Nayar for respondents Nos. 1 to 12.

BENSON, OFFG. C.J.

BENSON, OFFG. C.J.—The question referred for our decision is "whether the self-acquisition of a female member of a Marumakkattayam tarwad would, on her death, lapse to the tarwad of which she dies a member, or whether they would descend to her nearest heirs or her tavazhi."

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(1) (1909) I.L.R., 32 Mad., 351 (F.B.). (2) (1911) I.L.R., 34 Mad., 387.

I have no doubt but that, according to the customary or common law of Malabar, such self-acquisitions descend to her tavazhi. That was the customary law, as I understood it, when I was District Judge of that district for several years before I became a Judge of this Court. That there is abundant evidence to support that view is clear from the order of reference to the Full Bench in *Govindan Nair* v. *Sankaran Nair*(1). It is, however, contended before us that the majority of the Full Bench in that case held that the case law of this Court since *Kallati Kunju* v. *Palat Erracha Menon*(2), shows that the self-acquisitions of a male lapse to his tarwad, and do not pass by inheritance to his nearest heirs, and that the decision, though it does not in terms apply to the self-acquisitions of females, yet is based on reasoning applicable to both alike, and that we should hold that the self-acquisitions of a female lapse to her tarwad in preference to descending to her tavazhi or heirs.

I cannot accede to this contention. In the suit out of which the reference arose, there was a question as to the descent of the self-acquisitions of a female, as well as of a male, but the order of reference was limited to the self-acquisitions of a male, and the referring Judges notwithstanding the decision of the Full Bench, decided that the self-acquisitions of the female in that suit descended to her own children and did not lapse to the tarwad. It is, therefore, clear that the learned Judges in that case did not regard the decision of the Full Bench as involving a decision that the self-acquisitions of a female on her death lapse to her tarwad. No case has been quoted to us, nor am I aware of a *single* case, *in* which *it* has been *directly* ruled that the self-acquisitions of a female pass to her tarwad in preference to her tavazhi. The *dictum* in *Ummanga* v. *Appadorai Patter*(3), was, I have no doubt, intended to apply only to the self-acquisitions of males, as is shown by the fact that it purports to state the result of the "decisions," and the decided cases refer only to the self-acquisitions of males.

Even in the case of the self-acquisitions of a male it may well be doubted whether the customary or common law of Malabar requires them to pass to his tarwad in preference to

(1) (1909) I.L.R., 32 Mad., 351 (F.B.). (2) (1864) 2 M.H.C.R., 162.
(3) (1911) I.L.R., 34 Mad., 387 at p. 391.

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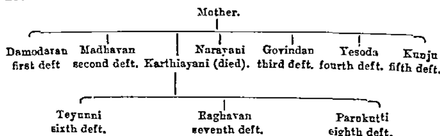
BENSON, OFFG. C.J.

his tavazhi. But, assuming, as held by the Full Bench in *Govindan Nair* v. *Sankaran Nair*(1), that it is now too late to give effect to the true customary law in the case of males in face of the decisions since 1864, there is certainly no reason to apply a similar rule to the self-acquisitions of females, which are not dealt with by the decisions, in opposition to what I think is the well established customary law. It may be added that since the decision of the *Katama Natchiar* v. *The Raja of Sivaganga* case(2), and the application of the principle of that decision to the Malabar cases—*Byrappan Nambiar* v. *Kelu Kurup*(3), *Alami* v. *Komu*(4), and *Achutan Nayar* v. *Cheriotti Nayar*(5), it has become logically impossible to hold that the members of a tarwad succeed to the self-acquisitions of one of its members on his or her death by virtue of survivorship. If they succeed, it can only be as heirs of the deceased, and it would be strange if the more distant relatives included in the tarwad should succeed equally as heirs with the issue and other near heirs of the deceased.

My answer to the reference is that the self-acquisitions of a female member of a Marumakkattayam tarwad on her death do not lapse to the tarwad of which she dies a member, but descend to her tavazhi, *i.e.*, to her issue, if she has any, and, if not, then to the tavazhi to which she would, in that case, belong according to the customary law of Malabar.

SANKARAN NAIR, J.

SANKARAN NAIR, J.—One Narayani Amma, a member of a Marumakkattayam tarwad, died without issue leaving certain separate or self-acquired properties. On behalf of the tarwad, certain members thereof sued the defendants Nos. 1 to 8, the brothers, sisters and sisters' children of Narayani for a declaration of their title.



(1) (1909) I.L.R., 32 Mad., 351 (F.B.) (2) (1863) 9 M.I.A., 539 at p. 542.
(3) (1882) I.L.R., 4 Mad., 150. (4) (1889) I.L.R., 12 Mad., 126.
(5) (1899) I.L.R., 22 Mad., 9.

The question referred to the Full Bench for decision is whether the self-acquisitions of a female member of a tarwad "would on her death lapse to the *tarwad* of which she dies a member or whether they would descend to her *nearest heirs* or her *tavazhi*." The 'tarwad' is composed of those whose names are given above, and also of the other parties to the suit, who are related to them in the female line through a common female ancestress. If we hold that the properties would lapse to the tarwad, all the members including defendants Nos. 1 to 8 take jointly.

A 'Tavazhi' means a woman and her descendants in the female line. There may be many tavazhis therefore in a tarwad. A female without issue or a male belongs to the tavazhi consisting of his or her mother and the mother's descendants in the female line; and when it is said that the property of that person descends to his or her tavazhi, it is meant that it devolves on this body of persons. When a female has descendants they all together form the tavazhi of which she is the root and her property devolves on them as her tavazhi. Thus if Narayani had any issue she and her descendants would have formed a tavazhi. But Narayani left no issue and the next group or tavazhi to which she belonged as distinct from the other members of her tarwad is that composed of her mother and all her (*i.e.*, the mother's) descendants in the female line. The mother in this case is dead and her descendants, defendants Nos. 1 to 8, accordingly claim Narayani's property as her tavazhi. The reference also suggests whether the nearest heirs take. This, if intended to refer to a class of heirs other than the tavazhi, may raise another question. If the nearer in blood takes the property then the defendants Nos. 6, 7 and 8 whose mother is dead may be excluded, though they would take as members of the tavazhi. The case before the referring Bench does not raise the question as the claim of the tarwad, the plaintiff in the suit, must be dismissed if any of the defendants are entitled to the property either as a member of the tavazhi or as being nearer in blood to the exclusion of the tarwad. In *Govindan Nair* v. *Sankaran Nair*(1), MILLER, J., and myself had to consider the question of succession to the property of a

(1) (1909) I.L.R., 32 Mad., 351 (F.B.).

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deceased male and also of a female. With reference to the former we had before us a number of decisions which assumed or decided that it lapsed to the tarwad; and as we were of opinion that those decisions ought not to be followed we referred the question to a Full Bench for decision. But in the case of a female, we felt no such difficulty. We had no doubt what the usage was. The question being one of customary law, not whether a custom has been proved in derogation of the ordinary law, the Courts were bound to give effect to it though no evidence had been given in the case of the usage.

Only two cases have been referred to in which the question of succession to the property of a deceased female was discussed. In the first case a Subordinate Judge of great experience, Mr. Gopalan Nair, refused to apply what is believed to be the ordinary rule laid down by HOLLOWAY, J., to the case of succession to females and upheld the claim of the children to the mother's property. He said :—

"In well-conducted Nair tarwads in Malabar where the Marumakkattayam law of inheritance obtains in all its purity and integrity, a female's property which is usually acquired by her more or less with funds derived from her parents or husband goes to her own children and I have never heard of a single instance in which a good karnavan has ever asserted the tarwad's rights to property of this character. Mr. K. R. Krishna Menon than whom there is no better authority on Malabar law has always maintained that a female's property would descend to her own children and not to the tarwad and the oft-quoted authority on the other side is the decision in *Kallati Kunju* v. *Palat Erracha Menon*(1) where the question was as to the self-acquisition of a deceased *male* and not a *female*." *Pathummah* v. *Mama*(2). The High Court did not lay down any general rule in that case but held that the Muhammadan law governed the self-acquisition of a member of that family. I am not aware of any case in which it has been held that the self-acquisitions of a female lapsed to or were inherited by her tarwad. The other case referred to by the appellants' pleader is not in point. The question there was whether in cases of Mappillas following Marumakkattayam law the devolution of self-acquired property was

(1) (1864) 2 M.H.C.R., 162. (2) Appeal No. 125 of 1885.

according to the *Muhammadan law*. The question was whether the Marumakkattayam law or the Muhammadan law was applicable to a species of property left by a member of a Muhammadan Marumakkattayam tarwad. The question as to the descent of the property of a *female* under the Marumakkattayam law was neither raised nor allowed to be argued in the High Court [*Illikka Pakramar* v. *Kutti Kunhamed*(1)]. The judgment of the District Judge in that case shows however the prevalence of the practice of the succession of her children to a female's property. I am not aware of any case in which the property of a deceased female was decreed in favour of the tarwad. Such at any rate was not and is not the legal consciousness of the people as stated by Mr. Gopalan Nair and I think he is quite right.

Is there any reason why we should not decide so? MILLER, J., and myself considered that the reasons which required a reference to the Full Bench in the case of succession to a male's property did not preclude us from acting on our opinion in the case of succession to the property of a deceased female, and we did so, even after receiving the decision of the Full Bench. The learned Judges refer to a judgment of the Chief Justice and myself decided before the question was considered by the Full Bench. The question of succession to the property of a male or female was not then before us for decision and it was not argued before us. Further the dictum was pronounced as regards the general law though it happened that the property in question was that of a deceased female.

Assuming that the customary law is as laid down by the Full Bench so far as the devolution of the property of a male is concerned, there is no reason why we should apply that rule to the property of a female when the usage is otherwise. I am also satisfied that such is the law also.

STRANGE, J., says in his Manual that self-acquired moveable property—which alone was considered by him heritable property—descends "in the case of females to their issue male and female." Both STRANGE and HOLLOWAY, JJ., spoke from personal knowledge of the customary law of the country.

Many reasons may be easily suggested for this difference; according to the theory of the Malabar law the property is

(1) (1894) I.L.R., 17 Mad., 69.

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vested only in females. (See Strange's Manual, article 401). The result was that the divisions of tarwad properties in old days was according to tavazhis (Strange's Manual, article 389). In decrees for partition the Courts set apart properties for males when they left or divided from the tarwad only for their use and on their deaths the decrees directed that the shares should lapse to their family, though there was no such restriction in the case of females who received their share. See the cases referred to and discussed. Aliyasantana Law by Krishna Rao, page 104. It is possible to suggest that therefore a male may not have been recognized as a source of inheritance when he had a tarwad. I assume that the Full Bench accepted HOLLOWAY's, J., view that the *property lapsed* to the tarwad. For to recognize the tarwad as *heir* would lead to the result that the property of a male who has no tarwad should escheat to the crown though he may have divided brothers, sisters and mother. Again the devolution of a person's property on his or her issue is generic to all systems of law though sex and seniority may have been grounds of preference. The succession of a widow in Hindu law is no exception as the widow is for this purpose treated as part of the person of the husband. The Malabar law is no exception, as in the case of males, the law does not recognize their issue. Females usually acquire property by gifts from husbands, fathers or favourite brother or uncle. Such property is intended for her and her children.

I should not be understood as suggesting that for these reasons the laws of inheritance are not the same for males and females. My reasons for the other conclusion are given in the order of reference to the Full Bench and in the dissenting judgment of MILLER, J., with which I agree. But if the law is rightly declared by HOLLOWAY, J., and by Full Bench, it is possible to suggest the above reasons for this difference in the customary law of succession.

I adhere therefore to our judgment in *Govindan Nair* v. *Sankaran Nair*(1) so far as succession to a female's property is concerned and hold that the children and other descendants, if any, of a female succeed to her property as members of her tavazhi.

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(1) (1909) I.L.R., 32 Mad, 351 (F.B.).

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This involves the conclusion that in their absence the tavazhi to which she would then belong, *i.e.*, her mother and the descendants of her mother, succeed to her. The mother of Narayani is dead. Therefore defendants No. 1 to 8 succeed to her property.

My reply to the reference is that the self-acquisitions of a female do not lapse to her tarwad but they descend to her tavazhi; if she has issue, the tavazhi is composed of that issue; if she has no issue, her mother and her descendants form her tavazhi

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SUNDARA AYYAR, J.—The question referred to the Full Bench is whether the self-acquisitions of a female member of a Marumakkattayam tarwad would on her death lapse to the tarwad of which she dies a member or whether they would descend to her nearest heirs or her tavazhi. In *Govindan Nair* v. *Sankaran Nair*(1) two out of the three Judges constituting the Full Bench expressed the opinion that the self-acquisitions of a male member must lapse on his death to the tarwad. The Judges who made the reference, MILLER and SANKARAN NAIR, JJ., were of contrary opinion and held that they should descend to the immediate heirs of the acquirer. MILLER, J., adhered to his opinion as a member of the Full Bench. Mr. C. V. Anantakrishna Ayyar contends that no difference can be made between the acquisitions of a male member and of a female member, that the *ratio decidendi in the Full Bench case is equally applicable to the acquisitions* of a female and that we are therefore now bound to hold that the self-acquisitions of a female must also lapse to the tarwad. In the case which was referred to the Full Bench the learned Judges—MILLER and SANKARAN NAIR, JJ.—had to decide also the question of the descent of the self-acquisitions of a female. They did not refer that question to the Full Bench but decided that a woman's self-acquisitions would go to her own children. The learned Chief Justice in his judgment expressly states that the question referred was limited to the self-acquisitions of males but he refers to the pronouncement of himself and SANKARAN NAIR, J., in an earlier case subsequently reported, *Ummanga* v. *Appadorai Patter*(2), that the self-acquisitions of a female would lapse to the tarwad. The judgment of ABDUR RAHIM, J., is not based on any considerations peculiar to a male and his reasoning

(1) (1909) I.L.R., 32 Mad., 351 (F.B.). (2) (1911) I.L.R., 34 Mad., 387.

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would apparently be equally applicable to the self-acquisitions of a female. The question is, are we bound to extend the rule laid down in *Govindan Nair* v. *Sankaran Nair*(1) to the self-acquisitions of a female? If the decision is to be regarded as based on the usage governing the followers of the Marumakkattayam law, then there is no reason for extending the decision beyond the circumstances in which the rule was laid down. There may be a custom that the self-acquisitions of males would lapse to the whole tarwad while the custom with regard to the self-acquisitions of females may be that they would descend to their own children. The children of males have no rights in the property of the tarwad and if the custom had its origin in a desire to benefit children, the motive would not operate in the case of a male's self-acquisitions. But whatever the motive may be the operation of a custom cannot be extended by analogy. The particular custom applicable to any set of circumstances must be proved. If on the other hand the basis of the Full Bench decision is not custom but a rule of law, then the appellants would be entitled to contend that the principle laid down must be applied though the facts may be different. The argument cannot be accepted to the extent that a principle enunciated with respect to certain circumstances must always be carried out to its logical conclusion and applied to all analogous circumstances for, in the language of Lord Halsbury, law is not always logical. It stops short of logical conclusions where it is necessary to do justice in a different state of things. Though the principle applicable may appear to be the same the rule of law to be laid down must depend on the interests of the community at large and the demands of justice in varying circumstances; and logical deduction must yield to what justice, equity and good conscience require. Between the male and female members in a Marumakkattayam tarwad, there is this important distinction; that the female is the stock of descent while the male is not. Whether this could be a ground on which the nearer heirs of a male could be denied preferential rights of inheritance while they are accorded to the nearer heirs of a female is questionable. Besides, females generally acquire property by gifts from their husbands or their nearest relations in the tarwad and the object of such gifts would

(1) (1909) I.L.R., 32 Mad., 351 (F.B.).

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ordinarily be not to benefit the donee alone but her children also. But again, it is questionable whether this should be a ground for giving rights of inheritance to a female's children which the nearest heirs of a male do not possess in acquisitions belonging to him. I confess that if the Full Bench judgment is to be regarded as based on a rule of law, I can find no sufficient reason for making a distinction between the acquisitions of a male and those of a female. If nearness of kinship is a ground of preference in the one case, it would seem that it ought to be equally so in the other. If the judgment, however, of the Full Bench supposing it to proceed on a rule of law and not on custom, proceeded on an incorrect view of the Marumakkattayam law as contended for by the respondents, then we are not bound to extend it beyond the actual circumstances of that case, and to apply it to the self-acquisitions of a female. The judgment of the learned Chief Justice is based solely on the rule of *stare decisis*; it is not clear whether he regarded the rule to be laid down as depending on usage or on law apart from usage. Probably he adopted the latter view. ABDUR RAHIM, J., apparently regarded the question as one of customary law for he observes, "Marumakkattayam law to which the question pertains is entirely customary law," and refers to the observations of this Court in *Wannathan Kandile Chiruthai* v. *Keyakadath Pydel Kurup*(1) that "if Malabar law is a branch of Hindu law, it is one put out or separated from the parent stem before the present form of Hindu law existed," and to the observations of the Privy Council in *Raman Menon* v. *Raman Menon*(2) that "there is no sacred book or other writing [among the Nairs] having legal authority" and their law is wholly based on the usages of the people. The learned Judge apparently regards the pronouncement of SCOTLAND, C.J., and HOLLOWAY, J., in *Kallati Kunju* v. *Palat Erracha Menon*(3) that all acquisitions of any member of a family lapse on the death of the acquirer to the family, as a decision on the usage prevailing amongst the followers of the Marumakkattayam law. He regards it as a rule of inheritance based on usage. If, as held by the learned Judge, the usage has, in numerous decisions extending over a long period, been held to be that the

(1) (1871) 6 M.H.C.R., 194. (2) (1901) I.L.R., 24 Mad., 73 at p. 80 (P.C.).
(3) (1864) 2 M.H.C.R., 162.

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self-acquisitions of a member must lapse to the tarwad, then I agree that the case is one to which the principle of *stare decisis* should be applied and that any change in the law must be left to the legislature. If, on the other hand, the decision in *Kallati Kunju* v. *Palat Erracha Menon*(1) was not a pronouncement on the existing usage but on the view of the judges who decided the case as to the rule of law applicable and their view as to the proper rule was erroneous, then the question whether the rule of *stare decisis* should be applied would depend on whether the habits of the people have been subsequently moulded on the rule laid down in that judgment and whether justice requires that those habits and the vested rights acquired in the faith of the rule laid down by the Court should not be disturbed after the lapse of a long time. The first matter for decision therefore is whether *Kallati Kunju* v. *Palat Erracha Menon*(1) held that the usage of Marumakkatayis was that the self-acquisition of a member of a tarwad lapsed to the whole tarwad. The dispute in the particular case was between the Karnavan of the tarwad of the deceased acquirer and the children of the acquirer who alleged that during his life-time he had alienated it to them. The alienation was held to be valid. The learned Judges observed that it was unquestionable law that the acquirer was fully entitled to hold, encumber and dispose in his life-time of his self-acquisitions and his right to alienate was held to be "unquestionably in accordance with usage, for in all the reckless litigation of Malabar, one member of the Court (*i.e.*, HOLLOWAY, J.) with judicial experience of several years does not remember an instance of a Karnavan attempting to get into his own hands the self-acquired property of a junior member." That was the only question that arose in the case. But the decision of it is preceded in the judgment of the learned Judges by a *dictum* with regard to the devolution of the property after the death of the acquirer. They say: "It is unquestionably the law in Malabar that all the acquisitions of any member of a family undisposed of at his death form part of the family property, that they do not go to the nephews of the acquirer but fall, as all other property does, to the management of the eldest surviving male." That is not stated to be the usage of the people or to be in

(1) (1864) 2 M.H C.R., 162.

accordance with the usage. On the other hand it is perfectly clear to my mind that HOLLOWAY, J., did not consider it to be in accordance with the usage. In *Kamaran* v. *Ryru*(1) he observed as Judge of Tellicherry that it was a prevalent fallacy in Malabar that the immediate heirs of the acquirer were held entitled to inherit the acquisition and the learned Judge deplored the actual law as fruitful in mischief. The learned Judge held about the same time in *Varadiperumal Udaiyan* v. *Ardanari Udaiyan*(2) that the self-acquired property of a Hindu co-parcener governed by the Mitakshara law would also lapse by survivorship to all his co-parceners and would not be inherited by his own heirs. There was no doubt a stage in the development of the law of joint families when all property acquired by any member of the family was taken to be for the benefit of the whole family. At first the acquirer was not held entitled to have any higher rights over it than any other member of his family. According to the Mitakshara law he was at one time entitled to a double share in that property; subsequently he was permitted to dispose of it at his pleasure during his life-time but probably the right of testamentary disposition ignoring the rights of the co-parceners was not at first recognized. But a stage was reached later on when the right of inheritance was taken to vest in the heir of the acquirer, and his co-parceners were held not entitled to take it by survivorship. The Privy Council held in the *Sivaganga* case—*Katama Natchiar* v. *The Raja of Sivaganga*(3)—that in a Mitakshara family the right of succession depended on the nature of the property and not on the status of the acquirer as to whether he was a member of an undivided family or a separate member. Is there any reason to suppose that the same stage of law had not been reached in 1864 when *Kallati Kunju* v. *Palat Erracha Menon*(4) was decided, amongst the followers of the Marumakkattayam law in Malabar? There is absolutely no reason for holding that it had not been reached. The rule of descent to the man's own heir was applied by the Privy Council in the Mitakshara law not only to cases where he was a separated individual, but also where he was living in commensality with his co-parceners. All the evidence of usage that we possess in Malabar is in favour of

(1) Moore's Malabar Law and Custom, III, Edn p. 181.
(2) (1863) 1 M.H.C.R., 412. (3) (1863) 9 M.I.A., 539 at p 543.
(4) (1864) 2 M.H.C.R., 162.

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the view that the prevalent rule of descent in Marumakkattayam law was the same as what was laid down in the Mitakshara law by the Privy Council in the *Sivaganga* case—*Katama Natchiar* v. *The Raja of Sivaganga*(1). Mr. Cook, Mr. Strange and Mr. Hollow himself have recorded the fact. Mr. Logan, the author of the Manual of Malabar Law, is another witness to the usage of the people. Mr. Wigram no doubt was of opinion that the rule laid down in *Kallati Kunju* v. *Palat Erracha Menon*(2) was "undoubtedly in accordance with ancient usage which regarded the family as an indissoluble unit and took no thought of the individuals composing that unit" and he regarded the practice of inheritance to the nearer heirs of the acquirer as of recent growth. See Moore's Malabar Law and Custom, page 176. But that learned Judge refers to no authority in support of his conception as to the actual usage in Malabar. His opinion was probably based on what he regarded "must have been the usage" as the family was regarded as "an indissoluble unit and took no thought of the individuals composing it." That is a theory applicable alike to Hindus governed by the Mitakshara and by the Marumakkattayam law. In *Alami* v. *Komu*(3) it was found that the practice of making wills relating to self-acquired property had come into vogue as early as the beginning of the past century. It is very unlikely at that very early time that the right of testamentary disposition would have been recognized if the property of the testator would not otherwise descend to his own heirs. The only evidence of usage as far as I am aware is that self-acquisitions should descend to the immediate heirs of the acquirer and the decision in *Kallati Kunju* v. *Palat Erracha Menon*(2) far from being based on usage was based on the theory of the Marumakkattayam law which one at least of the learned Judges who decided it knew to be contrary to the prevailing usage; and usage was referred to only in support of the view that the acquirer could during his life dispose of his acquisitions at his pleasure. Regarding that judgment, then, as based on the theory of the Marumakkattayam law of property was it a correct exposition of the law? If as observed by ABDUR RAHIM, J.,

(1) (1863) 9 M.I.A., 539 at p. 543. (2) (1864) 2 M.H.C.R., 162.
(3) (1887) I.L.R., 12 Mad., 126.

Marumakkattayam system is customary law, then the judgment must be held to be wrong as it was not based on the usage but was contrary to it. If on the other hand, it was not based on usage but upon the theory of lapse applicable to all property acquired by a member of an undivided family then it was equally wrong as shown by the judgment of the Privy Council in the *Sivaganga* case—*Katama Natchiar* v. *The Raja of Sivaganga*(1). I myself have no doubt, as already observed, that the learned Judges based it on the theory of joint family property. Their view was that the tarwad had an inchoate right in the acquisitions of a member which should therefore lapse to them by survivorship on the acquirer's death. After the decision in the *Sivaganga* case—*Katama Natchiar* v. *The Raja of Sivaganga*(1)—the judgment can be no longer held to be right. It has been held in subsequent decisions that SCOTLAND, C.J., and HOLLOWAY, J., based their judgment on the right of survivorship. This was the view taken of it in *Ryrappan Nambiar* v. *Kelu Kurup*(2), *Alami* v. *Komu*(3) and *Achutan Nayar* v. *Cheriotti Nayar*(4) as well as in other cases. In the first of these cases it was held that divided kinsmen had no right to object to a will made by the last survivor of a tarwad as they had no right of survivorship. In the second case it was held that the *Sivaganga* case—*Katama Natchiar* v. *The Raja of Sivaganga*(1)—showed that there was no survivorship with regard to the self-acquired property of a member and that therefore when the property lapses to the tarwad they must take it subject to his debts. The question did not arise there as to whether it would descend to the immediate heirs of the acquirer or to the tarwad. In the third case, it was held overruling an earlier decision that an acquirer could dispose by will of his self-acquisitions and the absence of the right of survivorship as shown by the *Sivaganga* case—*Katama Natchiar* v. *The Raja of Sivaganga*(1)—was again referred to. The language of the judgment in *Kallati Kunju* v. *Palat Erracha Menon*(5) is itself quite clear on the point. It was observed by ABDUR RAHIM, J., in the Full Bench case "no doubt the use of the words 'lapse' and 'survivorship' points to a stage in the growth of the Marumakkattayam system when the tarwad had an interest in

(1) (1863) 9 M.I.A., 539 at p. 543. (2) (1882) I.L.R., 4 Mad., 150.
(3) (1889) I.L.R., 12 Mad., 126. (4) (1899) I.L.R., 22 Mad., 9.
(5) (1864) 2 M.H.C.R., 162.

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the self-acquired property of one of its members, but I do not find it difficult to conceive that though this may serve to explain its origin the rule in favour of succession by the tarwad may have survived the state of things which gave rise to it." I entirely agree that a rule may survive the reason which gave rise to it. But did it survive as a matter of usage in this case? I think not, for there is absolutely no evidence that it did. As a rule of law the proposition is wrong as shown by the judgment of the Privy Council. I would respectfully observe that the Malabar law is really only a school of Hindu law. It is true that there are no sacred writings which are authoritatively binding on the followers of the Marumakkattayam system but the Marumakkattayis are undoubtedly a class of Hindus whose system of holding property is similar to that of other Hindus and who have a system of heirs of their own as other Hindus have. There are, no doubt, two essential differences between the Mitakshara law and the Marumakkattayam law; first with regard to the rule of inheritance and secondly that a co-parcener is not entitled to a compulsory right of partition. But the same principle would be applicable to Marumakkattayam law and to Hindu law in deducing the consequences flowing from the joint-holding of property. Such holding if it would not affect the succession to the self-acquired property of a Mitakshara Hindu, should no more affect the rule applicable to the self-acquisitions of a Marumakkattayi. At any rate such a distinction could be supported only by the actual usage of the people. The effect of the Privy Council decision was perceived by the Court in the cases already referred to, *viz.*, *Ryrappan Nambiar* v. *Kelu Kurup*(1), *Alami* v. *Komu*(2) and *Achuthan Nayar* v. *Cheriotti Nayar*(3). But with regard to the self-acquisitions of a male the consequences of the judgment of the Privy Council were apparently not clearly apprehended. No doubt the rule laid down in *Kallati Kunju* v. *Palat Erracha Menon*(4) was limited and its logical consequences denied as pointed out in the judgment of SANKARAN NAIR, J., in the order of reference in the Full Bench case. No case actually arose between the tarwad and the immediate heirs of an acquirer in which the dictum in

(1) (1882) I.L.R., 4 Mad., 150. (2) (1889) I.L.R., 12 Mad., 126.
(3) (1890) I.L.R., 22 Mad., 9. (4) (1864) 2 M.H.C.R., 162.

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Kallati Kunju v. *Palat Erracha Menon*(1) was affirmed. Several Subordinate Judges, followers of the Marumakkattayam law, denied the correctness of the dictum. The High Court no doubt has affirmed the dictum in subsequent *obiter dicta*. The question arose directly for decision only in the case of a Muhammadan family in *Illikka Pakramar* v *Kutti Kunhamed*(2), but all that was decided there was that Moplah families in North Malabar governed by the Marumakkattayam law would be governed by the rule of lapse of self-acquired property to the tarwad, it being assumed that this was the rule applicable to Hindu Marumakkattayis. It was decided more than a quarter of a century ago that amongst the followers of the Aliyasantana law in South Canara, the incidents of which are in all essential respects the same as those of the Marumakkattayam law, the succession to the self-acquisitions of a member was to his own heirs and not to the tarwad, the decision being based on the usage prevailing amongst the people. The same decision has been recently arrived at with regard to the self-acquisitions of a member of a Nambudri family, the law of the Nambudris also disallowing compulsory partition as the Marumakkattayam law does. The Travancore High Court and the Cochin Chief Court have also held that according to the Marumakkattayam, law the rule laid down in *Kallati Kunju* v. *Palat Erracha Menon*(1) is wrong [see *Sakthi Kerulan* v. *Sakthi Sakthi*(3)]

It is not denied, and it was not denied in the course of the arguments in the Full Bench case, that a Marumakkattayi has his own heirs other than the tarwad. Suppose for instance all the members of a Marumakkattayam tarwad become divided from each other at the same time and one of them subsequently dies, who is the heir to the property of the deceased? There is no tarwad to which it could lapse. It is impossible to contend that every person who was a co-parcener of the deceased would be equally entitled to the property. That would be completely ignoring the rule established from time immemorial that a man's own nearest heirs are entitled to succeed to the property. The rule was recognized in the translation of the Mahabharata by the well-known Tunjat

(1) (1864) 2 M.H.C.R., 162. (2) (1894) I.L.R., 17 Mad., 69.
(3) 24 Trav. L.R., 102 and 1 Coch L.R., 187.

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Ezhutta the father of Malayalam literature. It was recognized by Mr. Cook and Mr. Strange. Nobody in Malabar has ever had any doubt about it. It is indeed not denied in the judgment of ABDUR RAHIM, J., in *Govindan Nair* v. *Sankaran Nair*(1). That learned Judge apparently adopts the view that there are two lines of heirs according as the deceased was the member of an undivided tarwad or not, a proposition which was negatived with respect to the Mitakshara law by the Privy Council and not supported by usage as observed by Messrs. Cook, Strange and Holloway. I am not impressed with the argument that there would be difficulties in giving effect to the succession of the nearest heirs or the tavazhi of an acquirer. It is contended that the tavazhi does not include the mother of the acquirer though she must be held to be nearer than the descendants of the sisters and perhaps even than the brothers and sisters themselves. But the definition of a tavazhi does not exclude the mother herself whose descendants including the acquirer form the tavazhi along with herself. In the enumeration of heirs by Mr. Strange in his manual of Hindu law the mother is no doubt mentioned after the brothers and sisters and the issue of sisters. But in the Keralavakasakramam by a native writer in Travancore the mother is included along with the brothers and sisters. I do not think that the Judges who made the reference in the Full Bench case intended to exclude the mother from the tavazhi of the acquirer though the descendants alone are named. It does not appear whether the mother was alive in that case. My examination of the decisions has led me to the conclusion that the rule laid down in the dictum in *Kallati Kunju* v. *Palat Erracha Menon*(2), was wrong as a proposition of law deduced from the Marumakkatayam system, that it was recognized at the time of its pronouncement as contrary to the prevailing usage, that the application of the rule has been restricted and departed from in subsequent decisions, that its incorrectness has been shown by the decision of the Privy Council in the *Sivaganga* case—*Katama Natchiar* v. *The Raja of Sivaganga*(3), and recognized in several decisions of this Court and that it has never been affirmed directly in any subsequent case where a competition arose

(1) (1909) I.L.R., 32 Mad., 351 at p. 367. (F.B.)
(2) (1864) 2 M.H.C.R., 162. (3) (1863) 9 M.I.A., 543.

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between the nearest heirs of the acquirer and his tarwad. The referring order in the Full Bench case shows that notwithstanding the *dicta* of the High Court the usage of the people has not been altered, that as a matter of custom it is the immediate heirs of the acquirer that succeed to his property at his death. In these circumstances I am of opinion that there is no scope for the application of the doctrine of *stare decisis*. The case is a curious one in which the people have followed their customary law for a period of about half a century notwithstanding the attempt of the High Court to modify it. They have succeeded in inducing the Court to depart from the principle in several respects. I do not think that we should hesitate to pronounce a judgment which would be in accordance with both law and custom. I think for these reasons that the decision in the Full Bench case in *Govindan Nair* v. *Sankaran Nair*(1), cannot be applied to the self-acquisitions of a female member of a tarwad. My answer to the question referred to the Full Bench is that the self-acquisitions of a female would descend to her nearest heirs under the Marumakkatayam law.

APPELLATE CIVIL.

Before Mr. Justice Abdur Rahim and Mr. Justice Sundara Ayyar.

MAMMALI AND EIGHT OTHERS (PLAINTIFF), APPELLANTS,

v.

ACHARATH PARAKAT MALIGAPURAYIL CHERIA KUNHIPAKKI HAJI AND NINE OTHERS (DEFENDANTS), RESPONDENTS.*

1912. September 6 and October 18

Limitation Act (IX of 1908), art 120—Pre-emption, right of—Knowledge of sale, essential for the article to apply.

In a suit by an othidar to enforce his right of pre-emption, the right to sue cannot be said to arise unless the plaintiff has the necessary knowledge of the sale. Such a right can only be exercised when the othidar knows first of all that

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(1) (1909) I.L.R., 32 Mad., 351 (F.B.).

* Second Appeal No. 350 of 1911.

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Full Bench decision in *Kurri Veerareddi* v. *Kurri Bapireddi*(1), is cited only to show that a mere contract in favour of the defendant to sell the property to him is no answer to a suit in ejectment. Here the suit is by the othidar himself to establish his right. The other cases deal with different questions relating to the right of pre-emption possessed by an othidar. Apart from any particular form of language that has been used in some of these cases, we think it can be fairly inferred from the course of decisions in this Court that the right of the othidar consists in a right to elect, when there has been an attempt on the part of the owner of the property to sell it to a third person, whether he will buy it for the same price as that offered by the third person or not. It is obvious that such a right can only be exercised when the othidar knows first of all that the property is sold or attempted to be sold to another person and what the terms are on which it is so proposed to be sold. If he has no knowledge of either fact he is not in a position to make any election. As it is put in some of the cases an othidar is entitled to have an opportunity given to him to make the election to which his right of pre-emption entitles him. If this be the correct apprehension of the othidar's right, we think it follows that the right to sue does not arise until the othidar knows of the sale of the property and the terms of the sale. Both the lower Courts have dismissed the suit finding the question of limitation against the appellant reckoning the period of limitation from the date of sale and as we have stated, it is not found when the othidar came to know of the auction sale. That is a point which must be decided, for in our opinion time would only run from the date of the othidar's knowledge of the sale. We therefore resolve to set aside the decrees of both the Courts and remand the suit to the District Munsif for disposal according to law having regard to the above remarks.

We may mention that in some of the cases, viz., in *Cheria Krishnan* v. *Vishnu*(2), *Vasudevan* v. *Keshavan*(3) and *Ammotti Haji* v. *Kunhayen Kutti*(4), language is used which might imply that the right of pre-emption consists in a right to have an offer made by the owner of the property to sell the property to the

(1) (1906) I.L.R., 29 Mad., 336 (F.B.). (2) (1882) I.L.R., 5 Mad., 198.
(3) (1884) I.L.R., 7 Mad. 309. (4) (1890) I.L.R., 15 Mad., 480.

othidar for the same price for which he has contracted to sell to a third person. We might have some hesitation in saying that this is an accurate definition of the nature of the right, because such a definition if strictly pursued to its logical conclusions might lead to difficulties and complications. We however refrain from pronouncing any definite opinion on that point as the learned Advocate-General says that if it be found that his client had knowledge of the sale more than six years before the institution of the suit he would not be prepared to contend in the facts of this case that the suit would still be within time, because no offer was made to him by the owner of the property before the auction sale.

MAMMALI v. KUNHIPAKKI HAJI.

ABDUR RAHIM AND SUNDARA AYYAR, JJ.

The costs of this appeal will abide the result.

APPELLATE CIVIL.

Before Mr. Justice Sundara Ayyar and Mr. Justice Sadasiva Ayyar.

NEELAM TIRUPATIRAYUDU NAIDU GARU AND TWO OTHERS (DEFENDANTS), APPELLANTS,

1912. October 14 and 23.

v.

VINJAMURI LAKSHMINARASAMMA (PLAINTIFF), RESPONDENT.*

Trustee—Breach of trust—Liability in damages—Failure to invest trust funds in authorised securities—Indian Trusts Act (II of 1882), sec. 20—Failure of unauthorised security—Degree of care and prudence—Indian Trusts Act (II of 1882), ss 15 and 20—Fund 'to be applied immediately or at an early date construction of—Fund payable to minor—If payable to guardian—Liability of trustee for interest—Interest on damages—Indian Trusts Act (II of 1882), ss. 41 and 23.

A testator appointed certain persons as trustees and directed them to realise an amount payable by the Oriental Life Assurance Company and to pay a sum of Rs 200 to his brother, another sum of Rs 400 to his daughter for her bride's jewels and the remainder to his minor son. The trustees realised the amount due from the Insurance Company, and after paying Rs 200 to the testator's brother, invested the balance on one year's fixed deposit with Messrs. Arbuthnot & Co who were then believed to be in very good credit. After the deposit had been renewed several times, Messrs. Arbuthnot & Co. became insolven and the

* Second Appeal No. 1339 of 1911.

TIRUPATI-RAYUDU NAIDU v. LAKSHMI-NARASAMMA. — SUNDARA AYYAR AND SADASIVA AYYAR, JJ.

to relieve them from the burden sought to be cast upon them, has the Court lost sight of the plain principle that a trustee who takes another man's money into his hands is bound, whatever other duties he may have to discharge, to take care that that money shall be preserved, and not to deal with it or to do anything with it which a prudent and reasonable man would not do with his own money. That is the rule which is properly to be applied to this and to all such like cases." This observation was in no way dissented from by the Court of Appeal. JESSEL, M.R., only objecting to the trustee being required to take greater precautions than a prudent man of business should and dissenting from BACON, V.C. only in so far as that learned Judge observed that resort to a broker for purposes of investment was not justified. In *Learoyd* v. *Whiteley*(1), Lord WATSON observed: "As a general rule the law requires of a trustee no higher degree of diligence in the execution of his office than a man of ordinary prudence would exercise in the management of his own private affairs Yet he is not allowed the same discretion in investing the moneys of the trust as if he were a person *sui juris* dealing with his own estate. Business men of ordinary prudence may, and frequently do, select investments which are more or less of a speculative character; but it is the duty of a trustee to confine himself to the class of investments which are permitted by the trust, and likewise to avoid all investments of that class which are attended with hazard. So, so long as he acts in the honest observance of these limitations, the general rule already stated will apply."

The next question is whether the defendants can be relieved from the consequences of their breach of trust by anything which can be found in section 15 of the Trusts Act. Their contention is that the clause in section 15 that a trustee acting with prudence is not responsible for the loss, destruction or deterioration of the trust property would permit the Court in a proper case not to award damages to the beneficiary caused by a breach of trust. This is clearly not the meaning of the section. Chapter 3 of the Trusts Act treats of the "duties and liabilities of trustees." The various duties of trustees are laid down in sections 11 to 22. Sections 23 to 30 deal with their liabilities in

(1) (1887) 12 A.C.. 727.

TIRUPATI-RAYUDU NAIDU v. LAKSHMI-NARASAMMA.

SUNDARA AYYAR AND SADASIVA AYYAR, JJ.

cases of violations of trusts. It cannot be held that the provision in section 15 exempting trustees from responsibility where they have acted with prudence is intended to exonerate them where by not acting with prudence they have committed a breach of trust. The meaning of the second clause of the section is that where a trustee has acted with prudence he should not be held to be guilty of breach of trust. But this rule must be applied in conjunction with the other sections which regulate the measure of prudence required in particular cases. Section 23 lays down in broad terms that "where the trustee commits a breach of trust, he is liable to make good the loss which the trust property or the beneficiary has thereby sustained." This statement is followed by certain exceptions to the rule. It is impossible to hold that section 23 can be controlled by interpreting section 15 in such a manner as to exempt a trustee from liability for damages on the ground that he has acted with ordinary prudence. If this were the intention of the legislature it would undoubtedly have stated so by laying down a rule of liability far less comprehensive than that enacted in section 23. The Indian Trusts Act was closely modelled on the English law of trusts. There was no power in the English Courts to save a trustee from the consequences of his breach of trust when the Indian Act was passed. Thus BACON, V.C., felt bound to award damages against the trustee in *In re Speight; Speight* v. *Gaunt*(1), already referred to although he held the trustee free from all blame. In England several statutes have been subsequently enacted to relieve trustees in cases where loss accrues to the estate in consequence of their acts. See sections 8 and 9 of the Trustee Act of 1893. Section 3 of the Trustee Act of 1896 gave relief to the whole extent that Mr. Ramachandra Ayyer desires that a trustee should have. It says: "If it appears to the Court that a trustee, whether appointed under this Act or not, is or may be personally liable for any breach of trust, whether the transaction alleged to be a breach of trust occurred before or after the passing of this Act, but has acted honestly and reasonably, and ought fairly to be excused for the breach of trust and for omitting to obtain the directions of the Court in the matter in which he committed such breach then the Court may relieve the

(1) (1883) 22 Ch D, 727.

TIRUPATI-RAYUDU NAIDU v. LAKSHMI-NARASAMMA. —— SUNDARA AYYAR AND SADASIVA AYYAR, JJ.

trustee either wholly or partly from personal liability for the same." Unfortunately the Indian Courts have not been given the power to protect trustees in any case where a clear breach of trust has been committed. The ordinary principle must therefore apply, that when an injury has been caused to the beneficiary by an act done by the trustee in violation of his duty he is entitled to claim from him the damages he has sustained by his breach of trust. The District Judge's opinion that the defendants are liable for the repayment of the amount lost by the failure of Messrs. Arbuthnot & Co. must therefore be upheld.

The only remaining point is whether the award of interest by the District Judge on the amount lost is proper. The appellants rely on section 23 of the Trusts Act which lays down that a trustee committing a breach of trust is not liable to pay interest except in the cases mentioned therein. None of the enumerated cases would comprise this case unless it can be brought under clause (*e*) which applies "where the breach consists in failure to invest trust-money and to accumulate the interest or dividends thereon." Where the trustee invests money in an unauthorised security this must apparently be treated as tantamount to failure to invest, for a trustee cannot be taken to have fulfilled his duty to invest, unless he does so in the manner required by law. Besides it may be doubted whether the rule disentitling the beneficiary to interest except in the cases enumerated could be applied where the trust money has been altogether lost. The Court should have power in such cases to award interest as damages. Illustration (*e*) to section 23 shows that where a trustee has failed to invest trust money in the manner directed by the instrument of trust he is liable for interest although he may have made some other investment. The same principle should be applicable where the failure is in making an investment in accordance with the provisions of section 20. Illustration (*f*) justifies the same conclusion. The District Judge must therefore be held to be right in awarding interest also.

In *Sriramulu* v. *Venkatramanjulu*(1), on the file the High Court Original Side where certain trustees made an investment of trust moneys with Messrs. Arbuthnot & Co. SANKARAN NAIR, J., held that they were liable for the loss caused by the failure of the firm. He also directed the trustees to pay interest. But

(1) Civil Suit No 64 of 1909.

the arguments urged in the present case with respect to section 15 of the Trusts Act and with regard to the trustees' liability for interest do not appear to have been addressed to the learned Judge.

TIRUPATI-RAYUDU NAIDU v. LAKSHMI-NARASAMMA.

The result is that the Second Appeal must be dismissed with costs.

SUNDARA AYYAR AND SADASIVA AYYAR, JJ.

APPELLATE CIVIL.

Before Mr. Justice Miller and Mr. Justice Abdur Rahim.

O. NAKU AMMA AND THREE OTHERS (DEFENDANTS NOS. 2 TO 5), APPELLANTS,

1912. October 23 and 24.

v.

C. RAGHAVA MENON AND OTHERS (PLAINTIFFS AND DEFENDANTS), RESPONDENTS.*

Malabar Law—Right to maintenance—Members of a tavazhi—Maintenance out of tavazhi property—Suit against managing member of tavazhi—Tarwad property, insufficient for maintenance—Gift by husband to wife—Mention of children—Interest taken by wife, whether absolute—Right of tavazhi—Construction of deed of gift.

A member of a tavazhi has a right to sue the managing member of the tavazhi for his maintenance if maintenance is refused by such managing member, where the karnavan of the tarwad is unable to maintain the member out of tarwad property. It is immaterial whether the member of the tavazhi seeking maintenance, has private means sufficient to provide for him an adequate maintenance without necessity of recourse to the tavazhi property.

Putravakasam property is held by the members of the tavazhi to which it belongs with the ordinary incidents of tarwad property.

Per ABDUR RAHIM, J.—Even apart from the fact whether there is sufficient property of the tarwad to which a member of a tavazhi can look for maintenance, he has a right to demand an allowance in the nature of maintenance from the tavazhi property itself.

Maintenance is not a mere subsistence allowance. It should be based on the value of the tarwad property, the position of the members and not confined to what is just sufficient to satisfy the needs of the members.

A member of a tavazhi is entitled to an allowance for maintenance both from the tavazhi and tarwad properties.

Where a deed of gift in favour of a woman is clearly expressed to be to her and her children, there is no warrant for construing it as conferring on the donee an absolute title to the property given where the donee is the wife of the donor and a member of a Marumakkattayam tarwad. It makes no difference that the karnavan of the tarwad joined in the gift.

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* Appeals Nos. 129 and 255 of 1909 and Appeal No. 5 of 1910.

NAKU AMMA v. RAGHAVA MENON.

In estimating the amount of the income of the tavazhi property out of which maintenance is payable, the interest payable upon debts binding on the tavazhi should be deducted but not interest on debts contracted after the period for which maintenance is claimed.

APPEALS against the decrees of K. IMBICCHUNNI NAIR, the Subordinate Judge of Palghat, in Original Suits No. 149 of 1908 and No. 45 of 1907, respectively.

These appeals arise out of two connected suits. One of the suits was filed by the junior members of a tavazhi against its managing member for maintenance out of certain tavazhi property. The other suit was filed by the eldest female member of the tavazhi for a declaration that certain properties were her absolute properties belonging to her under deeds of gift and were not liable for the maintenance of the defendants in her suit who were the plaintiffs in the other connected suit. The properties claimed by the female member (Naku Amma) were granted to her on a kanom-demise, the consideration for which was paid by her husband, and the document was executed by her husband and his karnavan who were the sole members of their tarwad at the time and the document mentioned that the kanom grant was to Naku Amma and her children. Within a month and a half after the document referred to above, the same persons executed another document in favour of Naku Amma alone of certain properties now in dispute. The lower Court held that the properties dealt with in both the documents were not the absolute properties of Naku Amma. The donee appealed to the High Court. The further facts appear from the judgment of the High Court.

C. V. Ananthakrishna Ayyar for the appellants.

The Honourable Mr. *J. L. Rosario*, the Officiating Advocate-General, for the respondents Nos. 5, 6, 9, 10 and 12.

T. R. Ramachandra Ayyar and *T. R. Krishnaswami Ayyar* for respondent No. 8.

Others not represented.

MILLER, J.

MILLER, J.—These appeals relate to the property known as Kulachamatu The first question is whether this property belongs to Naku Amma alone or to her tavazhi; and I have no doubt that the Subordinate Judge's conclusion on this question is the right one. Exhibits XXXIV and XIV make it clear that the gift was to her and her children and I find no warrant for construing a gift so expressed as conferring on the donee an

absolute title to the property given, where, as here, the donee is the wife of the donor and a member of a marumakkattayam tarwad. And it seems to me to make no difference that the karnavan of the tavazhi joined in the gifts. The next question with which I propose to deal is whether or not the plaintiffs in Original Suit No. 45 of 1907 can maintain the suit for maintenance against Naku Amma. The contention is that they are bound to sue the karnavan of their tarwad now whatever be the rights of members of a tavazhi in the tavazhi property. I think there can be no doubt that one of them is to look to the income of the property for maintenance if they are in need of it.

In the present case I proceed on the footing that the karnavan of the tarwad is unable to maintain the members; he has said so, and Mr. Ananthakrishna Ayyar did not contend that he is not telling the truth on that point. The members of the tavazhi, therefore, have to look to the tavazhi property or to their private property for their maintenance. It has not been shown—I do not say that it would have made any difference if it had been shown—but it has not been shown that any of the tavazhi members now seeking maintenance has private means sufficient to provide for him an adequate maintenance without the necessity of recourse to the tavazhi property. Therefore the members have to look to their tavazhi property and, I have no doubt, have a right, if maintenance is denied to them by managing member, to sue that member for it; I can see no ground on which that right can be denied to them where the circumstances are those of this case. There is no direct authority on this question but we are bound by authority to hold that *putravakasom* property is held by the members of tavazhi to which it belongs, with the ordinary incidents of tarwad property and no reason has been suggested why in the circumstances of the present case the right to sue for maintenance out of the income, which is the right of a member of a tarwad when maintenance is denied to him, should not be given to the members of the tavazhi. It is not suggested that maintenance has not been refused by Naku Amma. The suit is therefore good.

The property being tavazhi property, the next question is as to the amount of the income. It is contended by the Appellant that it should be reduced by the amount of the interest on a

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debt of Rs. 1,500, which it is claimed, should be held to be a debt binding on the tavazhi. Another sum of Rs. 1,500 which was dealt with in the Court below is also said by Mr. Anantha-krishna Ayyar to be a debt binding on the tavazhi; but it was contracted after the period for which maintenance has been claimed in this suit, and he does not contend that the interest payable on that should be deducted from the income out of which maintenance is payable for the period to which these appeals relate.

[His Lordship then dealt with the evidence in the cases and disposed of the Appeals Nos. 129 and 255 of 1909 and then proceeded as follows :]

Appeal No. 5 of 1910 relates to another item of property which is known as Komban Patta. The only question in this appeal is whether that property is the absolute property of Naku Amma or belongs to the tavazhi. Exhibit XVIII is the document which evidences its transfer to Naku Amma and by that document the transfer is to her alone. That document is a month and a half after the document Exhibit XXXIV to which I have referred in dealing with the other two appeals; and an argument is based on the difference in the form of these two instruments. By the latter, Exhibit XXXIV, the gift of the property there dealt with was to Naku Amma and her children. By Exhibit XVIII it is to Naku Amma alone. We are asked to hold that this difference proves that the gift under Exhibit XVIII was a gift of absolute property to Naku Amma. If these two documents had been executed on the same date and drawn up by the same conveyance no doubt that would be strong evidence in favour of the contention. The greater the distance between the dates of the documents the less will be the weight which attaches to such difference. It appears that there was a month and a half between them and I think it can be legitimately suggested that an inference might be drawn in favour of Naku Amma from the difference; but at the same time it has to be remembered that ordinarily in a document conferring an absolute estate we expect to find some words to the effect that the property should be "enjoyed by you and your sons and grandsons for ever and ever" or some similar words. Here there is nothing. It is only that the gift is to the wife; apart from any other consideration, if I had Exhibit XVIII and nothing more before me, I should be

inclined to hold that it was intended by the donor as a *putravakasam* gift, a gift for the benefit of Naku Amma and her children in the absence of words to show that he intended to give an absolute estate.

Taking it with Exhibit XXXIV alone I might be inclined to take a different view ; but there is other evidence which discounts the effect of Exhibit XXXIV. In Exhibit F we find that Naku Amma allowed one of her sons to claim a share in this as well as in other properties : and I do not think that that is satisfactorily explained on the ground that she was trying to shield her properties from his creditors, for fear that the creditors might take advantage of there being no release of these properties and claim Naku Amma's property as that of Madhava Menon. Exhibit F I think may be taken to counteract such inference as may be drawn from the difference between Exhibits XVIII and XXXIV. We find also that the allegation of Naku Amma that she bought this property with her own money is contradicted by her evidence in a former suit, Exhibit G, wherein she lumps this property together with other properties as gifts from her husband, so that the case she originally made that this property was purchased by her for Rs. 200 fails. And as a gift on the whole, I am unable to differ from the view of the Subordinate Judge that it was intended to be a *putravakasam* gift

An argument was also pressed that the decision in Original Suit No. 177 of 1902 concludes the question between the parties. The fourth defendant there, is the person who is now the first plaintiff in Original Suit No. 45 of 1907. The plaintiffs in that case alleged that this Komban Patta was the family property and the fourth defendant in that case supported that claim in the lower Court ; but in the appeal the fourth defendant did not appear but the plaintiffs admitted that Komban Patta was the separate absolute property of Naku Amma. It is suggested that the decision in that appeal or the decision of the Court of First Instance that the property was Naku Amma's separate property binds the first plaintiff in Original Suit No. 45 in the present case. The Subordinate Judge holds that it is not so and I think he is right, for in the appeal the fourth defendant made no admission and in fact did not appear and the Court which tried that suit in the first instance was not competent to try the present suit. The issue whether this land was the sole property of Naku Amma was

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MILLER, J.

not an issue on which any relief was sought. It was an issue merely incidental to the question what amount of maintenance, if any, should be decreed to plaintiffs. The District Munsif who tried that issue is not competent to try the present suit and on that ground I am of opinion that the decision in that suit does not bar the present suit

It is hardy contended that the sale and mortgage to the third defendant in Original Suit No. 45 of 1907 should be held good once it is found that the gift was a *putravakasam* gift enuring for the benefit of the tavazhi; Mr. Ramachandra Ayyar conceded that the gift of Rs. 500 out of love and affection made it impossible to press that contention. He suggested no doubt that the third defendant might have a charge on the tavazhi property, for a portion of the amount of Exhibit XVIII, but that question does not arise in this case. This appeal fails and is dismissed with costs.

ABDUR RAHIM, J.

ABDUR RAHIM, J.—I agree in the judgments delivered by my learned brother in the Appeals. I wish to add only a few words on the general question of law which has been raised by Mr. Anantakrishna Ayyar in Appeal No. 129 of 1909. The question is whether, as his contention is, a member of a tavazhi is not entitled to ask for maintenance from that karnavan of that tavazhi, at any rate so long as there is a tarwad to which such member can look for his maintenance. His argument is that a member of a tavazhi, who is also a member of a larger tarwad, is entitled to maintenance only from the tarwad property and in no case can he ask for maintenance from the tavazhi property. It seems to me that this contention is clearly unsound. Though there is no authority directly in point, there can be no question that all the members of a tavazhi have an interest in the tavazhi property. Then, if they have an interest in the property, what is the nature of the interest or what is the benefit they are entitled to derive from that interest? When I put this question to Mr. Anantakrishna Ayyar, the learned vakil, went so far as to contend and he had to go that length in order to make his contention good that a member of a tavazhi could not look for any benefit from the property, and that the income from the property must be accumulated in the hands of the karnavan. It seems to me that this is a proposition which cannot possibly be accepted. The members of a tarwad are not entitled to any share in the tavazhi

property, and if they have any interest in the tavazhi property at all, they must have what has been called the right of maintenance. It has been authoritatively laid down and this is not denied that a tavazhi property is subject to the ordinary incidents which attach to tarwad property. These incidents have not all been clearly defined; but there can be no doubt, whatever they may be, a member of a tavazhi is entitled to an allowance in the nature of maintenance from the tavazhi property. It is argued by Mr. Anantakrishna Ayyar that no member of a tarwad is entitled to maintenance unless he resides in the tarwad house. That is undoubtedly so; then he argues further that unless the member of a tavazhi lives in the tavazhi house, he will not be entitled to maintenance, and suggests that, if we allow the members of a tavazhi the right of maintenance against the karnavan of their tavazhi, then in some cases it may be difficult to work out their rights. I am not prepared to say that in some cases difficulties may not arise; but here we are not faced with any such difficulty And further in this case the karnavan of the tarwad is unable to make any allowance by way of maintenance to the plaintiffs. But so far as at present advised it strikes me that even apart from the fact whether there is sufficient property of the tarwad to which a member of the tavazhi can look for maintenance, he has got a right to demand an allowance in the nature of maintenance from the tavazhi property itself. It has been decided in the first place that the maintenance which a member of a tarwad can claim is not a mere subsistence allowance. The allowance is to be according to the value of the tarwad property, the position of the members and is not confined to what is just sufficient to satisfy the needs of those members. It has also been decided that the fact that a member of a tarwad is possessed of private means is not a good ground for refusing all allowance to him out of the tarwad property. I think these two facts tend to show that though the allowance which a member of a tarwad is entitled to receive from the tarwad property is generally called maintenance and is to a great extent in the discretion of the karnavan the word must be understood in a very liberal sense. Thus if a member of a tarwad is entitled to this allowance independently of whether he has private means or not and if his right is not limited to mere subsistence allowance when the income of the

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property admits of more, then I can see nothing inconsistent or anomalous in allowing a member of a tavazhi allowance both from the tavazhi properties and the tarwad properties. On the other hand, if we are to give effect to the contention which has been urged on behalf of the appellant, we should be reduced to this position: there may be valuable property which the tavazhi owns and at the same time for years together there may be no use for that property and the income must go on accumulating. That, *I think, would be clearly against public policy and certainly* is against the spirit of the Malabar Law. This is all that I have to say and I agree in all the points with the judgment delivered by my learned brother.

APPELLATE CIVIL.

Before Mr. Justice Sundara Ayyar and Mr. Justice Sadasiva Ayyar.

1912 October 21 and November 13.

RANDUPARAYIL KUNHI SOU (KARNAVAN AND MANAGER OF HIS TARWAD—PLAINTIFF), APPELLANT,

v.

ABLUKANDIYIL PARKUM MULLOLI CHATHU (FOURTH DEFENDANT), RESPONDENT.*

Lessor and lessee—Assignment by lessee—Assignee's right to apportionment, as against lessor—Transfer of Property Act (IV of 1882), ss. 36 and 108—Apportionment in English Law—under Statute Law in England—under the English Common Law—Rent—Interest accrues de die in diem—English Statute Law, principle of, to be followed in India—No Statute Law in India—Apportionment as between lessor and lessee's assignee

An assignee from a lessee is entitled to claim as against the lessor apportionment of rent accruing due after the date of assignment to him up to the time of a transfer (if any) of his interest as assignee to a third person.

There is privity of estate between the lessor and the assignee, and the latter is bound to perform the covenants of the lease after the assignment Possession is not the ground of the assignee's liability but the *privity of estate* which is created by the assignment itself.

It is settled law that the privity of estate between the lessor and the lessee's assignee is terminated by an assignment by the assignee of his interest to a third person

On principle there seems to be no reason why an assignee should not be entitled to apportionment as between himself and the lessor, and why rent

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* Second Appeal No. 1581 of 1911.

should not be deemed to accrue due from day to day as between them. In England the law of apportionment has long been regulated by statutes, and all rents, etc., are, like interest on money lent, considered as accruing from day to day and apportionable in respect of time accordingly. In India there is no reason for not applying to rent the principle adopted in England in the case of interest.

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SECOND APPEAL against the decree of M. J. MURPHY, the District Judge of North Malabar, in Appeal No. 510 of 1910 preferred against the decree of M. R. SANKARA AYYAR, the District Munsif of Kuthuparamba, in Original Suit No. 474 of 1910.

The plaintiff sues to recover arrears of rent for the years 1083 to 1085 (Malayalam year) under a lease executed by the first defendant and the manager of the family of the defendants Nos. 2 and 3. The fourth defendant is the purchaser of the rights of the defendants Nos 1 to 3 in the land on the 4th January 1909, during the currency of the year 1084, and he transferred his rights under his purchase to the defendants Nos. 6 and 7 on the 29th April 1909. The plaintiff's case is that the fourth defendant is also liable for the whole of the rent for the year 1084, notwithstanding his transfer to the defendants Nos. 6 and 7 in the same year. The District Munsif passed a decree against the fourth defendant for rent for the whole of the year 1084 On appeal, the Lower Appellate Court held that the fourth defendant was liable only for the rent for the period during which he was in possession under his purchase. The plaintiff preferred a Second Appeal to the High Court.

C. V. Anantakrishna Ayyar for the appellant.

K. Govinda Marar for the respondent

The judgment of the court was delivered by SUNDARA AYYAR, J.

SUNDARA AYYAR AND SADASIVA AYYAR, JJ.

JUDGMENT —This is a suit for rent for three years 1083 to 1085 (Malayalam year). Defendants Nos. 1 to 3 are sought to be made liable directly under the marupat or rental instrument, the first defendant and the manager of the family of defendants Nos. 2 and 3 being the executants of the *marupat* The fourth defendant purchased the rights of defendants Nos. 1 to 3 in the land on 4th January 1909 during the currency of the year 1084 and assigned his rights to defendants Nos 6 and 7 on the 29th April 1909 about 3½ months after his purchase. The plaintiff's case is that the fourth defendant is also liable for the rent of the Malayalam

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SUNDARA AYYAR AND SADASIVA AYYAR, JJ.

year 1084 and that defendants Nos. 6 and 7 are liable for the rents of the years 1084 and 1085. The District Munsif passed a decree against the fourth defendant for the rent of the year 1084 He appealed to the District Court on the ground that he was liable only for the rent accruing from the date of his purchase up to the date of his assignment to defendants Nos. 6 and 7, *i.e.*, from the 4th January to 28th April 1909. The District Judge upheld his contention.

The plaintiff has preferred this Second Appeal and his contention is that the fourth defendant is liable for the whole of the rent for the year 1084 inasmuch as the rent for that year became payable after his purchase. Exhibit A, the rental instrument, did not fix any specific date for the payment of the annual rent A rent of Rs. 60 per annum was fixed to be paid from the 25th Meenam 1069. It is argued that this must be construed to mean that the rent should be paid on the 25th Meenam each year.

In the plaint the allegation is that the annual rent was payable in monthly instalments. We cannot say, on the construction of Exhibit A that the 25th of Meenam can be regarded as the date fixed for the payment of rent every year. The Malayalam year 1084 expired only after the fourth defendant's assignment of his rights under the lease. If the rent is regarded as payable at the end of each Malayalam year, the plaintiff can have no ground for holding fourth defendant liable for the whole rent of 1084 If the tenancy be regarded as running from the 25th Meenam each year to the 24th Meenam of the succeeding year, then the rent due for 1084 fell due during the period that the fourth defendant held the leasehold interest by virtue of his purchase. Assuming that the whole rent for the year was intended to be payable on the 24th or 25th Meenam, can it be held that the fourth defendant is bound to pay the whole of the rent for 1084? Section 108 of the Transfer of Property Act lays down that "a lessee may transfer his interest in the leasehold property," but that he shall not, by reason only of such transfer, "cease to be subject to any of the liabilities attaching to the lease." It does not enact any rule regarding the liability of the assignee but as the assignee becomes the lessee from the date of the assignment, according to the section, he must be held liable for the rent accruing after the assignment. The appellant's

argument is that a covenant to pay rent being one running with the land, the assignee is bound to discharge all obligations under the covenant which mature after the assignment It is no doubt the rule that an assignee is liable for all breaches of express covenants running with the land occurring after the date of the assignment. There is privity of estate between the lessor and the assignee and the latter is bound to perform the covenants of the lease after the assignment If a covenant to keep the premises in repair or to do an act on a day which falls after the assignment is broken, subsequently, the assignee is undoubtedly liable. That a covenant to pay rent is one running with the land appears to be the established rule in England. See Woodfall's "Landlord and Tenant," page 189 The assignee is liable for rent even though he may not have taken possession. See page 296 of the same book For possession is not the ground of his liability, but the privity of estate which is created by the assignment itself—24 American Cyclopædia of Law and Procedure, page 1180. But the question for our decision is whether the liability on the covenant can be apportioned or not. According to section 36 of the Transfer of Property Act, all rents are, upon the transfer of the interest of the lessor, to be deemed, as between the transferor and transferee, to accrue due from day to day to be apportionable accordingly but to be payable on the days appointed for the payment thereof. See *Lakshminaranappa* v *Melothraman Nair*(1) No rule of apportionment has been laid down in the Act with regard to liability for rent, as between the lessor and the transferee from a lessee. It is settled law that the privity of *estate between the lessor and the lessee's assignee is terminated* by the assignment to a third person by the assignee and the latter would not be responsible to the lessor for rent after he has assigned his rights under the assignment to himself. The question whether the assignee of a lease can claim as against the lessor an apportionment of the rent accruing after the date of his assignment does not appear to have been definitely decided either in this country or in England in a case arising between the lessor and the assignee. But on principle there seems to be no reason why he should not be entitled to do so and why the rent should not be deemed as accruing due from day to day as between him

(1) (1903) I.L.R., 26 Mad., 540.

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(1) (1903) I.L.R., 26 Mad., 540.

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and the lessor. The liability of the assignor of a lease continues notwithstanding the assignment and the lessor cannot be damnified in any manner by the apportionment of liability on the personal covenant for rent, so as to make the assignee liable only for the rent accruing after the assignment. Privity of estate being the ground of the assignee's liability, there is no reason why it should be made heavier than the extent of that privity would justify. If the lease contains any provision entitling the lessor, to any right in case of a breach of the covenant to pay rent on a day subsequent to the assignment, he should no doubt be entitled to exercise that right as against the assignee. But it does not follow from this that he should be liable to have a decree passed against him personally for the payment of more than the rent accruing after the assignment in his favour. If the assignment be of a portion only of the premises included in a lease, it is settled law that the assignee is not liable for more than the proportionate rent due on what is comprised in his assignment. Why should not the same principle apply where diminished liability is claimed, not on the ground that the whole of the premises has not been assigned, but on the ground that the assignment has been in operation only during a portion of the period for which rent is claimed. In Halsbury's "Laws of England," volume 18, page 483, it is stated that "an apportionment can be made not only as between the persons entitled to the rent, but also as against a tenant whose liability for rent ceases, or changes its character, between two rent days; and after the day when the entire portion of rent has, or would have, fallen due, the proportionate rent is recoverable against the tenant as rent due under the lease Consequently a lessee who surrenders his lease between two rent-days is liable for rent up to the surrender, and a lessee on whom a lessor lawfully re-enters is liable for rent up to the re-entry." In *Swansea Bank* v. *Thomas*(1), a liquidator in whom the residue of a term under a lease became vested assigned over during a current quarter. In an action brought after the expiration of the quarter against the trustee by the lessor to recover a proportionate part of the quarter's rent up to the time of the assignment over by him, it was held that the lessor was entitled to apportionment. In England the law of

(1) (1879) 4 Ex. D., 94.

apportionment has long been regulated by statutes and the case was decided on the construction of 33 and 34 Vict., c. 35 (sec. 2) which provided that "all rents, annuities, dividends and other periodical payments in the nature of income (whether reserved or made payable under an instrument in writing or otherwise) shall, like interest on money lent, be considered as accruing from day to day, and shall be apportionable in respect of time accordingly." According to the Common Law of England rent neither accrued due nor was payable except on the day on which it was reserved, although interest on money lent accrued due *de die in diem* although it might be payable on certain specified days. In India there is no reason for not applying to rent the principle adopted in England in the case of interest. There are other cases in England which follow the rule laid down in *Swansea Bank* v. *Thomas*(1) See *Re Johnson*; *Ex parte Blackett*(2), *In re Wilson*; *Ex parte Hastings*(3), *In re South Kensington Co-operative Stores*(4) and *In re Howell*, *Ex parte Mandle Brieg & Co.*(5). If the lessor can claim apportionment as against the lessee assigning his right, there is no reason why the assignee should not have the right to *make a similar claim against the lessor. Reason and equity seem* to us to require that he should have such right. In *Glass* v. *Patterson*(6), it was held that an assignee was only liable for the apportioned rent from the date of assignment. In America a different view appears to have been taken. Metden in his work on "Landlord and Tenant," volume I, page 801, says "when a covenant to pay rent becomes broken after an acceptance of an assignment and during actual possession, the assignee is liable for the whole rent then becoming due." It is not clear how the question of actual possession is material, seeing that privity of estate and not possession is the ground of the assignee's liability. The Irish decision in *Glass* v. *Patterson*(6) seems to be more in accordance with the *ratio decidendi* of the English cases referred to above and with principle and justice.

We must therefore hold that the plaintiff's claim against the fourth defendant for the whole rent of the year 1081 should not be sustained and this Second Appeal must be dismissed with costs.

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(1) (1870) 4 Ex D., 94.
(2) (1894) 70 L.T., 381.
(3) (1893) 62 L.J., Q B, 628 at p 632.
(4) (1881) 17 Ch.D., 161.
(5) (1895) 1 Q.B., 844.
(6) (1902) 2 Ir. R., 660.

APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Sundara Ayyar.

1912 November 6, 7 and 26.

SRINIVASA AYYANGAR AND TWO OTHERS (PLAINTIFFS), APPELLANTS,

v

THE SECRETARY OF STATE FOR INDIA, REPRESENTED BY THE COLLECTOR OF TANJORE AND TWO OTHERS (DEFENDANTS), RESPONDENTS.*

Limitation—Limitation Act (IX of 1908), sec 15 (2), applicability of—Suits under special Acts—Madras Revenue Recovery Act (II of 1864), sec. 59, suits under.

Section 15, clause (2) of the Limitation Act (IX of 1908) which excludes from the computation of the period of limitation, the time occupied by the notice legally necessary to be issued before instituting certain actions, is applicable to suits brought under section 59 of the Madras Revenue Recovery Act (II of 1864).

Venkata v. *Chengadu* (1889) I.L R , 12 Mad., 168 (F.B.) and *Iswara Pattar* v. *Karuppan* (1893) 3 M L J., 255, followed.

Abu Backer Sahib v *Secretary of State for India* (1911) I L.R , 34 Mad , 505 (F B), *distinguished*

The question whether the general provisions of the Limitation Act should be applied to cases where a special period of limitation is prescribed by a special or local Act depends on whether the provisions of such Act should be regarded as enacting a complete body of provisions with regard to limitations of suits coming within the purview of the Act In other words the question is whether the special or local Act should be construed as excluding the applicability of the general provisions of the Limitation Act

SECOND APPEAL against the decree of J. T. GILLESPIE, the Acting District Judge of Tanjore, in Appeal No. 767 of 1909, preferred against the decree of C S. VENKATARAMANA RAO, the District Munsif of Mannargudi, in Original Suit No. 69 of 1909.

The following facts are taken from the judgment of the District Judge on appeal:—

"The appellants sued in the lower Court for a declaration "that a sale of the plaint lands for arrears of revenue on 30th May "1908 is null and void, and for recovery of possession of the said "lands from the first and second defendants. The lower Court "held that the suit was barred by limitation and accordingly "dismissed it with costs. Hence this appeal.

"The Revenue sale was held on 30th May 1908, and was "confirmed by the Divisional Officer (a Deputy Collector) on 30th "June 1908. Against the order confirming the sale, an appeal "seems to have been preferred to the District Collector on 7th

* Second Appeal No. 2104 of 1910.

"September 1908, and dismissed by him on 2nd November 1908. "Notice of the present suit was sent to the Collector on 22nd "December 1908, and the suit was brought in the District "Munsif's Court on 22nd February 1909. . . .

"The next point argued by the pleader for the appellants is that "granting that the cause of action arose on 30th June 1908, and "that section 59 of Act II of 1864 is applicable to the case, the "suit is nevertheless in time because the lower Court having been "closed for the Christmas recess on 30th December 1908, the "last day of the period of 6 months prescribed by section 59, the "appellants were entitled to file their suit on the first subsequent "day on which the Court was open, *i e.*, on 4th January 1909, and "as by that time the new Limitation Act IX of 1908 had come into "force, the appellants are entitled to claim the benefit of section "15 (2) of that Act and to exclude from the computation of the "time taken to bring their suit the period of two months required "for giving notice to the Collector It is argued that limitation "being a law of procedure only, and not a substantive law [*Valia* "*Tamburatti* v. *Vira Rayan*(1), *Her Highness Ruckmaboye* v. "*Lulloobhoy Mottichund*(2), and *Kali Amma* v. *Palappakkara* "*Manakal*(3)] the law of limitation in force at the time when a "suit for appeal is filed must be applied to it. That is no doubt "correct, but the law of limitation applicable to this suit was "and continued to be after Act IX of 1908 came into force, "section 59 of the Revenue Recovery Act II of 1864. It was "not by virtue of section 5 of the old Limitation Act as the "District Munsif says in his judgment that the appellants would "have been able to bring their suit on 4th January 1909 although "it became barred by time on 31st December 1908, but by virtue "of the general principle of law that where parties are prevented "from doing a thing in Court on a particular day, not by any "act of their own, but the act of the Court itself, they are entitled "to do it at the first subsequent opportunity—see *Sambasiva* "*Chari* v. *Ramasami Reddi*. The suit was none the less barred "on 31st December 1908, and the fact that by virtue of the general "principle of law above referred to, the plaint might have been "presented on 4th January 1909 cannot operate to entitle the "plaintiffs to claim the benefit of the new Limitation Act on

(1) (1876) I.L.R., 1 Mad., 228 (2) (1852) 5 M.I.A., 234.
(3) (1910) 20 M.L.J., 347. (4) (1899) I L.R., 22 Mad., 179 at p. 181.

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"22nd February 1909, the date when the suit was actually "filed. I therefore uphold the lower Court's finding that the "suit was barred by limitation before the present Limitation "Act came into force, and that for this reason alone, none of "the provisions of that Act are applicable to the case."

The plaintiffs preferred this Second Appeal.

Mr. *T. Rangachariar* for the appellants.

C. F. Napier, Government Pleader, for the first respondent.

V. Rathnasomanathan for the second respondent.

BENSON AND SUNDARA AYYAR, JJ.

JUDGMENT.—This is a suit to set aside a sale held for arrears of revenue on the ground of fraud. The suit has been dismissed by the lower Courts on the ground that it is barred by limitation. Section 59 of Madras Act II of 1864 provides a period of six months for such a suit from the date on which the cause of action arose. There are several ways in which the plaintiffs attempt to get rid of the bar. We consider it sufficient to deal with one of their contentions as we have come to the conclusion that it must succeed and that the suit must be held to be not barred. Section 15, clause (2) of the Limitation Act enacts that "in computing the period of limitation prescribed for any suit . . . of which notice has been given in accordance with the requirements of any enactment for the time being in force, the period of such notice shall be excluded." This clause did not exist in the previous statute, Act XV of 1877. The six months provided by section 59 of Act II of 1864 elapsed on the 31st December 1908. The Court was closed on that day for the Christmas holidays and re-opened only on the 4th January 1909. On the 1st January 1909 the present Limitation Act came into force; that is before the suit was barred. The plaintiffs are therefore entitled to have the question of limitation decided in accordance with the provisions of the present statute. They claim the benefit of section 15, clause (2). If this claim be well-founded, the suit would be within time. The question argued is whether the provision in question is applicable to suits governed by section 59 of Act II of 1864, it being conceded that the period of limitation for the suit is that provided by section 59 of that Act and not article 12 of the Limitation Act, which has provided a period of one year for a suit to set aside a sale for arrears of Government revenue. The respondent's contention is that section 15, clause (2) and other general provisions enacted in sections 4 to 25 of

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the Limitation Act are not applicable to suits for which a special period of limitation has been provided by a local or special act, and reliance is placed on section 29 which lays down that nothing in the Limitation Act "shall affect or alter any period of limitation specially prescribed for any suit, appeal or application by any special or local law now or hereafter in force in British India" and on a Full Bench decision of this Court in *Abu Backer Sahib* v. *Secretary of State for India*(1). The appellant on the other hand contends that that case which decided that section 12 of Act XV of 1877, allowing a deduction of the time requisite for obtaining a copy of the judgment and decree of the lower Court in computing the period of limitation for an appeal in a case decided under the Indian [Madras?] Forest Act V of 1882, should not govern this case and that it is in conflict with another Full Bench decision of this Court in *Venkata* v. *Chengadu*(2) and the decision of a Division Bench in *Seshama* v. *Sankara*(3) which were not overruled by or noticed in that judgment. In *Abu Backer Sahib* v. *Secretary of State for India*(1), the question whether section 12 of the Limitation Act was applicable, arose with respect to an appeal presented against the decree of the District Court on an appeal against an order of the Forest Officer under the Forest Act of 1882. The Full Bench composed of three learned judges held that it was not. The learned Chief Justice based his judgment on three grounds: (1) that the provisions of the Forest Act showing that the power to extend the period of limitation in cases coming within that Act was vested in the Governor-in-Council must be taken to indicate that the general provisions of the Limitation Act having the effect in certain cases of extending the period of limitation should not be applicable; (2) that the application of those general provisions would have the effect of affecting the period of limitation prescribed by the Forest Act within the meaning of section 6 of Act XV of 1877; (3) that section 12 of the Limitation Act could not be applied to cases where the law did not render it necessary for an appellant to produce a copy of the decree and judgment of the lower Court for the valid presentation of an appeal. WALLIS and MILLER, JJ., the other members of the Court proceeded purely on the language of section 6 of Act XV of 1877 which in

(1) (1911) I.L.R., 34 Mad., 505 (F.B.) (2) (1889) I.L.R., 12 Mad., 168 (F.B.)
(3) (1889) I.L.R., 12 Mad., 1.

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their opinion was plain and unambiguous and held that the application of the general sections of the Act would have the effect of affecting the period of limitation prescribed by special or local Acts and was therefore disallowed by section 6. Those learned judges did not refer to the earlier decisions of this Court in *Venkata* v. *Chengadu*(1) and *Veeramma* v. *Abbiah*(2). According to those decisions the question whether the general provisions of the Limitation Act should be applied to cases where a special period of limitation is prescribed by a special or local Act, would depend on whether the provisions of such Act should be regarded as enacting a complete body of provisions with regard to the limitations of suits coming within the purview of the Act. In other words, the question would be whether the special or local Act should be construed as excluding the applicability of the general provisions of the Limitation Act. Each case would have to be decided on the construction of the particular statute which provides a special period of limitation. The learned Chief Justice's judgment also makes no reference to *Venkata* v. *Chengadu*(1). He refers to the observations of SHEPPARD, J., in *Veeramma* v. *Abbiah*(2) as supporting the view that section 6 would make the provisions of the Limitation Act inapplicable to any suit coming within a local or special Act. SHEPPARD, J., in that case based his judgment in part at least on the construction he placed on the provisions of the Registration Act, which in his opinion excluded the applicability of any of the sections of the Limitation Act, although he also expressed the opinion that the language of section 6 of the Limitation Act rendered the general provisions of the Act inapplicable to cases coming under special or local Acts. In *Haji Ismail Sait* v. *Trustees of the Harbour, Madras*(3), he accepted *Veeramma* v. *Abbiah*(2) as authority for the proposition that section 5 of the Limitation Act would be applicable to cases under the Forest Act—see page 397—although he was also prepared to apply to the principle of section 5 on general grounds. In *Venkata* v. *Chengadu*(1), four learned judges took part. Two of them, MUTHUSWAMI AIYAR and KERNAN, JJ., held that section 18 of the Limitation Act was applicable to a suit falling under section 59 of Act II of 1864. It was, however, not necessary to decide the question as the

(1) (1880) I.L.R., 12 Mad., 168 (F.B.)
(2) (1895) I.L.R., 18 Mad., 99 (F.B.). (3) (1900) I.L.R., 23 Mad., 389.

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application of the sections would not save the suit from limitation. PARKER and WILKINSON, JJ., cannot in our opinion be taken to have expressed any opinion on the point, although Mr. Rangachariar contends that they intend to do so. In a later case *Iswara Pattar* v *Karuppan*(1), COLLINS, C J, and DAVIES, J., applied section 18 to a suit under section 59 of the Revenue Recovery Act In *Seshama* v. *Sankara*(2), COLLINS, C J., and MUTHUSWAMI AIYAR, J, applied section 14 of the Limitation Act to a suit under the Madras Boundary Act XXVIII of 1860. They observed: "The true construction of s 6 then is that save as to the period of limitation, the other provisions of the General Act of limitations are applicable to cases falling under special or local law." We do not consider it necessary for the purpose of this case to consider whether section 29 of the present statute corresponding to section 6 of Act XV of 1877 may not render the general sections of the Limitation Act inapplicable to special and local Acts generally. We think that *Abu Backer Sahib* v. *Secretary of State for India*(3) cannot be regarded as overruling the decisions in *Venkata* v. *Chengadu*(4) and *Iswara Pattar* v. *Karuppan*(1) which laid down the law with regard to suits coming under section 59 of Act II of 1864. They were not considered or dissented from in that case. We are of opinion that on a construction of Act II of 1864 the conclusion can be arrived at that the period of six months was intended to be subject to the general provisions of the Limitation Act. *Abu Backer Sahib* v. *Secretary of State for India*(3) would not preclude us from giving effect to that conclusion.

Act II of 1864 was enacted when the General Limitation Act in force was Act XIV of 1859. Section 16, clause (3) of that Act provided that "where by any law now or hereafter to be in force a shorter period of limitation than that prescribed by this Act is specially prescribed, such shorter period shall be applied notwithstanding this Act." The starting point of limitation and the period of limitation are clearly distinguished as distinct factors in the various statutes of Limitation Act XIV of 1859, Act IX of 1871, Act XV of 1877 and Act IX of 1908. Section 3 of Act XIV of 1859 provided a limitation of one year to set

(1) (1893) 3 M.L.J., 255. (2) (1889) I L.R., 12 Mad., 1 at p. 5 (F.B.).
(3) (1911) I.L.R., 34 Mad., 505 (4) (1889) I.L.R., 12 Mad., 168 (F.B.)

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aside sales for arrears of Government revenue from the date of the confirmation of the sale. The period was liable to be shortened by any special statute. In *Mussumat Phoolbas Koonwur* v. *Lalla Jogeshur Sahoy*(1), the Judicial Committee of the Privy Council held that clause 11 of section 16 of Act XIV of 1859 postponing the starting point of limitation in cases of disability on account of minority was applicable to suits provided for by section 246 of the Civil Procedure Code, Act VIII of 1859. Referring to Acts VIII and XIV of 1859 their Lordships observed · "The object of the first was to enact a general code of procedure for the Courts of Civil Judicature not established by Royal Charter. The object of the second was to establish a general Law of Limitation in supersession both of the regulations which had governed those Courts, and of the English Statutes which had regulated the pratice of the Courts established by Royal Charter. Looking to the 5th sub-section of the 1st section" (providing a period of one year for suits to alter or set aside summary decisions and orders of Civil Courts) "and the 3rd and 11th sections" (providing a limitation of one year for suits to set aside sales under decrees or for arrears of Government revenue, and a limitation of twelve years to suits for the recovery of immoveable property) "of Act XIV of 1859, their Lordships have no doubt that the intention of the Legislature was that the period of limitation resulting from the 246th section of Act VIII should in the case of a minor be modified by the operation of the 11th section of Act XIV · and that this construction has obtained in the Courts of India appears from *Huro Soonduree Chowdhrain* v. *Anundnath Roy Chowdhry*(2)." The above passage shows that their Lordships based their decision on the construction of section 246 of Act VIII of 1859, whether it excluded or not the provisions of the Limitation Act of 1859. Their Lordships distinguished an earlier decision of theirs in *Mohummad Buhadoor Khan* v. *The Collector of Bareilly*(3). There certain property belonging to *A* was taken possession of by *B*. Some years later *B* was convicted and executed as a rebel and all the property in his possession was confiscated including the property of *A*. The sons of *A* sued for the recovery of the lands of

(1) (1876) L.R., 3 I.A., 7 at pp 24 and 25. (2) (1865) 3 W.R. (C.R), 8.
(3) (1874) L.R, 1 I.A., 167 at pp. 175 and 176.

which they had been dispossessed by the rebel. The suit was brought more than a year after the younger plaintiff came of age and more than a year after the passing of Act IX of 1859 which allowed only one year to sue and did not save the rights of persons under disability. Their Lordships held that the claim was barred by limitation. They observed: "The words are perfectly plain,—no suit brought by any party in respect of forfeited property shall be entertained unless it be instituted within the period of a year from the date of seizure. It is true that this limitation is introduced by way of proviso. But their Lordships think that, looking at the various parts of Act and gathering the purpose and intention of the Legislature from the whole, this was a substantive enactment; and that, although it appears under the form of a proviso, it was a limitation intended by the Legislature to apply to all suits brought by any persons in respect of forfeited property." With respect to the argument that a saving with regard to parties under disability must be taken to be by equitable construction implied in this case and that the clause in Act XIV of 1859 relating to disabilities might be imported into the Act, their Lordships held that it could not be done. They observed: "This Act is of a special kind and does not admit of those enactments being annexed to it." This seems to show that their Lordships' judgment was based on the construction of the special Act in question. Referring to this decision their Lordships observed in *Mussumat Phoolbas Koonwur* v. *Lalla Jogeshur Sahoy*(1). "It arose upon a very special statute, and upon that ground the judgment rests." Then they refer to the passage cited above and point out: "And they proceeded to observe that the application of the statute (if it did apply) would not assist the appellants who would not even in that case have brought their suit in proper time" It is clear that their Lordships were disposed to regard the pronouncement in the earlier case as a dictum not necessary for the decision of the case. The learned Government Pleader argues that the decision in *Mussumat Phoolbas Koonwur* v. *Lalla Jogeshur Sahoy*(1) proceeded on the ground that the two statutes, Acts VIII and XIV of 1859, were passed in the same year, a fact to which their Lordships no doubt refer; but

(1) (1876) L.R., 3 I.A., 7 at pp. 24 and 25.

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we cannot agree that any stress was intended to be laid upon that circumstance. The basis of the decision, as we understand it, was that the provisions of the general Code of Procedure should be regarded as subject to those of the general Code of Limitation We do not think any distinction can be drawn with respect to the applicability of the general provisions of the Code of Limitation between suits for which a special period of limitation is prescribed by the Civil Procedure Code and those for which a special period is prescribed by some other statute. Both the decisions of the Privy Council proceeded upon the construction placed upon the particular statute in question in each case. We must take it that the Legislature in Madras was not unaware of the provisions of Act XIV of 1859 when it enacted section 59 of Act II of 1864. In our opinion it did not intend to do anything more than shorten the period of one year given by the Limitation Act to suits to set aside sales for arrears of revenue, and having regard to the language of clause 3 of section 16 of Act XIV of 1859 we must conclude that the legislature intended that the period prescribed in section 59 of Act II of 1864 should be subject to the general provisions of the Limitation Act *for the time being in force* which might have the effect of postponing the starting point of limitation or of excluding any time in the computation of the period of limitation. The question of the construction to be placed on section 59 cannot be affected by section 29 of the Limitation Act IX of 1908. What effect section 29 would have upon provisions in special Acts which could not be construed as subjecting any special period of limitation prescribed therein to any provisions of the Limitation Act, it is unnecessary to consider in this case. We feel strengthened in this conclusion by the decisions of this Court already referred to above relating to the limitation for suits coming within section 59 of Act II of 1864. We hold therefore that the suit in the present case is not barred by limitation and reversing the decrees of the Courts below remand the suit for disposal on the merits to the Court of First Instance. The costs of this and in the Lower Appellate Court will abide result.

APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Sundara Ayyar.

1912. November 27 and December 4.

RAMAKRISHNA CHETTY (PLAINTIFF), APPELLANT,

v.

SUBBARAYA IYER AND ANOTHER (DEFENDANTS), RESPONDENTS.*

Limitation—Madras Estates Land Act (I of 1908), ss. 210, 211, cl. (2), art. 8 of sch. Part A—Suit for rent under registered agreement, more than three years but less than six years of the Act coming into force—Statutes—Construction of—Retrospective operation, when—Limitation Act (XV of 1877), art. 116, applicability of, suits for rent in a Revenue Court.

A suit to enforce an inamdar's right to rent under a registered agreement, which accrued due more than three years but less than six years before the Estates Land Act came into force, is not barred by the limitation of three years enacted by its provisions but is governed by article 116 of the Limitation Act.

Section 210 and article 8 of Part A to the schedule of the Madras Estates Land Act (I of 1908) have no application to cases where the period of three years thereby provided had expired before the 1st July 1908 when the Act came into force and where to apply them would be to deprive the plaintiff of a right of action which was then vested in him.

The rule regarding vested rights is not confined to substantive rights but extends equally to remedial rights or rights of action including rights of appeal. Retrospective operation of statutes considered.

Colonial Sugar Refining Company v. *Irving* (1905) A.C., 369, applied.

SECOND APPEAL against the decree of H. O. D. HARDING, the District Judge of Salem, in Appeal No. 240 of 1909, preferred against the decree of P. A. BOOTY, the Acting Sub-Collector of Hosur, in Summary Suit No. 249 of 1909.

The following is the judgment of the District Court on appeal:—

"This is a suit under section 77 of Act I of 1908 for arrears "of rent for fasli 1315."

"The suit was filed on 25th September 1909, more than "three years after the close of fasli 1315. The plaintiff "contended that it is not barred by limitation, because he holds "a permanent registered lease. There is no saving for such

* Second Appeal No. 1203 of 1911.

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"leases in the schedule of Act I of 1908 and the Limitation "Act cannot apply in the face of the special provision in Act I of "1908 itself. The suit is therefore dismissed as time barred. "The defendant has incurred no costs.

"Plaintiff appeals and says he has six years under article "116 of the Limitation Act, because he sues on a registered rent "agreement. Under section 210, Act I of 1908, the suit is "barred by the limitation provided by the schedule of that Act, "which allows three years only.

"The suit is so barred subject to the provisions of section "211. Section 211 says that certain sections of the Limitation Act "of 1877 do not apply to such suits and subject to the provisions "of this Chapter the Limitation Act of 1877 applies to all suits, "etc., mentioned in section 210. That is to say the Act of 1877 "applies, except that every suit instituted after the limitation "provided by the schedule of Act I of 1908, shall be dismissed. "This suit was filed after the three years mentioned in the schedule "of the Act—Serial No. 8. It was therefore rightly dismissed. "The suit is a suit for rent under section 77. It is not a suit "for damages for breach of contract contemplated by article 116. "The appeal is dismissed with costs".

The plaintiff thereupon preferred this Second Appeal.

C. Venkatasubbaramayya for the appellant.

V. C. Seshachariar for the first respondent.

BENSON AND SUNDARA AYYAR, JJ.

JUDGMENT.—The question for decision in this case is one of limitation. The suit is by a land-holder for recovery from a ryot of rent for fasli 1315 ending on the 30th June 1906. It was instituted in a Revenue Court (before the Sub-Collector of Hosur) after the Estates Land Act came into force. More than three years, but less than six years, had elapsed at the time of the institution of the suit after the rent became due. Both the lower Courts held that the suit was barred by limitation under Part A, article 8 of the schedule to the Estates Land Act, I of 1908, which provides a period of three years from the date the rent became due.

The contention in Second Appeal is that the rent being due under a registered instrument and six years having been allowed for such a suit according to the decisions of this Court, holding article 116 of the schedule to the Limitation Act to be applicable to such a suit, and the Estates Land Act having come into force

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(on 1st July 1908) only after the three years allowed under the Act had elapsed from the date of the rent accruing due, the Act ought to be held to be not applicable to the case. This question has already been the subject of consideration in this Court in *Sundaramaiyah* v. *Muthu Ganapathegal*(1) before a Bench consisting of MILLER and ABDUR RAHIM, JJ.; MILLER, J., following *Khusalbhai* v. *Kabhai*(2), upheld the contention now urged before us, while ABDUR RAHIM, J., was of opinion, that the suit in that case was barred, as according to him the language of section 210 of the Estates Land Act was perfectly clear and barred every suit for rent instituted after the Act came into force, more than three years after time began to run. After full consideration we are of opinion that the rule of limitation in Act I of 1908 should be held to be inapplicable to cases where the period of three years had expired before the 1st July 1908 when the Act came into force. The general principle undoubtedly is that the law of limitation applicable to a suit is that in force at the time when it is instituted. The period of limitation that the party is entitled to have is that prescribed by the statute then in force whether it be shorter or longer than that provided in a previous statute repealed by it [see *Rex* v. *Chandra Dharma*(3)]. This rule is expressly enacted in the Indian Limitation Act now in force as it was also in the previous statutes of limitation. The reason of the rule is that limitation is a branch of the law of procedure and is only a condition annexed to the enforcement of a substantive right in a Court of Law and does not affect the right itself. And there is no injustice in requiring a person having a substantive right to seek the enforcement of it in a Court of Law within such time as the legislature may think fit from time to time to prescribe. It is at the same time a well-established principle that unless the terms of a statute expressly so provide or necessarily require it retrospective operation will not be given to a statute so as to affect, alter or destroy any vested right. See section 6, clause (c) of the Indian General Clauses Act and section 8, clause (c) of Madras Act I of 1891. For to do so would result in great injustice, and it will be presumed that the legislature did not

(1) (1912) M.W.N., 652. (2) (1882) I.L.R., 6 Bom., 26.
(3) (1905) 2 K.B., 335.

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intend to deprive any person of a right previously vested in him. The general rule that statutes relating to processual law have retrospective operation is as much subject to this important qualification as statutes dealing with substantive rights. The questions whether a person is entitled to maintain a particular action or to do so in a particular form and what defences are open to the defendant cannot be affected by any statute passed after its institution. The principle has been applied even to the right of appeal which a party to an action has. See *Colonial Sugar Refining Company* v. *Irving*(1), in which the Judicial Committee of the Privy Council laid down this rule. Lord MACNAGHTEN delivering the judgment of the Committee observed—

"On the one hand, it was not disputed that if the matter in question be a matter of procedure only, the petition is well founded. On the other hand, if it be more than a matter of procedure, if it touches a right in existence at the passing of the Act, it was conceded that, in accordance with a long line of authorities extending from the time of Lord COKE to the present day, the appellants (the Sugar Company) would be entitled to succeed The Judiciary Act is not retrospective by express enactment or by necessary intendment. And therefore the only question is, Was the appeal to His Majesty in Council a right vested in the appellants at the time of the passing of the Act, or was it a mere matter of procedure? It seems to their Lordships that the question does not admit of doubt. To deprive a suitor in a pending action of an appeal to a superior tribunal which belonged to him as of right is a very different thing from regulating procedure." The rule regarding vested rights is not confined to substantive rights but extends equally to remedial rights or rights of action including rights of appeal, an appeal being regarded as a continuation of the proceedings in the Court of First Instance. In *Wright* v. *Hale*(2), the question was whether the plaintiff in the action was disentitled to costs under 23 and 24, Vic, c. 126, s. 34, according to which a plaintiff in an action for an alleged wrong recovering a verdict for less than £ 5 should not be entitled, to any costs. CHANNELL, B., observes: "In dealing with Acts of Parliament which have the

(1) (1905) A.C., 369 at p. 372. (2) (1860) 6 H. & N., 227.

effect of taking away rights of action, we ought not to construe them as having a retrospective operation, unless it appears clearly that such was the intention of the legislature." POLLOCK, C.B., also laid down the same rule. A distinction was drawn between rules affecting the right of action and those relating to practice and procedure and the question of costs was regarded as coming within the latter category. An exception was sought to be introduced in *Towler* v. *Chatterton*(1). The question there was whether an oral promise to pay a debt could be relied on to save it from limitation in a suit instituted after Lord TENTERDEN's Act which made oral acknowledgments and promises insufficient for the purpose. The promise was made before the Act came into force The Court held that the Act was applicable because the statute prevented all mischief of *ex post facto* legislation by giving due notice that it should have no operation for nearly eight months after its enactment. The same view was held in *The Queen* v. *The Leeds and Bradford Railway Company*(2), where the question related to the period of limitation applicable. Lord CAMPBELL, C.J., observed: "If the Act had come into operation immediately after the time of its being passed the hardship would have been so great that we might have inferred an intention on the part of the legislature not to give it a retrospective operation; but when we see that it contains a provision suspending its operation for six weeks, that must be taken as an intimation that the legislature has provided that as the period of time within which proceedings respecting antecedent damages or injuries might be taken before the proper tribunal." See also *Ings* v. *London and South Western Railway Company*(3). The soundness of this exception was questioned in *Moon* v. *Durden*(4), by ROLFE, B. In *In re Joseph Souche & Co., Limited*(5), JESSEL, M.R., again enunciated the rule as follows:—"It is a general rule that when the legislature alters the rights of parties by taking away or conferring any rights of action, its enactments, unless in express terms, they apply to pending actions, do not affect them." His Lordship held that the right of a creditor to prove his debt in the winding up of a company was not a mere matter of procedure

(1) (1829) 6 Bing., 258 (130 E.R., 1280). (2) (1852) 21 L.J., Com. L.M.C., 193.
(3) (1868) L.R., 4 C.P., 17 at p. 19. (4) (1845) 2 Ex., 22.
(5) (1875) 1 Ch.D., 48.

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and that it was not distinguished in substance from a right of action before winding up. In a similar case *In re Athlumney*(1), WRIGHT, J., observes: "Perhaps no rule of construction is more" firmly established than this—that a retrospective operation is not to be given to a statute so as to impair an existing right or obligation, otherwise than as regards matter of procedure, unless that effect cannot be avoided without doing violence to the language of the enactment." The learned Judge referred to the observations of JESSEL, M.R., in *In re Joseph Souche & Co., Limited*(2) and to the dissent expressed in *Moon* v. *Durden*(3), from the attempt to make an exception to the rule. It is clear that the result of applying the rule prescribed in the Estates Land Act to cases where three years had elapsed before it came into force would be effectually to deprive the plaintiff of a right of action which was then vested in him. It may be observed that this case would come even within the exceptions admitted in *Towler* v. *Chatterton*(4) and *The Queen* v. *The Leeds and Bradford Railway Company*(5), as Act I of 1908 came into force after the expiration of three days only from the time of its enactment. It is unreasonable to suppose that the Act intended to destroy a man's rights without giving him an opportunity to comply with its provisions. The Court, if asked to give retrospective effect to a statute, will bear in mind the consequences of doing so. See *Ex parte Todd, In re Ashcroft*(6). In *Jackson* v. *Woolley*(7), it was held that section 14 of the Mercantile Land Amendment Act, 1856, which provided that a debtor shall not lose the benefit of the statutory limitations by his co-debtors' payment of interest or part payment of the principal would not affect the efficacy of such payment made before the Act is passed, a decision which is hardly consistent with *Towler* v. *Chatterton*(4) and *The Queen* v. *The Leeds and Bradford Railway Company*(5). On principle, therefore, the present case must be regarded as one in which a vested right of action would be destroyed by the application of the Estates Land Act to it. The language of section 210 does not in terms apply to such a case. It is true, as pointed out by ABDUR RAHIM, J., in *Sundaramaiyah* v. *Muthu*

(1) (1898) 2 Q B, 547 at p. 551.
(2) (1875) 1 Ch D, 48.
(3) (1848) 2 Ex., 22.
(4) (1829) 6 Bing., 258 (130 E.R., 1280).
(5) (1852) 21 L.J., Com L.M.C., 193
(6) (1887) 19 Q B D., 186.
(7) (1858) 8 E. & B., 778.

Ganapathegal(1), that the section does not, in terms, make any exception to the rule laid down in it. But this is not necessary; for, every statute must be taken to have been framed subject to the rules of interpretation applicable to all legislative enactments; and it must be presumed that if the legislature intended that any such rule should not be applicable it would use apt language to indicate its intention. It is argued that if the Act be held not to be applicable to the present case it would logically lead to the conclusion that it would not apply to any case where the cause of action for rent arose before it was passed. But this would certainly not be the case; for, the principle we have enunciated would not apply to cases where three years did not elapse before the Act came into force, for then, the rule enacted in it would not have the effect of destroying the cause of action vested in the land-holder for the rent due to him. The legislature in enacting section 210 then was apparently under the impression that the period of limitation for all suits for rent under the general Limitation Act was three years as it might well have thought, having regard to article 110 in the schedule. But it was decided that article 116 of the Limitation Act which enacted that the limitation for a suit for breach of contract in writing registered would apply also to suits for rent if it was due under a registered instrument. See *Ambalavana Pandaram* v. *Vaguran*(2). This interpretation placed on the general statute of limitation apparently escaped attention of the legislature.

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We do not think that there is any force in the argument that the Revenue Court has no jurisdiction to entertain suits for breach of contract and that it, therefore, could not apply article 116 of the Limitation Act in a suit for rent before it. The effect according to the judicial interpretation of article 116 is that a suit for rent is a suit for breach of contract and there can be no difficulty in a Revenue Court applying the proper rule of limitation applicable to a suit for rent coming before it. Section 211, clause (2) of the Madras Estates Land Act makes the provisions of the Limitation Act applicable to all suits in Revenue Courts subject to the other provisions of the Act. If the rule in schedule A, article 8, be held inapplicable to the case, article 116 of the Limitation Act must necessarily apply. We must hold

(1) (1913) M.W.N., 632 (2) (1896) I.L.R., 19 Mad., 52.

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that the suit is not barred by limitation. We reverse the decrees of the Courts below and remand the suit for disposal according to law to the Court of First Instance: all costs up to date will abide the result.

APPELLATE CIVIL.

Before Mr. Justice Sankaran Nair and Mr. Justice Sadasiva Ayyar.

1912. December 4 and 9

THE SECRETARY OF STATE FOR INDIA IN COUNCIL, REPRESENTED BY THE COLLECTOR OF TRICHINOPOLY (DEFENDANT), APPELLANT,

v.

RAGHUNATHA TATHACHARIAR (PLAINTIFF), RESPONDENT.*

Grant, inam—Grant of land "besides poramboke," construction of—Padugai lands in Trichinopoly and Tanjore taluks, ownership of—'Padugai,' meaning of.

A grant of land by the Government acknowledging the grantee's title to a whole village consisting of certain specified area "besides poramboke," gives the grantee a right to all the unassessed waste in the village such as waste or padugai land (i.e. land between a river bed and the high flood bank of the river) though it may not operate to give communal property such as burying-grounds, temple, sites, etc., to the grantee

Narayanasami v. Kanniappa, Second Appeal No 1145 of 1910 and *Secretary of State v. Kannapallee Venkataratnammah* (1912) 23 M.L J., 109, referred to.

Padugai land in Trichinopoly and Tanjore taluks means land on the lower level bank breadth of the river between the edge of the sandy stream bed and the high flood level bank.

SADASIVA AYYAR, J.—The grant of poramboke does not operate to give the grantee the bed of the river.

Meaning of the word 'Poramboke', considered.

SECOND APPEAL against the decree of C. G. SPENCER, the District Judge of Trichinopoly, in Appeal No. 6 of 1910, preferred against the decree of K. S. KODANDARAMA AYYAR, the District Munsif of Srirangam, in Original Suit No. 311 of 1908.

The inam title-deed (Exhibit C), whose construction is the subject of this decision, ran as follows :—

"On behalf of the Governor in Council of Madras, I acknowledge your title to the whole village of Kadiyakurichi in the

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* Second Appeal No. 1834 of 1911.

taluk of Trichinopoly, District of Trichinopoly claimed to be of (seventeen) 17·74 acres of dry land (one hundred and eighty) acres 180·40 of wet land and (twenty-eight) 28·21 of garden land besides poramboke."

The facts are given in the judgment of SADASIVA AYYAR, J.

C. F. Napier, the Government Pleader, for the defendant, appellant.

K. Srinivasa Ayyangar and *S. G. Srinivasaraghavachariar* for the respondent.

SADASIVA AYYAR, J.

SADASIVA AYYAR, J.—The appellant is the Secretary of State for India in Council. The suit as amended was for possession of padugai land on the banks of the Cauvery from the defendant (appellant) The District Munsif found that the whole village of Kadiakurichi in the Trichinopoly taluk belonged to the plaintiff as inamdar, that the grant to the plaintiff included poramboke land and the plaint land bounded on the north by the Cauvery stream bed was included in the poramboke granted to the plaintiff and that the plaintiff's title was therefore established But he dismissed the suit on the ground that the Government by occasionally cutting branches from the trees standing on the ground, had been in adverse possession as against the plaintiff for twelve years before suit, and the plaintiff's suit was therefore barred. On appeal the learned District Judge confirmed the Munsif's finding as to title but differed on the question of adverse possession and holding that the plaintiff was exercising acts of ownership while allowing the Government merely to exercise the easement of cutting branches of trees for putting twigbunds occasionally, decreed the suit for possession. Hence this appeal. On the question of possession which is a question of fact there is no ground for interference in Second Appeal. The land was jungle land. Most of the trees growing on it were not timber or fruit trees and the fruit of the two tamarind trees growing on the land used to be eaten up by wild monkeys. There is evidence showing that the plaintiff was cutting branches of the trees for fuel and gathering leaves for manure. The really important question is therefore the question of title which both Courts have found in the plaintiff's favour. The Inam title-deed, Exhibit C, is quite clear, and it grants not only the cultivated dry area in the village and the cultivated wet area but it acknowledges the inamdar's title to the whole

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village of Kadiakurichi (both wet and dry areas) "besides poramboke." The meaning of this term "besides poramboke" has been the subject of consideration in two recent cases in this Court. In *Narayanasami* v. *Kanniappa*(1), a case from the Chingleput district, decided by BENSON and BAKEWELL, JJ., the learned Judges said: "These words 'besides poramboke' would indicate a right to poramboke land, *such as unassessed waste*, but it could not include all porambokes since that word includes all kinds of communal property such as burying grounds, temple sites, threshing floors and so forth, and also public roads (called road poramboke) and rivers (called river poramboke)." "It is unreasonable to suppose that in a grant such as is evidenced by Exhibits F and H, Government by describing the grant as the 'grant of the village' in Exhibit F, or by using the words 'besides poramboke' in Exhibit H, intended by such general terms to assign away a portion of the river bed and thus introduce a divided ownership and control over it and deprive themselves of the power of properly discharging their duties in connection with the irrigation dependent on the river. There is no specific grant of the river-bed and we do not think that the general terms used should be construed as involving such a grant." It is clear to us that all that was decided in this case is that the grant of poramboke should not be held to include grant of river-beds and the like communal property such as channel beds, burying grounds, temple sites, etc. That the grant of poramboke land must include the grant of unassessed waste which is not communal property and which has nothing to do with the control of irrigation sources is admitted by the learned Judges. The other case is that of *Secretary of State* v. *Kannapallee Venkataratnammah*(2) and was decided by BENSON and SUNDARA AYYAR, JJ. There the question was whether certain channel beds and tanks in a village granted as a whole inam in the Ganjām district belonged to the inamdar as included in the title-deed which used the words "besides poramboke" after describing the areas of the dry and wet lands in the village. The learned Judges say: "The effect to be given to the insertion of the words 'besides poramboke' must depend on the evidence available in each case and the circumstances attending

(1) Second Appeal No. 1445 of 1910. (2) (1912) 23 M.L.J., 109.

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the grant. In this case it is extremely unlikely that when the whole of the village was granted in 1767 by Sitaramraz it was not intended to convey to the grantee all the waste and poramboke in the village. The British Government accepted that grant and recognised the inamdar's title under it. The channel was not one which passed through any Government property before it reached the village of Lakkimdiddi . . . Both the learned District Judges who dealt with the case proceeded on the footing that the channel and other poramboke in the village belonged to the inamdar. On the whole we see no reason to dissent from that conclusion." It will be seen that one of the learned Judges who decided *Narayanasami* v. *Kanniappa*(1), was also a party to this later decision and on the facts of the latter case, held that even channels and tanks did pass by the grant of poramboke under the title-deed. The respondent's (plaintiff's) learned vakil in this case did not contend that if the plaint land was part of the bed of the river Cauvery he could claim title to it as part of the village granted to him. Assuming for the moment that it is not part of the river-bed but waste land on the bank of the river occasionally liable to have water standing on it when there are high floods, is it included in the poramboke granted to the plaintiff? The word poramboke is loosely used in many senses. Whatever land does not yield revenue to Government is usually known as poramboke, though several kinds of lands may be included in it. That ordinary unassessed waste though overgrown with grass or trees must be included in the grant of poramboke seems to us to be clear even after giving the largest scope possible to the decision in *Narayanasami* v. *Kanniappa*(1). The question has thus become narrowed down to this question of fact: whether the plaint land—

(a) is part of the river-bed of the Cauvery and not ordinary uncultivated poramboke;

(b) is an island enclosed by two streams of the Cauvery river dividing at the western extremity of the island and rejoining at the eastern extremity; or

(c) is poramboke waste just south of the river-bed which bounds it on the north, its southern boundary being the flood bank.

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(1) Second Appeal No. 1445 of 1910.

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As regards the second contention (b) this is not mentioned in the three grounds of the memorandum of Second Appeal. It is clear from the Munsif's judgment that the plaint land was not contended to be surrounded on all sides by the Cauvery river but only on one side of it. The contention there was that the high level ground south of the sandy bed of the river but north of the flood bank and called the padugai must also be treated as part of the river-bed. See paragraph 6 of the Munsif's judgment. The contention that the plaint land was bounded on both sides by the river was advanced at the hearing of this appeal before us on the basis of the rather obscure language used by the District Judge in the first sentence of his judgment, where he says that "the suit relates to padugai or island in the Cauvery." The plaint land may be loosely called an island because though the Cauvery river is only on the northern side of it there is a small irrigation channel called the *Elantha Voithalai* channel running south of it close to the flood bank. Padugai land in the Trichinopoly and Tanjore taluks means land on the lower-level bank breadth of the river between the edge of the sandy stream bed and the high flood-level bank. It is known as padugai poramboke, padugai waste, padugai punjah, padugai garden or merely padugai, while the sandy river-bed is known as the Neerodi; very occasionally the high island made of alluvial deposits formed by two branches of a river dividing and rejoining within a few yards distance might be called padugai and such land if of small area may no doubt be treated as part of the river-bed poramboke and may not be ordinary poramboke waste. The plaint land is not of such a character. The only remaining question for disposal is whether the plaint land as ordinary padugai land is waste poramboke or must be treated as river-bed poramboke. The contention of the Government that not only the sandy river-bed but also the higher level padugai waste up to the flood bank is part of the river-bed poramboke was unhesitatingly rejected by the learned District Judge who has had also long experience as a revenue officer. As he says, "the flood bank is an artificial construction not proved to exist in its present position at the time when the (inam) register was prepared and is liable to be shifted according to the requirements of the river conservancy." Further, Exhibits V, VI and VIII which are reports submitted by revenue officers,

negative the defendant's contention on this point. In Exhibit V, it is said: "The inamdars will have to improve *their own padugais* within their limits" and padugais are described as padugai waste. In Exhibit VI it is said, "the karnam of Kadiakurichi states that padugai land in his village is shown in the accounts as waste *and quit-rent on the taram assessment of the land at As. 6 per acre is included in the quit-rent collected from the inamdar.*" If padugai was river-bed, how could the quit-rent be charged or any *taram* assessment calculated as imposed upon it? In Exhibit VIII in describing the boundaries of several padugais, they are described as south of the Cauvery. If the padugai is part of the Cauvery river-bed it cannot be described as south of the Cauvery. Exhibit F prepared in 1877 in accordance with the inam preliminary statement prepared before 1864 shows the plaint land as poramboke immemorial tharisu waste padugai. Poramboke No. 8 in Exhibit F is described as the Cauvery Neerodi north of the plaint padugai, while the Elanda Voithalai channel is stated to be situated south of this padugai. The Revenue Inspector examined as the ninth witness for the Government says, "there was a padugai between the flood bank and the Cauvery." This is almost conclusive to show that the padugai is not part of the Cauvery river-bed but it is the alluvial strip of land between the flood bank and the Cauvery river-bed. This strip of land is, of course, distinctly higher in level than the sandy river-bed, though lower in level than the flood bank and can never be mistaken for the river-bed itself. We have no hesitation therefore in finding that the limits of the Cauvery river-bed poramboke are the limits of the sandy *neerodi* river-bed and that the padugai rising up from the river-bed and up to the flood bank is not part of the river-bed; and, if it has been lying waste, is included in those poramboke lands which, even according to the decision in *Narayanasami* v. *Kanniappa*(1) must pass to the grantee under the expression "besides poramboke" in the inam title-deed. The result is that the Second Appeal is dismissed with costs.

SECRETARY OF STATE v. RAGHUNATHA TATHACHARIAR.

SADASIVA AYYAR, J.

SANKARAN NAIR, J.—I concur. The land in suit lies between the flood bank and the sandy bed of the stream. I have no doubt it is included in the Government grant. I express no

SANKARAN NAIR, J.

(1) Second Appeal No. 1445 of 1910.

SECRETARY OF STATE v. RAGHUNATHA TATHACHARIAR — SANKARAN NAIR, J.

opinion on the question whether the inamdar is entitled to any portion of the bed proper or the sandy river-bed. We fix a period of two months for the satisfaction of the decree for costs under section 82, Civil Procedure Code.

APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Sundara Ayyar.

1912. December 4 and 12.

KOLATHU AYYAR (SEVENTH DEFENDANT), APPELLANT,

v.

RANGA VADHYAR AND ANOTHER (PLAINTIFF AND SIXTH DEFENDANT), RESPONDENTS.*

Pre-emption, contract of—Promisor, heirs of, not enforceable against—Perpetuities, rule of, applicable to Hindu law also.

A contract of pre-emption (with reference to lands), which fixes no time within which the agreement to convey is to be performed cannot be enforced against the heirs of the person who entered into the contract as it infringes the rule against perpetuities The rule of perpetuities is applicable to Hindus also.

Nobin Chandra Soot v *Nabab Ali Sarkar* (1900) 5 C.W N., 343, followed

SECOND APPEAL against the decree of F. D. P. OLDFIELD, the District Judge of Tinnevelly, in Appeal No. 430 of 1910, preferred against the decree of N. SUNDARAM AYYAR, the District Munsif of Ambasamudram, in Original Suit No. 16 of 1910.

The facts are given in the judgment.

The seventh defendant filed this Second Appeal.

T. R. Ramachandra Ayyar and *T. R. Krishnaswami Ayyar* for the appellant.

T. Rangachariar for the first respondent.

BENSON AND SUNDARA AYYAR, JJ.

SUNDARA AYYAR, J.—The only question of law which it is necessary to decide in this case is whether a contract of pre-emption can be enforced against the heirs of the person who entered into the contract and, if so, whether the rule against perpetuities may be relied on as rendering the contract invalid as against the heirs. The agreement in this case was that the

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* Second Appeal No. 1949 of 1911.

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covenantor Ammaippen Ammal in the event of selling the property in question "should sell it to Appa Vathiar wagaira on receiving the value stated and if any building should be erected thereon, the cost thereof; but in case they do not desire it she could sell it away to others according to her pleasure." The suit for the enforcement of the agreement was instituted against the heirs of the covenantor. Both the lower courts decided that the agreement was enforceable against the defendants.

The first question is whether the agreement is enforceable against the heirs of the covenantor. *Nobin Chandra Soot* v. *Nabab Ali Sarkar*(1) is an authority in favour of the appellant. That judgment is in accordance with *Stocker* v. *Dean*(2). Sir JOHN ROMILLY, M.R., observed as follows:—"The words are, 'in case Deborah Setchfield should wish to sell' . . . It is manifest they anticipated that something was to be done by Deborah Setchfield, personally, when this contract was to be carried into effect, and this limits the right to the case of her wishing to sell in her lifetime. This is the natural import of the words, and it would be a strained construction of the contract to say that it applied to such a state of things as the present." An unconditional contract to sell would no doubt ordinarily be enforceable against the heirs of the covenantor as if he had said, "I and my heirs shall convey"; but the question is, can an agreement in the words, "I promise to convey to you if I sell the land" be held to bind the heirs as if the promisor said, "I promise that I or my heirs shall convey to you if I or they sell"? In other words, Is an agreement to convey enforceable when the option to sell is exercised by the heirs when the document says, "If I sell"? It seems to us that there is much reason in the view that such a contract is not enforceable against the heirs. But we do not consider it necessary to rest our decision on this ground. We are of opinion that if no time is fixed within which the agreement to convey is to be performed the contract must be held to be invalid as infringing the rule against perpetuities. This is undoubtedly the rule which has been laid down in England. A mere personal contract cannot be questioned on the ground that it is obnoxious to the rule. But a contract which gives the promisee an executory interest in land is as much liable to the

(1) (1900) 5 C.W.N., 343. (2) (1852) 51 E.R., 730.

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objection as a grant of the land itself, because the promisee obtains by virtue of the contract an equitable right in the land. See *London and South Western Railway Company* v. *Gomm*(1), which dissented from *Gilberton* v. *Richards*(2) and *Birmingham Canal Company* v. *Cartwright*(3). See also *Edwards* v. *Edwards*(4). The doctrine was applied in this country by the Calcutta High Court in *Nobin Chandra Soot* v. *Nabab Ali Sarkar*(5). In *Haris Paik* v. *Jahuruddi Gazi*(6) MACLEAN, C.J., and BANERJEE, J., held that an agreement of pre-emption could be enforced against a purchaser with notice from the promiser. According to the report of the arguments the objection that the agreement infringed the rules against perpetuities was submitted to the Court, but the only point decided by the learned Judges was that the agreement was not unenforceable against a purchaser with notice. In *Ramasami Pattar* v. *Chinnan Asari*(7), BHASHYAM AYYANGAR, J., expressed the opinion that the rule against perpetuities was applicable to an agreement of pre-emption; but it was not necessary to decide the question and the learned Judge abstained from expressing a final opinion on it as it was not argued at the Bar.

It is contended by the learned vakil for the first respondent that the English rule should not be applied in this country as the Indian law does not recognise equitable estates except in the case of trusts. Although it is true that according to the Indian law there are not two classes of estates, legal and equitable, there is no substantial difference in the law to be applied to the case as the benefit of an equitable estate is in substance given to a person in whose favour a promise to convey lands has been made. The Specific Relief Act lays down that an agreement for the sale of land may be specifically enforced against any person claiming under the vendor's title arising subsequently to the contract except a *bonâ fide* purchaser for value without notice (section 27). The Indian Trusts Act also lays down that a transferee taking with notice of a prior contract in favour of another must hold the right obtained under his transfer as a trustee for the previous promisee (section 91). In effect, therefore, one who has

(1) (1882) 20 Ch. D., 562
(2) (1859) 4 H. & N., 277
(3) (1879) 11 Ch. D., 421.
(4) (1909) A.C., 275
(5) (1900) 5 C.W.N., 343.
(6) (1897) 2 C.W.N., 575.
(7) (1901) I.L.R., 24 Mad., 449 at p. 467.

obtained a promise for the conveyance of land has a substantial interest in it, although according to the decision of this Court, he cannot set it up in defence to a suit by a person who has obtained a subsequent transfer; he is bound to enforce his rights by a suit for specific performance—*Kurri Veerareddi* v. *Kurri Bapireddi*(1). Section 14 of the Transfer of Property Act, which makes the rule against perpetuities applicable in this country does not apply to merely contractual rights. But there is, in our opinion, no reason why the principle should not be applied to contractual rights entitling a person to the conveyance of land and giving him a substantial interest in it in the sense we have indicated above. There is no reason for supposing that the Hindu law encourages the perpetual tying up of landed property any more than the English law does. Possibly, as pointed out by BHASHYAM AYYANGAR, J., in *Ramasami Pattar* v. *Chinnan Asari*(2), the Indian law is even stricter than the English law, as it does not, according to the decided cases, recognise transfers in favour of unborn persons as valid.

South Eastern Railway v. *Associated Portland Cement Manufacturers* (1900), *Limited*(3) was cited on behalf of the first respondent. But that case merely decided that the contract could be enforced against the promisor himself during his lifetime, although no time might have been fixed for the purpose. The same view was held in *Kalimaddin Bhaya* v. *Reazuddin Ahmed*(4). This does not affect the applicability of the rule when it is sought to enforce the contract against the heirs of the covenantor. If a man promises that he and his heirs will convey, the promise may be enforced, according to these cases against himself, *i.e.*, the promise may be treated as divisible so as to make it enforceable against him, though it may not be enforceable against the heirs. We are of opinion that the view taken in *Nobin Chandra Soot* v. *Nabab Ali Sirkar*(5) that the rule should be applied, so far as the heirs of the covenantor are concerned, is sound. The same view was taken by MARKBY, J., in *Sreemutty Tripoora Soondaree* v. *Juggur Nath Dutt*(6). The appeal therefore must succeed. We reverse the decrees of the Courts below and dismiss the suit with costs throughout.

(1) (1906) I.L.R., 29 Mad., 336 (F.B.).
(2) (1901) I.L.R., 24 Mad., 449.
(3) (1910) 1 Ch., 12.
(4) (1909) 10 C.L.J., 626.
(5) (1900) 5 C.W.N., 343.
(6) (1875) 24 W.R., 321.

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obtained a promise for the conveyance of land has a substantial interest in it, although according to the decision of this Court, he cannot set it up in defence to a suit by a person who has obtained a subsequent transfer; he is bound to enforce his rights by a suit for specific performance—*Kurri Veerareddi* v. *Kurri Bapireddi*(1). Section 14 of the Transfer of Property Act, which makes the rule against perpetuities applicable in this country does not apply to merely contractual rights. But there is, in our opinion, no reason why the principle should not be applied to contractual rights entitling a person to the conveyance of land and giving him a substantial interest in it in the sense we have indicated above. There is no reason for supposing that the Hindu law encourages the perpetual tying up of landed property any more than the English law does. Possibly, as pointed out by BHASHYAM AYYANGAR, J., in *Ramasami Pattar* v. *Chinnan Asari*(2), the Indian law is even stricter than the English law, as it does not, according to the decided cases, recognise transfers in favour of unborn persons as valid.

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article 44 in the scheme of the Act, the unsoundness of the contention becomes apparent. The fallacy of the argument consists in treating the article as if it stood by itself and there were no other provisions of the Act applicable to the case to which that article applies. A suit by a minor to set aside a sale by his guardian and a suit to recover possession of the property so sold from the vendee is regarded as standing substantially on the same footing so far as the applicability of article 44 is concerned and as one to which in the first place not only is this article applicable but also article 144 and section 28 of the Limitation Act. This has been so held by the Privy Council *Gnanasambanda Pandara Sannadhi* v. *Velu Pandaram*(1) and the reasons for it are obvious. Suppose a case in which the plaintiff attained majority within less than nine years from the date of the alienation, could it then be said that if he did not sue for three years after attaining majority his suit would be barred and he would not be allowed 12 years from the date of alienation! Clearly not. It is well established that the Limitation Act does not deprive persons under disability of any advantages which other persons have under the provisions of the Act, but on the other hand the Act makes certain concessions in their favour because of the disability (see Mitra on Limitation, 4th Edition, pages 295, 315—7 and 696) Section 28 also applies, as it is only after 12 years of adverse possession against the minor by the alienee but not less, even if the three years after attainment of majority expired within 12 years from the commencement of adverse possession, that the rights of the minor would be extinguished. Then if we read article 44 along with article 144 and section 28 the result clearly is that article 44 must be understood as extending in the case of suit of a particular class by minors—the period of limitation provided for in article 144, the general residuary article, to three years after cessation of the disability. In other words the running of time is suspended in such cases so long as minority lasts and that after cessation of his minority the plaintiff shall have three years from such date or 12 years from the commencement of adverse possession whichever period is the longest. Now let us see what relation does article 44 bear to sections 7 and 8. It is a well established rule of construction of the Limitation Act that the

(1) (1900) I.L.R., 23 Mad., 271 at p. 279 (P.C.).

sections in the body of the Act govern and control the application of the articles in the two schedules except so far as the language of a particular article clearly precludes the application of any such section. If the proper meaning and scope of article 44 be what I have stated it is exactly what section 7 lays down; only the latter lays down the rule generally for all forms of disability, and in all descriptions of suits while the former enunciates the rule only in one form of disability, *viz.*, minority and for one class of suits, *viz.*, suits to set aside sales by guardians. So far article 44 is but a mere illustration of section 7. It has however been held that section 7 applies to suits where there is one plaintiff and he is under disability, or where there are more than one plaintiff and all of them are under disability, but not to suits by a number of plaintiffs only some of whom are under disability [see *Seshan* v. *Rajagopala*(1) *Vigneswara* v. *Bapayya*(2) and *Ahinsa Bibi* v. *Abdul Khader Sahib*(3)]. Suits of the latter class are dealt with by section 8 which lays down in what cases of joint claimants and creditors the running of time shall be suspended as provided for by section 7 and when there shall be no such suspension. Article 44 applies to suits by several plaintiffs, but is confined to cases of minority and where the object of the suit is to set aside sales by a guardian. Section 8 therefore covers all the cases to which article 44 would apply when the plaintiffs could be said to be joint creditors or joint claimants.

Then as I have shown, article 44 really enacts that in the suits to which it applies the running of time would be suspended during minority, and the first part of section 8 lays down that the running of time shall not be suspended in certain cases. If the present is one of those cases the fact that article 44 applies to it would not, having regard to its scope, exclude it from the operation of section 8.

This brings me to the next branch of the argument in support of the appeal. This point is covered by authority. I am not prepared to hold a different view. It is laid down in *Vigneswara* v. *Bapayya*(2) in *Ahinsa Bibi* v. *Abdul Khader Sahib*(3), and in *Surju Prasad Singh* v. *Khwahish Ali*(4) that the co-parceners

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(1) (1890) I.L.R., 13 Mad., 236. (2) (1893) I.L.R., 16 Mad., 436.
(3) (1902) I.L.R., 25 Mad., 26 at pp. 39 and 40. (4) (1882) I.L.R., 4 All., 512.

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of a Hindu family seeking to recover the family property from an alienee are joint claimants within the meaning of section 8, and it certainly can make no difference in the application of section 8 whether the alienation was made by a guardian as here or by the manager. The two plaintiffs are brothers and it is found that the elder of the two on attainment of majority would presumably be the manager. He became therefore competent more than three years before the institution of the suit to give a valid charge within the meaning of section 28 as laid down in the cases just referred to. The suit has therefore been rightly held to be time-barred. The appeal is dismissed with costs.

SUNDARA AYYAR, J.

SUNDARA AYYAR, J.—This Letters Patent Appeal is against the decision of KRISHNASWAMI AYYAR, J., in a second appeal which that learned Judge dismissed under Order XLI, rule 11. The original suit was instituted by two brothers who are members of an undivided Hindu family to recover certain properties which were alienated by their mother and natural guardian in favour of the defendants by several sale deeds in the year 1895. The plaintiffs impeached the sales as not justified by any necessity and therefore not binding on them. Both the District Munsif and the Subordinate Judge on appeal dismissed the suit on the ground that it was barred by limitation. At the time of the presentation of the plaint the first plaintiff was 23 years old and the second plaintiff 20 years, so that the suit was instituted more than 3 years after the attainment of age by the first plaintiff, but less than 3 years after the second plaintiff became a major. The Lower Courts proceeded on the view that section 8 of the Limitation Act XV of 1877, which was in force at the time, was applicable to the case, and that the plaintiffs were joint claimants, one of whom, the first plaintiff, was competent to give a discharge for the claim when he became major without the concurrence of the other claimant. Before KRISHNASWAMI AYYAR, J., it seems to have been admitted that according to Act XV of 1877 the suit would be barred. On appeal it was stated that this admission on a point of law was wrongly made and it was contended that the suit was really not barred by limitation with respect to either of the plaintiffs; and that even if the first plaintiff should be held to have been barred, the second plaintiff was entitled to a decree for possession of the whole property and not merely a half share, thereof. As the alienations were made

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in 1895, more than 12 years had expired since then before the suit was instituted.

It is therefore unnecessary to consider whether article 44 of schedule II to the Limitation Act would be applicable to a suit by a Hindu for the recovery of immoveable property alienated by his guardian during his minority—a point the decision of which is in my opinion attended with considerable difficulty on account of the conflicting decisions bearing on it. There can, however, be no doubt that the plaintiffs are entitled to rely on article 44 when 12 years have elapsed from the date of the alienations. The question therefore is whether on a correct construction of that article the suit is barred either wholly or partially and whether section 8 of the Act is applicable to cases governed by article 44 The lower Courts have, as already stated, assumed that section 8 would be applicable to the case.

Mr. Varadachariar's argument at the hearing of the appeal was that that section has no application to a case governed by article 44. In this contention I think he is right. The article in question fixes a certain date as the time from which the period of limitation begins to run. In a suit "by a ward who has attained majority to set aside a sale by his guardian," that date is "when the ward attains majority." In my opinion each ward has 3 years from the time when he attains majority to set aside a sale by his guardian. The right of guardianship with respect to each minor is distinct from, though similar to, the right with respect to the other. The guardian has distinct rights and liabilities as guardian of each of the minors. His right of guardianship cannot be said to be joint with regard to the two plaintiffs. In making the alienations in question the guardian must be taken to have exercised the power of alienations over the rights of the first plaintiff and of the second plaintiff separately though a single deed of transfer was employed for the alienation of the rights of both the plaintiffs. The juristic act was different with regard to each of the plaintiffs though the guardian did not sell the undivided share of each of the plaintiffs separately but sold their joint shares by a single instrument. It must be remembered that the right to recover the property flows from the right to set aside the alienation and the nature of the rights of the plaintiffs must be determined therefore with reference to the character of the act of alienation. Each of

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the plaintiffs therefore has a distinct cause of action. Is section 8 of the Act applicable to such a case? I am of opinion that it is not. I think that section 8 which deals with suits by joint claimants must be held inapplicable to the case for the simple reason that the claim cannot be regarded as joint for the reasons just mentioned. The alienation of the right of each being juristically a different act, the claim to set it aside must also be regarded as distinct in law, notwithstanding that the two plaintiffs are members of a joint Hindu family. It is desirable to refer to the language of both sections 7 and 8 of Act XV of 1877.

Section 7 is in these terms (I quote only the portion necessary for the case) "where a person entitled to institute a suit or make an application is at the time from which the period of limitation is to be reckoned a minor or insane or an idiot, he may institute the suit or make the application within the same *period after the disability has ceased as would otherwise have* been allowed from the period prescribed therefor in the third column of the schedule. Section 8 enacts as follows:— "Where one of several joint creditors or claimants is under any such disability and when a discharge can be given without the concurrence of such person, time will run against them all; but where no such discharge can be given time will not run as against any of them until one of them becomes capable of giving such discharge without the concurrence of the others. It is clear to my mind that the expression in section 7, "the same period after the disability has ceased as would otherwise have been allowed from the time prescribed in the third column of *the first schedule,*" *clearly shows that the section contemplates* only cases where, but for the disability which is made the ground of protection to the person suffering therefrom, time would run against the litigant before the cessation of the disability, and that the section would be inapplicable where, apart from the disability, time would not run against the plaintiff under the third column of the schedule before the disability ceases. The fact that the time fixed as the starting point in article 44 is in reality the same as the time of the cessation of the disability is, in my opinion, immaterial in deciding whether section 7 would apply, inasmuch as to make that section applicable, it is necessary that time should run from a previous date under the

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schedule but for the protection afforded by the section on the ground of disability. It is not open to me, I think, to overcome this argument by regarding article 44 as a mere illustration to section 7 or as a surplusage. Proceeding to section 8 I am unable to avoid the conclusion that it is applicable only to the same class of cases as section 7, that is, to cases where, it being provided by the third column of the schedule that time should run from a certain date, the starting point is postponed by reason of a disability. Stress was laid by Mr. Varadachari on the words "such" in the clause "when one of several joint creditors or claimants is under such disability: " But it seems to me that the word merely designates the disabilities referred to in section 8, viz., minority, insanity, or idiocy, and that the use of that word would by itself be insufficient to show that the section is applicable only to cases where a period otherwise fixed in the schedule is postponed by reason of a disability. But there are, I think, other words in the section which support his argument. It says: "When a discharge can be given without the concurrence of such person time will run against them all, but where no such discharge can be given time will not run as against any of them until one of them becomes capable of giving such discharge without the concurrence of the others." Take the expression in the latter clause "until one of them becomes capable of giving such discharge." Does this not indicate that it applies to a case where time would otherwise be running previously on account of the starting point fixed in the third column of the schedule? The same is the import in my opinion of the expression "when a discharge can be given without the concurrence of such person." It assumes that time would be running with reference to the starting point fixed in the schedule but for disability against the person not capable of giving a discharge. Both clauses assume that time would be running with reference to the starting point in the schedule, against some persons not capable of giving a discharge either when time so begins to run or at a later time. Both sections 7 and 8 are, I venture to think, inapplicable except where the starting point fixed by the schedule is postponed by reason of disability. But as the Legislature, whatever the reason might be, has fixed for the present suit as the starting point of imitation, the time when minority ceases, it is impossible to regard it as a

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case where the starting point fixed by the schedule is postponed by section 7 or as one in which a person under disability is incapable of giving a discharge himself, when limitation would be running against him with respect to the starting point in the schedule and (he) could be sought to be bound by the discharge given by another person capable of giving it on his behalf also.

For this reason also I am of opinion that section 8 is inapplicable to the case, apart from the fact that as already pointed out, the cause of action of each of the plaintiffs is distinct in the case. On the view taken by me I must hold that the right of action of the first plaintiff was barred at the date of suit and that the second plaintiff's right of action was not barred.

What, then, as to the relief to which the second plaintiff is entitled? It was contended on his behalf that though the first plaintiff's right of action might be barred the defendants would not acquire the ownership in his share of the family property, as an undivided member of a Hindu family cannot be set to own till partition any distinct share in the property of the joint family, and that the second plaintiff is therefore entitled to recover the whole property; and the decision in *Ramanna* v. *Venkata*(1) is relied on as supporting the argument. I am of opinion that this contention is not entitled to prevail. When the first plaintiff's right to sue became barred his right and ownership whatever they were became extinguished according to section 28 of the Limitation Act. The nature of the rights of undivided members of a Hindu family has recently received much elucidation in the decisions of this Court. It is now settled for their Presidency that an alienee for consideration from a Hindu co-parcener obtains title to the alienor's share in the property transferred as it stood on the date of the alienation. See *Ayyagari Venkataramayya* v. *Ayyagari Ramayya*(2), and the observations of BASHYAM AYYANGAR, J., therein; *Ramachandram Pillai* v. *Kolumuthu Chetti*(3). It is there conclusively shown that the proposition that a co-parcener has no right to any definite share of the property is only true in the sense that his share is liable to fluctuations of increase and decrease as between him and his co-parceners and also in the sense that until

(1) (1888) I.L.R., 11 Mad., 246. (2) (1902) I.L.R., 25 Mad., 690.
(3) (1911) 21 M.L.J., 246.

partition he cannot claim as between himself and his co-parceners, exclusive title to any particular item of the family estate or any definite share of the income of the estate. It is also demonstrated that the decisions of the Judicial Committee of the Privy Council make it impossible to hold any other view than that an alienee's position is quite different from what that of the alienor would be in the absence of a transfer by him. The sale by the guardian of the first plaintiff's right must be taken therefore to have conveyed his half share to the alienees. I abstain from discussing the question further on principle, as I regard the proposition as established beyond dispute so far as this Court is concerned. Therefore when the first plaintiff's right to sue the alienees became barred, his right to one-half of the properties became extinguished and was transferred to the alienees.

Ramanna v. *Venkata*(1) has really no application to this case. There a Hindu father made a gift of some family property and his son sued subsequently to recover it. A previous suit by the father to set aside the sale and get back the property had failed. COLLINS, C.J., and MUTHUSWAMI AYYAR, J., held that the son was entitled to recover the whole. The sale not being for consideration, the father's share did not vest in the alienee but the whole property continued to vest in the joint family notwithstanding the gift. The family was undivided at the time of the suit. The son was therefore held entitled to recover the whole property as part of the family estate. In *Gopalsvami* v. *Peraswami Thevar* (2) the eldest only of three sons instituted a suit to recover certain property belonging to the family claiming it as his own. Subsequently his co-parceners, in order to prevent the dismissal of the suit, purported to renounce their shares in the property. The plaintiff's exclusive right was negatived at the trial. The plaintiff in the course of the suit asked to be allowed to amend his plaint so as to enable him to recover his share of the property; but his request was refused. It was held that the co-parceners' petitions were ineffectual and that the plaintiff's application for amendment was rightly refused. SHEPHARD, J., made an observation which is pertinent to this case. He said: "The question then is, whether the

(1) (1888) I.L.R., 11 Mad., 246. (2) (1896) 6 M.L.J., 27.

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Judge was wrong in not allowing the plaintiff so to amend as to make him to recover his share of the property. He could not recover more, for any right which his brothers ever had was extinguished by limitation in March 1891 and even if it subsisted such right has not been validly transferred to the plaintiff." He then went on to observe that "when one of the joint creditors has omitted to join the others at the outset and the latter have been joined only after expiration of the period allowed by the law as to limitation, it has been held that the suit must be dismissed altogether and not that the original plaintiff should be allowed to recover his share of the money due. *Kalidas Kevaldos* v. *Nathu Bhagavan* (1) and *Imamuddin* v. *Liladhar* (2). It seems to me that the same principle must be applied in the present case and that as when the plaintiff's application was made it was too late for his brothers to assert their right by suit, the Judge was right in refusing the amendment applied for." BEST, J., was of opinion that the cases referred to by SHEPHARD, J., were actions on contracts and were not applicable to a suit for property against trespassers. He was of opinion that the amendment asked for should have been allowed. I agree respectfully with the proposition that the shares of those who did not sue in time would be extinguished when the period of limitation expired. In *Manzur Ali* v. *Mahamud Unnissa* (3), STANLEY and BANNERJEE, JJ., held that when some of several co-obligees of a money bond were barred by limitation from recovering their shares, their rights would become extinguished by limitation and the remaining co-obligee who was a minor was saved from limitation by minority to his share of the money. The principle that should govern the case is that where the remedy alone is barred and the right of the co-sharer who is barred is not extinguished, his undivided coparceners would be entitled to recover the whole. See *Govindram* v. *Tatia* (4). *Ananto Kishore Dass Bakshi* v. *Anando Kishore Bose* (5).

As I am of opinion that the first plaintiff's right was extinguished when he attained the age of 21, I must hold that the

(1) (1883) I.L.R., 7 Bom., 217. (2) (1892) I.L.R., 14 All., 524.
(3) (1905) I.L.R., 25 All., 155. (4) (1896) I.L.R., 20 Bom., 383.
(5) (1887) I.L.R., 14 Calc., 50.

second plaintiff is entitled to recover only a half share of the properties alienated.

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I would reverse the decrees of both the lower Courts and the judgment of KRISHNASWAMI AYYAR, J., in so far as the second plaintiff is concerned and remand the suit to the first Court for the disposal of his claim on the merits I would also direct that in the circumstances of the case each party should bear his own costs throughout up to date.

RAHIM, J.

RAHIM, J.—My learned brother holds a different view. The appeal is dismissed with costs.

As the Judges (RAHIM and SUNDARA AYYAR, JJ.) differed, Letters Patent Appeal No. 114 of 1911 was filed by the plaintiffs which was disposed of by a Bench of three Judges constituted as above.

T. R. Venkatarama Sastriar for the appellants.

S. Srinivasa Ayyangar for the respondents.

WHITE, C.J.

WHITE, C.J.—I have read the judgment of SANKARAN NAIR, J., and I agree.

The Letters Patent Appeal is dismissed with costs.

SANKARAN NAIR, J

SANKARAN NAIR, J.—The properties in suit belonged to the plaintiffs' father who died in 1895. The plaintiffs are his only heirs and during their minority their mother as their guardian sold the properties to the defendants. The plaintiffs now seek to recover possession of them. The instrument of sale was executed in November 1895. At the date of the institution of the suit the first plaintiff was 23 years old and the second plaintiff 20. The plaintiffs' case is that the suit is not barred by limitation as it was brought within three years of the second plaintiff's attaining majority and as the first plaintiff could not give a valid discharge without the concurrence of the second plaintiff. Both the lower Courts dismissed the suit on the ground that it was barred by limitation following the decision in *Vigneswara* v. *Bapayya*(1). The learned Judges of this Court who heard the case differed in their opinion, ABDUR RAHIM, J., holding that the suit was barred and SUNDARA AYYAR, J., holding that the suit was barred so far as the first plaintiff was concerned and that it was not barred with reference

(1) (1893) I.L.R., 16 Mad., 436.

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and that it is the ward alone who has got the power to repudiate or ratify it on his attaining majority. *Muthukumara Chetty* v. *Anthony Udayan*(1) decided on the 27th September 1912.

But there are cases binding on us (and it is so admitted in that same judgment), which show that even before the ward attains majority, a suit could be brought on behalf of the minor by a next friend to set aside the alienation made by the guardian, though, in such a case, the Court has got large powers of interference with the course of the litigation. If such a suit is *bonâ fide* brought on behalf of the ward during his minority and decided against him, it is clear that the ward's power of repudiating the transaction on attaining his majority is extinguished, and he cannot be allowed, within three years of his attaining majority to bring a second suit to set aside the same alienation. This seems to indicate that the cause of action to set aside the alienation arises at once, though the ward has three years to sue after he attains his majority, *provided that a previous suit had not been* bonâ fide *instituted during his minority on that same cause of action on his behalf and* bonâ fide *conducted to its natural termination.*

After mature consideration, I think that just as the minor would be barred from bringing a suit to set aside his guardian's alienation after he attains majority by reason of the decision in a previous suit brought and conducted *bonâ fide* by a next friend during his minority, for the same relief, so he would be barred if the manager under the Hindu Law, of the family property in which the minor had an interest and which interest was conveyed away by the minor's guardian during his minority, confirms the said alienation on behalf of the family on proper grounds before the minor attains majority and releases for the family benefit the minor's right to question the alienation. It seems difficult to hold that there are two separate causes of action given to the ward to set aside an alienation of the ward's property by the guardian—

(*a*) One cause of action which arises at once to be enforced by a suit brought by anybody acting as his next friend during the whole course of his minority, and

(*b*) another distinct cause of action which arises as soon as he attains majority (and only on the date of his so attaining

(1) Second Appeals Nos. 892 to 912 of 1911.

majority and not before) to be enforced by a suit brought by himself as a major.

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If there is only one cause of action which arises on the date of alienation, it seems to follow (as ABDUR RAHIM, J., has remarked) that article 44 is only an illustration of the principle embodied in section 7; and though a succeeding guardian (in the strict sense of the word) cannot ratify or repudiate the alienation of a prior guardian during the minority of the ward so as to bind the minor (according to the ruling already quoted in *Muthukumara Chetty* v. *Anthony Udayan*(1) decided by SUNDARA AYYAR, J., and myself), the adult managing member of the minor's undivided family can deal with the family property for proper purposes and he (the managing member) has a right as soon as he attains majority and becomes such managing member to bring a suit *as such manager* for recovery of, not only his share of the alienated property but of the whole of the alienated family property, including his minor brother's share *treating the whole as family property* improperly alienated during the minority of himself and his younger brother. If such a suit became barred through his (the managing member's) not bringing it within three years of his attaining majority and of thus attaining the position of managing member, his younger brother cannot [see *Ahinsa Bibi* v. *Abdul Khader Sahib*(2)], be allowed to contend that he had a separate cause of action to recover his share alone, apart from the cause of action of the adult managing member to recover the whole. For the above reasons and after some hesitation I agree that this Letters Patent Appeal ought to be dismissed with costs.

(1) Second Appeals Nos. 892 to 912 of 1911.
(2) (1902) I.L.R., 25 Mad., 26.

APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Sundara Ayyar.

1913. December 19 and January 9.

VENKATARAMANA IYER BY AGENT T RAMA RAO (PETITIONER—PLAINTIFF), APPELLANT,

v.

N. G. NARASINGA RAO (DEFENDANT), RESPONDENT.*

Attorney, power of, construction of—General power of attorney, what is a—Civil Procedure Code (Act XIV of 1882), sec. 37 (a)—(Indian) Stamp Act (II of 1889), sch. I, art. 48—Single transaction, meaning of.

A power of attorney which authorises a person to do all things and take all the steps necessary to complete the execution of a decree is a general power of attorney within the meaning of section 37 (*a*) of the Civil Procedure Code (Act XIV of 1882).

Semble: The expression "a single transaction," in the Stamp Act (II of 1889), schedule I, article 48, applies to a single act or acts so related to each other as to form one judicial transaction.

CIVIL MISCELLANEOUS SECOND APPEAL against the decree of H. MOBERLY, the District Judge of South Arcot, in Appeal No. 259 of 1910, preferred against the order of M. R. NARAYANASWAMI AYYAR, the District Munsif of Tirukkoyilur, in Execution Petition No. 3 in E.P.R. No. 402 of 1910, in Original Suit No. 442 of 1906 on the file of P. NARAYANACHARIYAR, the District Munsif of Namakkal.

On the 16th of March 1907, Venkata Rao, an agent of the holder of a decree, dated 16th June, 1906, applied for the execution of the decree. The execution-application was dismissed on the 30th of April, 1907, for default of appearance of the applicant, but after notice to the judgment-debtor.

On the 8th of March, 1910, Rama Rao, another agent of the decree-holder, filed the present application for execution which was dismissed by the Court of First Instance as barred by limitation; on appeal the lower Appellate Court confirmed the above order of dismissal holding that the previous application by Venkata Rao was not one in accordance with law, inasmuch as his power of attorney was not a general one within the meaning of

* Appeal Against Appellate Order No. 56 of 1911.

section 37 (*a*) of the Code of 1882. Venkata Rao's power of attorney was stamped with a stamp of one rupee, and ran as follows:—

"As the decree-amount, costs and further interest, etc., "have not been collected under the decree got by me . . . "and as I have appointed you as my agent to sign and take "such proceedings as filing execution-petitions, razinama "petitions, etc., in Court, to grant receipt and receive the "money if collected, under the aforesaid decree and to take "all proceedings taken by you in connection . . . thereto "on my behalf, I accept all proceedings taken by you in connec-"tion therewith as being taken by me . . ."

The decree-holder appealed.

T. Narasimha Ayyangar for the appellant.

The respondent was not represented.

BENSON AND SUNDARA AYYAR, JJ.

JUDGMENT.—The only question for decision in this Second Appeal is whether the application for execution is barred by limitation. It was presented within three years of a prior application which was signed and put into Court on behalf of the decree-holder by an agent. The question is whether that application was one presented in accordance with law, and that depends on whether the agent who presented it was one holding a general power of attorney and as such, authorised to sign and present the petition under section 37 of the repealed Code of Civil Procedure or one having only a special power of attorney and not qualified to do so.

The power of attorney under which the agent acted authorised him to present applications for execution, to realise the amount due to the decree-holder, to compromise the claim and to do all other acts relating to the execution of the decree. The lower Courts have held that the agent had only a special power of attorney. In taking this view they were much influenced by the fact that the power of attorney was executed on a stamp paper of the value of one rupee only. It need hardly be stated that the legal nature of a document must be determined by its contents and not by the value of the stamp duty paid for it. If a stamp of the appropriate value was not used for executing a document, that is a matter to be dealt with according to the rules provided for such cases. The expression "general power of attorney" has not been defined either in the Civil Procedrue Code or in any

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BENSON AND SUNDARA AYYAR, JJ.

other statute; nor has any case been brought to our notice which could be regarded as giving an authoritative decision on the question. But according to the view accepted by eminent lawyers, there can be no doubt that the agent in this case had a general power of attorney. Story, in his work on Agency, section 17, says: "A special agency properly exists, when there is a delegation of authority to do a single act; a general agency properly exists where there is a delegation to do all acts connected with a particular trade, business or employment. Thus, a person, who is authorised by his principal to execute a particular deed, or to sign a particular contract, or to purchase a particular parcel or merchandise, is a special agent. But a person, who is authorised by his principal to execute all deeds, sign all contracts, or purchase all goods required in a particular trade, business, or employment, is a general agent in that particular trade, business, or employment." In Parsons on Contracts, volume 1, page 39, a special agent is defined as one authorised "to do one or two particular things" and a general agent as one authorised "to transact all his principal's business or his business of a particular kind." In Halsbury's Laws of England, volume 1, page 152, the following explanation is given:—"A special agent is one who has authority to act for some special occasion or purpose which is not within the ordinary course of his business or profession. A general agent is one who has authority arising out of and in the ordinary course of his business or profession to do some act or acts on behalf of his principal in relation thereto or one who is authorised to act on behalf of the principal generally in transactions of a particular kind or incident to a particular business." The statement in the Encyclopædia of Laws of England, first edition, volume 10, page 263, is similar. In Bouvier's Law Dictionary, volume 2, page 714, the statement is "a general power authorises an agent to act generally in behalf of the principal: a special power is one limited to particular act." See also Amercian Cyclopædia of Laws and Procedure, volume 31, page 1338. *Smith* v. *M'Guere*(1) and *Brady* v. *Todd*(2). The same conception seems to underlie article 48 of schedule I to the Indian Stamp Act. Clauses (*a*), (*b* and (*c*) relate to an authority for procuring the registration of a document or documents

(1) (1858) 3 H. & N., 551. (2) (1861) 9 C.B. (N.S.), 592.

or admitting the execution of one or more of such documents for registration or for acting in any other manner " in a single transaction." Clause (d) which apparently relates to a general power of attorney speaks of authority to not more than five persons "to act jointly and severally in more than one transaction or generally"; clause (e) relates to a similar authority to more than five but not more than ten persons. The expression " a single transaction " seems to us to apply, either to a single act or to acts so related to each other as to form one judicial transaction such as all the acts necessary to perfect a mortgage or a sale of a particular property. This interpretation would be in accordance with the distinction between a special agent and a general agent as set forth in the authorities already referred to.

According to this view, when a power of attorney authorises a person to do all things and take all steps which may be necessary to complete the execution of a decree, it must, in our opinion, be regarded as a general power of attorney. The acts to be done might be of various and numerous kinds and could not be regarded as constituting one legal transaction. We may observe that the question has become immaterial under the new Code of Civil Procedure. Order III, rule 2 in describing the kind of agent by whom appearances, applications and acts may be made or done on behalf of a party uses wider language, viz., " persons holding powers of attorney, authorising them to make and do such appearances, applications and acts on behalf of such parties. "

We hold that the previous application for execution in this case was presented by an agent having a general power of attorney, and that it was therefore one presented in accordance with law. It follows that the present application is not barred by limitation. We reverse the orders of the Courts below and remand the application to the Court of First Instance to be disposed of afresh according to law. The costs in this and in the lower Appellate Court will abide the result.

APPELLATE CIVIL.

Before Sir Charles Arnold White, Kt., Chief Justice, and Mr. Justice Tyabji.

1913. January 10, 16 and 31.

P VARAHASWAMI (DEFENDANT), APPELLANT,

v.

M. RAMACHANDRA RAJU (PLAINTIFF), RESPONDENT.*

Transfer of Property Act (IV of 1882), sec 6 (e)—Right to sue, assignment of—Tort—Assignment of claim founded on, validity of—Damages for negligence of agent—Assignment of claim for.

A mere right to recover damages for the negligence of an agent in failing to collect rents cannot be transferred. Such a right is nothing more than a right to sue within the meaning of section 6 (e) of the Transfer of Property Act (IV of 1882).

If such a claim is founded on tort, it is not assignable.

Dawson v. *Great Northern and City Railway* (1905) 1 K.B., 260 and *Defries* v. *Milne* (1913) 1 Ch., 98, referred to

Held also, that the claim if founded on contract was unassignable in law, being transferred after breach.

Abu Mahomed v *S C Chunder* (1909) I.L R, 36 Calc., 345, applied.

Shyam Chand Koondoo v *The Land Mortgage Bank of India* (1883) I.L R., 9 Calc, 695, referred to.

Madho Das v. *Ramji Patak* (1894) I L.R., 16 All., 286, distinguished.

Dawson v *Great Northern and City Railway* (1905) 1 K.B., 260, explained.

SECOND APPEAL against the decree of T. GOPALAKRISHNA PILLAI, the Subordinate Judge of Kistna at Ellore, in Appeal No. 231 of 1910, presented against the decree of T. VARADARAJULU NAYUDU, the District Munsif of Tanuku, in Original Suit No. 674 of 1906.

The facts, so far as they are material for the purpose of this report, appear from the judgment of the learned Chief Justice.

S. Srinivasa Ayyangar and *K. Bhashyam Ayyangar* for the appellant.

P. Nagabhushanam for the respondent.

WHITE, C.J.

WHITE, C.J.—The plaintiff sues on a sale deed executed to him by the heir of one Krishna Boyamma. Krishna Boyamma died in February 1905 and the deed is dated February 24, 1905.

* Second Appeal No. 1341 of 1911

The deed recites that on Krishna Boyamma's death certain lands described as a *mokhasa inam* as well as all the current dues and arrears recoverable on these lands and all kinds of rights relating to the *mokhasa* passed to the heir. By the deed, the heir sold to the plaintiff all the said lands and the current and past dues, etc., and all other rights as per details given in the deed. The "details" referred to are the rights incidental to the ownership of the land and "all kinds of rights relating to the *mokhasa*."

The deed does not refer to the defendant.

The plaint alleges, and this is not denied that the defendant was Krishna Boyamma's manager.

The plaintiff claims delivery of documents and accounts relating to the estate kept by the defendant's father and alleged to be in the possession of the defendant and Rs. 1,000, the cash balance in the defendant's hands, Rs. 300 as damages for the defendant's failure to deliver the documents and accounts referred to above.

In his written statement the defendant denies that either he or his father had any documents in his possession. He says that he only managed for 18 months, that he only collected Rs. 100 and odd, and that this was not sufficient to pay his salary and that of his peon.

We are dealing with this case in Second Appeal and are bound by findings of fact.

Neither of the Courts below finds that the defendant had money in hand for which he was liable to account to the plaintiff. The Munsif finds (paragraph No. 21) that the defendant might have collected about Rs. 400 in fasli 1313 and about Rs. 300 in fasli 1314, and that if he had not collected those sums he could with ordinary diligence have done so. The Subordinate Judge's finding is to the same effect.

The plaintiff does not allege that the defendant was his agent, and he says that his cause of action arose on the date of Krishna Boyamma's sale to him, and on the date two months later of the final demand for an account and delivery of the documents.

The Courts below would appear to have found the defendant liable for Rs. 700 not as the "balance remaining according to chitta," which is the plaintiff's claim, but as damages for negligence in not collecting the rents which he might have

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collected for faslis 1313 and 1314. In the first place, this is not the plaintiff's claim; and in the second place, assuming that the evidence establishes that before she died Krishna Boyamma could have recovered damages from the defendant on the ground of negligence as her agent (and I do not feel altogether satisfied as to this), it seems to me that Krishna Boyamma's claim (assuming the deed purported to transfer it to the plaintiff) was nothing more than a right to recover damages, a mere right to sue within the meaning of section 6 (e) of the Transfer of Property Act, and could not be transferred.

If Krishna Boyamma's claim was founded on tort, it is well settled that the claim is not assignable. See the judgment of the Court of Appeal in *Dawson* v. *Great Northern and City Railway*(1) and the recent judgment of the Court of Appeal in *Defries* v. *Milne*(2). If the claim was founded on contract the transfer was after breach (if any) and I think the principle of the decision in *Abu Mahomed* v. *S. C. Chunder*(3), applies. See too, *Shyam Chand Koondoo* v. *The Land Mortgage Bank of India*(4). *Madho Das* v. *Ramji Patak*(5), is clearly distinguishable. There, for the purposes of the question whether the right was assignable, it was assumed that when the assignment was made, there was money in the hands of the agent which was money had and received to the use of his principal. Here there is no such finding. In the unreported case to which we have been referred [*Ramiah Chettiar* v. *Rukmani Ammal*(6)] the right assigned was a right to recover moneys which had been omitted from an account, not unliquidated damages.

There are some observations in *Dawson* v. *Great Northern and City Railway*(1), which to a certain extent support the contention of the respondents. But I think the case is clearly distinguishable. There it was held by the Court of Appeal reversing WRIGHT, J., that a claim under section 68 of the Lands Clauses Consolidation Act, 1845, to compensation in respect of an interest in lands, injuriously affected not a claim to damages for a wrongful act but a claim to compensation for damage which might be done in the lawful exercise of statutory powers, and that such a claim was capable of assignment." The Court of

(1) (1905) 1 K.B., 260 at p. 275.
(2) (1913) 1 Ch., 98.
(3) (1909) I.L.R., 36 Calc., 345.
(4) (1883) I.L.R., 9 Calc., 695.
(5) (1894) I.L.R., 16 All., 286.
(6) Appeal No. 71 of 1910.

Appeal point out that the claim of the plaintiff was not in the nature of damages for a wrong. The claim there arose from an act which was not unlawful but was done lawfully in the exercise of statutory powers. It is pointed out that the compensation might be regarded as the price payable for the exercise of the statutory powers and was property.

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I am of opinion that the Krishna Boyamma's claim against her agent based on his failure to collect the rents was not assignable.

I do not think we ought, in Second Appeal, to interfere with the finding of the Courts below as to the non-delivery of the accounts or with the damages awarded in respect thereof.

I would modify the decree of the lower Appellate Court by giving the plaintiff a decree for Rs. 300 only and direct that the parties should pay and receive proportionate costs throughout.

TYABJI, J.—I concur. TYABJI, J.

APPELLATE CIVIL.

Before Sir Charles Arnold White, Kt., Chief Justice, and Mr. Justice Tyabji.

P. VENKIAH (DEFENDANT), APPELLANT,

1913. February 4 and 7.

v.

S KRISHNAMOORTHY (MINOR BY HIS NEXT FRIEND S LAKSHMIKANTHAM) (PLAINTIFF), RESPONDENT.*

Deed, construction of—"Easements, advantages, appurtenances, held and enjoyed as part of the house," meaning of.

Words in a sale-deed of a house, such as the following:—"All my right, title and interest in and to the said house and ground with all the buildings, fixtures, rights, easements, advantages and appurtenances whatsoever to the said house and ground appertaining or with the same held and enjoyed or reputed as part thereof or appurtenant thereto," are wide enough to convey not only actually existing easements but also (*a*) a way formerly enjoyed as an easement, but as to which the right had been suspended by unity of possession of the two tenements, and (*b*) a way, which during the unity of possession, had never existed as an easement but was in fact used for the convenience of one of the tenements afterwards severed.

Chunder Coomar Mookerji v. *Koylash Chunder Sett* (1881) I.L.R., 7 Calc., 665, followed.

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* City Civil Court Appeal No. 12 of 1912.

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If on a disposition of property belonging to the same owner, tenements are severed and conveyed to different people either simultaneously or at different times but as part of one transaction, *quasi-easements*, apparent and continuous and necessary for the enjoyment of the several tenements as they were enjoyed at the time of severance, will pass to the grantees thereof. In either case the conveyances are regarded in equity as one transaction, and each grantee who takes his tenement with the knowledge that the other tenements are being conveyed at the same time or will be conveyed as part of the same transaction, is deemed, in the absence of express stipulation, to take the land burdened or benefited, as the case may be, by the qualities which the previous owner had a right to attach to the different portions of his property before severance.

APPEAL against the decree of C. V. KUMARASWAMI SASTRIYAR, the City Civil Judge, in Original Suit No. 446 of 1910.

The facts of the case appear from the judgment of WHITE, C.J.

T. Ethiraja Mudaliyar for the appellant.

V. V. Srinivasa Ayyangar for the respondent.

WHITE, C.J.

WHITE, C.J.—In this case, the plaintiff claimed, among other things, that he was entitled as owner of a house, which we will call No. 67, to the use of a passage to a latrine in his house, the passage in question forming part of a house which we will call No. 11—the property of the defendant. The two houses are practically adjacent. The learned Judge granted him this declaration. The Judge was of opinion that he was not entitled to the right which he claimed under section 13 of the Easements Act or on the ground that it amounted to an easement of necessity. But, on a construction of the sale-deed in favour of the plaintiff, the Judge held that the words of the conveyance were wide enough to pass by express grant the right over the defendant's passage. Now, before considering the law, it is desirable to state the precise findings with reference to this passage and the use of it. The learned Judge found on the evidence that the plaintiff's scavenger always entered the latrine of the plaintiff's house through the passage which now forms part of the house of the defendant. On the question of ownership of the properties, he found that one Narasimhulu Nayudu was the owner of the two houses till the 23rd January 1893, that on that date the plaintiff's house passed to Canthum & Co., and that both the properties again became subject to the same ownership on the 17th August 1894 when the defendant's house was sold to Canthum & Co, who had already

purchased the house No. 67. It comes to this, according to the finding, that there was unity of possession in one owner of the two houses till January 1893, and severance between January 1893 to August 1894, and there was again unity of possession in one owner in August 1894. Now, this owner who had unity of possession became an insolvent, and the Official Assignee sold the two houses by auction on the 22nd April 1910. At the auction sale, the plaintiff bought No. 67, and the defendant bought No. 11. As regards the order in which the properties were sold, we are told that the plaintiff bought before the defendant. Formal conveyances were given by the Official Assignee. The defendant got his sale deed on the 3rd August 1910, and the plaintiff got his sale deed on the 21st September 1910.

For the purposes of the question we have to decide, it seems to me immaterial that house No. 67 was knocked down first at the sale by auction whilst the formal conveyance to the defendant was prior in time to the formal conveyance to the plaintiff, because I think, for the purposes of the question we have to decide, we must take it that the transaction was one and that we must deal with the case on the footing that the two conveyances were simultaneous. The law is stated in Mr. Peacock's book, page 385, "It is now settled law that when on a disposition of property belonging to the same owner, the severed tenements are conveyed either simultaneously or at different times but as part of one transaction, *quasi-easements*, apparent and continuous and necessary for the enjoyment of the severed tenements as they were enjoyed at the time of severance, will pass by presumption of law to the grantees thereof. In either case the conveyances are regarded in equity as one transaction, and each grantee who takes his tenement with the knowledge that the other tenements are being conveyed at the same time or will be conveyed as part of the same transaction, is deemed, in the absence of express stipulation, to take the land burdened or benefited, as the case may be, by the qualities which the previous owner had a right to attach to the different portions of his property before severance." Then, later on, on page 387, he says "It is important to note that the rule applies not only in the case of simultaneous conveyances as in *Allen* v. *Taylor*(1), but also in the

(1) (1880) 16 Ch D, 355

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case of conveyances executed at different times but as part and parcel of the same transaction. In such cases the conveyances are founded upon transactions which, in contemplation of equity, are equivalent to conveyances between the parties at the time the transactions were entered into, such transactions being entered into at the same moment of time and as part and parcel of one transaction." On behalf of the appellant, it was contended that the right which the plaintiff claims in this case is not a *quasi-easement*, apparent and continuous. It seems to me it is a *quasi-easement*. Whether it is a *quasi-easement* apparent and continuous, I do not think it is necessary to consider, because I think the principle laid down there with regard to *quasi-easements* apparent and continuous is applicable to the right which the plaintiff claims in this case.

With regard to this question of one transaction, I may refer to the terms of the conveyances. Both the conveyances recite, the sale by the Official Assignee was made under an order of Court and both the conveyances, I think I am right in saying—certainly the conveyance to the plaintiff—recite the sale at court-auction to the vendees in pursuance of which a formal deed of conveyance was afterwards executed. Now, turning to the words of the conveyance itself, what the sale deed to the plaintiff purports to convey is "all his rights, title, interest and claim whatsoever and of the said adjudicated insolvents and of the said mortgagee in and to the said house and ground No. 67, Govindappa Naick Street, Peddunaickenpettah, Madras, more further described in the schedule hereunder written together with all the buildings, fixtures, rights, easements, advantages and appurtenances whatsoever to the said house and ground appertaining or with the same held and enjoyed or reputed as part thereof or appurtenant thereto." There is no express reference to any right of way in that conveyance, whereas in the conveyance to the defendant there is reference in express terms to rights of way. It seems to me that, on the authority of *Chunder Coomar Mookerji* v. *Koylash Chunder Sett*(1), we ought to construe this conveyance to the plaintiff as wide enough to carry the right to use this particular passage for the purpose of obtaining access to the plaintiff's latrine. The words are "appurtenances whatsoever to the said house and ground appertaining or with the

(1) (1881) I.L.R., 7 Calc., 665 at pp. 670 and 671.

same held and enjoyed or reputed as part thereof or appurtenant thereto." Words, very similar if not identical, were before the Court in *Chunder Coomar Mookerji* v. *Koylash Chunder Sett*(1). WILSON, J., in dealing with the law, says: "About the law applicable to this question, there is, I think, no doubt. The words 'appurtenant' or 'belonging' will ordinarily carry only actually existing easements, and therefore will carry no right over the land of the grantor." Later on, he says: "Where further words are used, such as those in this deed, 'therewith held or used,'"—and we have these words in the deed before us, 'with the same held and enjoyed'—"the case is different. Those words will carry a way formerly enjoyed as an easement, but as to which the right has been suspended by unity of possession. . . . On the other hand, such words will not carry a way made by the owner of both properties during the unity of possession *for his own greater convenience in the use of the two* properties jointly. . . . Where again, during the unity of possession, a way, which has never existed as an easement, is in fact used for the convenience of one of the tenements afterwards severed, the authorities show that the words in question are large enough to carry it." I should be disposed to hold that the present case comes within the first proposition, "those words will carry a way formerly enjoyed as an easement, but as to which the right has been suspended by unity of possession." Whether this is so or not, I have very little doubt that the present case falls within the third proposition, "where again, during the unity of possession, a way, which has never existed as an easement, is in fact used for the convenience of one of the tenements afterwards severed, the authorities show that the words in question are large enough to carry it." Here, we have the finding that the particular way has always been used as the means of access to the plaintiff's latrine, the inference from that finding is that, during the unity of possession, the way had in fact been used for the convenience of tenement No. 67 which was afterwards severed from tenement No. 11. On behalf of the appellant, it has been pointed out that there is express reference in the instrument which was being considered by WILSON, J., to 'ways, paths, passages,' etc., and that there is

(1) (1881) I.L.R., 7 Calc., 665 at pp. 670 and 671.

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have referred above may be applicable also where the disputes are of the nature that we have to deal with in this case.

It remains to decide whether, assuming that the two conveyances formed part of one transaction and that the said principle is applicable to the present case, the terms in which the conveyance to the respondent is couched are such as to give him any right to this passage. The clause in the conveyance so far as material is as follows: "All rights, easements, advantages and appurtenances whatsoever . . . appertaining to or with the same held or enjoyed or reputed as part thereof or appurtenant thereto." Now, on the authority of the cases referred to by the learned Chief Justice, I think we should be justified in holding that the right of passage in question falls within the description of "rights, easements, advantages and appurtenances." The cases decided in England, such as the decision of CHITTY, J., in *Bayley* v. *Great Western Railway Company*(1), show the wide meaning given to such words as 'rights.' We have here, in addition, the word 'advantages.' Again, the cases referred to by WILSON, J., in *Chunder Coomar Mookerji* v. *Koylash Chunder Sett*(2) show the meaning to be given to such expressions as 'appurtenant to,' 'enjoyment of' or 'being reputed as forming part of' in deciding what easements or other rights are to be taken as having been granted under a conveyance which contains them. It seems to me, therefore, that, both when we consider the class of rights that are referred to in the conveyance in the descriptive part of the clause, and when we refer to the manner in which those rights are annexed to the premises, we have words sufficiently wide to pass the right of passage involved in this appeal. I therefore agree that this appeal should be dismissed with costs.

JUDGMENT IN MEMORANDUM OF OBJECTIONS.

WHITE, C.J.

WHITE, C.J.—As regards the drain the Judge said he was not satisfied that it existed before the purchase by the plaintiff. It is true, there was no cross-examination of the plaintiff's next friend with regard to this, and there is no specific denial of the allegation in the plaint with reference thereto; but the written statement states that the defendant does

(1) (1884) 26 Ch.D., 434 at pp. 441 and 442.
(2) (1881) I.L.R., 7 Calc., 665 at pp. 670 and 671.

not admit any of the allegations not expressly admitted. We are not satisfied the Judge was wrong as to this. Also we are not satisfied he was wrong as regards the water pipe.

The memorandum of objections is dismissed with costs.

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WHITE, C.J.

APPELLATE CIVIL

Before Mr. Justice Sankaran Nair and Mr. Justice Oldfield.

RAMASAWMY NAICKER (MINOR BY HIS MOTHER AND NEXT FRIEND CHELLAMMAL AND LEGAL REPRESENTATIVE OF THE FIRST APPELLANT), APPELLANT,

1913. January 28 and February 7.

v.

RASI NAICKER AND FOUR OTHERS (DEFENDANTS), RESPONDENTS.*

Waterflow—Agricultural lands, upper and lower, owners of—Right of upper owner to drain his water naturally on lower land—Indian Easements Act (V of 1882) sec. 7, ills (a) and (i)

An owner of upper agricultural land is entitled to let his water flow in its *natural* course without any obstruction by the owner of the lower land, and the lower owner is not entitled to raise any bund on his land which will have the effect of seriously interfering with the upper owner's cultivation.

Mahamahopadyaya Rangachariar v. *The Municipal Council of Kumbakonam* (1906) I L R., 29 Mad , 539, distinguished.

Subramanya Ayyar v. *Ramachandra Rau* (1877) I L.R., 1 Mad , 335 and *Abdul Hakim* v. *Gonesh Dutt* (1886) I.L.R , 12 Calc., 323, followed.

Sangana Reddiar v. *Perumal Reddiar* (1910) M.W.N., 545, dissented from.

SECOND APPEALS against the decrees of A. S. BALASUBRAHMANYA AYYAR, the Temporary Subordinate Judge of Tuticorin, in Appeals Nos. 986 of 1909 and 18 of 1910, preferred against the decrees of S. SUBBAYYA SASTRI, the Additional District Munsif of Tinnevelly, in Original Suits No. 3949 of 1907 and No. 117 of 1908.

The facts of the case are given in the judgment.

S. Doraiswami Ayyar for the appellant.

V. Venkatachariar and *C. S. Venkatachariar* for the respondents.

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* Second Appeals Nos. 1266 and 1267 of 1911.

RAMASAWMY v. RASI. — SANKARAN NAIR AND OLDFIELD, JJ

The judgment of the Court was delivered by

SANKARAN NAIR, J.—The plaintiff and the defendants are conterminous landholders engaged in agriculture, the former owning the upper, and the latter the lower land. The plaintiff alleges that the defendants, who are the owners of the adjacent lower land have erected a bund or wall which has the effect of preventing the water that fell on his (that is, the plaintiff's) land from flowing to the defendant's land as it has been doing from time immemorial. The Subordinate Judge was of opinion that he was bound to dismiss the plaintiff's claim in accordance with the rulings in *Mahamahopadyaya Rangachariar* v. *The Municipal Council of Kumbakonam*(1) and *Sangana Reddiar* v. *Perumal Reddiar*(2). He pointed out, however, that "these rulings are real impediments to punjah cultivation which would be impossible if the adjoining owners put up ridges and pen back water on a man's punjah. The configuration of punjahs in the country have not provided every man's punjah with an odai or water course. The right of drainage for punjah is a right of necessity. The rulings in question no doubt leave out of consideration the inconvenience pointed out above," but as he was bound to follow the decisions he dismissed the plaintiff's claim observing that the hardship, if any, is a matter for Legislature to consider and not for the courts. The right of the owner of an upper land to let his water run naturally into the adjacent lower land is a natural right. It has been recognised by this court in *Subramaniya Ayyar* v *Ramachandra Rau*(3) and in a series of decisions by the Calcutta High Court which are referred to in *Abdul Hakim* v. *Gonesh Dutt*(4). See also illustration (i) to section 7 of the Indian Easements Act. The English law on this point is stated in Kerr on Injunctions, Fourth Edition, page 195, in the following terms: "When land is so located that water naturally or in the course of ordinary agricultural operations, such as by deep ploughing, descends from the estate of the superior proprietor to the inferior estate, the owner of the latter cannot do anything to prevent the course of such water. If he builds a wall at the upper part of his estate so as to prevent the water from descending on it, whereby the land above is damaged, there

(1) (1906) I.L.R., 29 Mad., 539.
(2) (1910) M.W.N., 545.
(3) (1877) I.L.R., 1 Mad., 335.
(4) (1886) I.L.R., 12 Calc., 323.

is an actionable injury. The owner of land lying on a lower level is subject to the burden of receiving water which drains naturally or in the course of ordinary agricultural operations such as by deep ploughing, from land on a higher level. The upper proprietor may drain his land, and the proprietor below must receive the water so drained, but the upper proprietor may not, by adapting a particular system of drainage, or by introducing alterations in the mode of drainage cause the drainage water to flow on his neighbour's land in an injurious manner, or obstruct the drainage of the other lands by overloading the ancient drains with water." This is also in accordance with the civil law, "*by which it was considered that land on a lower level* owed a natural servitude to that on a higher, in respect of receiving, without claim to compensation, the water naturally flowing down to it." See *Smith* v. *Kenrick*(1).

It was argued before us on behalf of the defendant that the result of applying this principle would be to prevent the defendant from ever improving his land. It may be pointed out, however, that, if the principle is not recognised, as pointed out by the Judge, it may prevent the plaintiff from carrying on his cultivation in the usual manner. It has also to be remembered that though the principle is to be maintained it has to be prudently applied as pointed out in Kerr on Injunctions. Whether in any case the owner of the upper land has exceeded his right must be determined upon the facts of each case. The decision in *Mahamahopadyaya Rangachariar* v *The Municipal Council of Kumbakonam*(2) has no application. In that case there was no damage caused to the plaintiff, whereas the Subordinate Judge finds in this case that the bund put up by the defendant will have the effect of seriously interfering with the plaintiff's cultivation of his punja land. Moreover, in that case there was a conflict of rights The natural right of the plaintiff was in conflict with the right of the defendant (see illustration (*a*) to section 7 of the Indian Easements Act) to build on his land, which was in a town. There is no such natural right of the defendant in the present case Both the learned Judges who decided that case make special reference to this right of the owner of the lower land. We are, therefore, of opinion that that

(1) (1849) 7 C.B., 566; s.c., 137 E.R., 205. (2) (1906) I.L.R. 29 Mad., 539.

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case does not apply. *Sangana Reddiar* v. *Perumal Reddiar*(1) apparently refers to land which does not lie within the Municipality, but the learned Judges who decided it follow the ruling in *Mahamahopadyaya Rangachariar* v. *The Municipal Council of Kumbakonam*(2), without recognising the distinction to which we have adverted. We are, therefore, of opinion that the plaintiff is entitled in Second Appeal No. 1266 of 1911 to an injunction against the defendant from interfering with the exercise of his natural right. He is entitled to his costs throughout.

It was then argued before us in Second Appeal No. 1267 of 1911 that the plaintiff has erected a bund which would result in increasing the volume of water which would flow to the defendant's land. On this question the Subordinate Judge has given no finding As we have already pointed out, whether the burden has been appreciably *increased or not, is a question of fact which* must be determined in each case. It is not the law that the owner of the upper land may not interfere with the flow of water at all. But he is not entitled to do anything that will throw on the defendant's land any water which would not have naturally gone there. See the quotation *supra* from Kerr on Injunctions and *Hughes* v *Anderson*(3)

The decree of the Courts below is reversed: the Subordinate Judge will restore the appeal to his file and dispose of it in accordance with the above observations The appellant is entitled to his costs in this Court. The costs in the Lower Courts will be disposed by the final decree.*

(1) (1910) M W N, 545 (2) (1906) I.L R., 29 Mad., 539

(3) (1880) 44 Am. Rep, 147 at p. 148.

* Second Appeals Nos. 1779 and 1780 of 1911 were decided by the same Judges on the same day, following the above Second Appeals Nos. 1266 and 1267 of 1911.

APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Sundara Ayyar.

D LINGAYYA (DEFENDANT), APPELLANT,

1913. February 11.

v.

D. KANAKAMMA (PLAINTIFF), RESPONDENT.*

Hindu Law—Maintenance of widow, rate of—Possession by widow of other property yielding income—Right to get maintenance from husband's estate.

The fact that a Hindu widow is able to maintain herself out of other property is no ground for not giving her some maintenance out of her husband's estate, but it is a factor to be taken into account in determining the quantum of maintenance to be decreed to her

The right of a widow of a coparcener in a Hindu family to maintenance is an absolute right due to her membership in the family and does not depend on any necessity arising from her want of other means to support herself

Ramawati Koer v. Manjhari Koer (1906) 4 C.L J., 74, dissented from.

SECOND APPEAL against the decree of T. V. ANANTAN NAIR, the Temporary Subordinate Judge of Masulipatam, in Appeal No. 722 of 1910, preferred against the decree of S. NILAKANTAM, the Additional District Munsif of Masulipatam, in Original Suit No. 451 of 1909.

The plaintiff, a Hindu widow, instituted the suit for maintenance against the defendant, her husband's brother. Both the lower Courts found that the defendant was in possession of family property yielding about Rs. 100 a year. The plaintiff had private property out of which she could get Rs. 40 or 50 a year. The lower Courts awarded to the plaintiff Rs. 20 a year, on the ground that the plaintiff's income from her own sources of Rs. 40 or 50 was not sufficient to cover her maintenance. The defendant was the only other member of the family.

The defendant filed this Second Appeal.

V. Ramesam for *V. Ramadas* for the appellant.

P. Naghabhushanam for the respondent.

JUDGMENT.—The plaintiff, a Hindu widow, instituted the suit which has given rise to this Second Appeal for maintenance against the defendant, her husband's brother. Both the lower BENSON AND SUNDARA AYYAR, JJ.

* Second Appeal No. 1845 of 1911.

LIN AYYA v. KANAKAMMA. BENSON AND SUNDARA AYYAR, JJ.

Courts have found that the defendant is in possession of family property yielding about Rs. 100 a year. The plaintiff has private property out of which she could get Rs. 40 or 50 a year. The lower Courts have awarded to the plaintiff Rs. 20 a year. Mr. Ramesam for appellant contends in Second Appeal that the income of the family property being small, and plaintiff having independent means of maintenance is not entitled to get maintenance out of her deceased husband's estate. His argument is that a widow who is able to maintain herself out of other property has no right to claim out of her husband's estate anything for that purpose. In our opinion this view cannot be supported. It is based on an entirely wrong conception of the right sought to be enforced. The wives of the male coparceners in a Hindu family are not entitled to equal shares with the males in the family estate, nor do they take their husbands' shares by representation on their death, but in place thereof they are entitled to a portion of their estate for their enjoyment during their lifetime sufficient to maintain them in comfort according to the means of the family. This is an absolute right due to their membership in the family and does not depend on their necessity arising from their want of other means to support themselves. At a partition made by the husband during his lifetime between his sons his wife was at one time entitled to an equal share with his sons. Mitakshara, chapters 1 and 2, slokas 8 and 9. According to the Dayabhaga the husband's undivided share descends to his widow in its entirety. According to Katyayana the widow may claim either a portion of the estate or an allowance for her maintenance. The same view is maintained by Vrihaspati—See G. Sirkar Sastri's Viramitrodaya, page 173. Mr. Ramesam, relies on *Ramavati Koer* v. *Manjhari Koer*(1) in support of his contention. That case no doubt is in his favour. But with all deference, we are unable to concur in the view taken there. The authorities cited in the judgment do not support the view. The passage cited from Mr. Mayne's work shows only that the private means of a widow may be taken into account in determining the quantum of maintenance to be decreed to her. The decision of the Privy Council in *Narayanarao Ramchandra Pant* v. *Ramabai*(2) has

(1) (1906) 4 C.L.J., 74. (2) (1879) 6 I.A., 114, s.c. I.L.R., 3 Bom., 415.

really no bearing on the point. Mr. Sirkar Sastri's view in his book on Hindu Law is not to the effect that the right to maintenance can be extinguished by the possession of other property by the widow. We must hold that the plaintiff is entitled to some maintenance out of her husband's estate. We cannot say that the amount awarded is excessive. We dismiss the Second Appeal with costs.

LINGAYYA v. KANAKAMMA.

BENSON AND SUNDARA AYYAR, JJ.

APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Sundara Ayyar.

SRI RAJAGOPALASWAMI TEMPLE THROUGH ITS TRUSTEE RAMA AYYANGAR (PLAINTIFF), APPELLANT,

1913 February 11 and 12

v.

JAGANNADHA PANDIAJIAR (DEFENDANT), RESPONDENT.*

Landlord and Tenant—Inam Register—Object of mentioning the tax payable for the land—Inam authorities, duties of—Right of melvaramdar to trees in case of lands which were topes at the Inam Settlement.

In cases where the holding of a tenant was at the time of the Inam Settlement and has subsequently been, a tope consisting of trees the melvaramdar has a right to a portion of the value of the trees and the ryot is not entitled to cut them down for his sole appropriation, the portion due to the melvaramdar being determinable according to the evidence

The incidents of the tenure of a tenant under an Inamdar are governed by the law applicable to landlord and tenant and not by the Inam patta or the Inam Register whose object in mentioning the tax payable by the tenant was only to enable the Inam authorities to fix the quit-rent payable to Government by the Inamdar.

Bodda Godderppa v. The Maharaja of Vizianagaram (1907) I L R, 30 Mad., 155, *Rangayya Appa Rao v Kadiyala Ratnam* (1890) I L R, 13 Mad., 249, *Apparau v. Narasanna* (1892) I.L R., 15 Mad, 47, *Narayana Ayyangar v. Orr* (1903) I.L R., 26 Mad., 252, and *Kakarla Abbayya v. Raja Venkata Pappayya Rao* (1906) I.L R, 29 Mad, 24, distinguished.

SECOND APPEAL against the decree of F. D. P. OLDFIELD, the District Judge of Tinnevelly, in Appeal No. 378 of 1910, preferred

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* Second Appeal No. 1827 of 1911.

SRI RAJAGOPALASWAMI TEMPLE v. JAGANNADHA PANDIAJIAR.

against the decree of K. S. RAMASWAMI SASTRI, the District Munsif of Tinnevelly, in Original Suit No. 311 of 1908.

The facts of the case appear from the judgment.

M. A. Thirunarayanachariar for the appellant.

M. D. Devadoss for the respondent.

BENSON AND SUNDARA AYYAR, JJ.

JUDGMENT.—The plaintiff, the trustee of a temple, instituted the suit on behalf of the temple, as the inamdar of a tope to recover half the value of the trees in the inam holding cut and appropriated by the defendant, the occupancy ryot of the holding. The plaintiff claimed to be the melvaramdar of the tope and alleged that both by virtue of his right as melvaramdar and according to usage he was entitled to half of the value of dead trees and trees cut by the ryot. The defendant pleaded that the plaintiff was entitled only to a sum of Rs. 11–11–6 a year and the road cess payable to Government out of the produce of the tope and that he himself was the absolute proprietor subject to the liability to the payment of the amount. The District Munsif and the learned District Judge have both found that the melvaram right in the land belonged to the plaintiff and that his right is not that of one entitled only to a benefit to arise out of land belonging to the defendant as proprietor. The Munsif also held that the evidence showed that the plaintiff's claim to half the value of the trees was supported by the evidence of usage adduced by the plaintiff and gave him a decree for Rs. 430. The District Judge held that as melvaramdar the plaintiff was not entitled to any portion of the value of the trees in the holding and that he also failed to establish any legal custom justifying his claim. He accordingly dismissed the suit. Mr. Devadoss for the respondent has repeated before us the contention that the defendant is the absolute proprietor of the holding subject only to the liability to pay Rs. 11–11–6 a year and the road cess to the plaintiff, but we agree with the Lower Courts that the plaintiff is the melvaramdar of the holding. The inam register and the inam patta show that the plaintiff's title to the land as inamdar was recognized by Government The register no doubt mentions Rs. 11–11–6 as the tree tax payable for the land and Rs. 16–4–9 as the net assessment. The object of mentioning the tax was to fix the quit rent payable to Government by the inamdar. Subject to the payment of the quit rent, the plaintiff was recognized as the melvaramdar. The relations between the melvaramdar and kudivaramdar

were governed by the law applicable to landlord and tenant and it was not the intention of the inam authorities, nor was it within the scope of their duties, to define those relations. The rights of the melvaramdar and kudivaramdar must therefore be determined according to the provisions of the Rent Recovery Act and other Rules of law applicable to them.

There is probably some conflict of opinion in the decisions of this Court with respect to the melvaramdar's right to the trees in the land comprised in a ryot's holding, *cf. Boddu Goddeppa* v. *The Maharaja of Vizianagram*(1), *Rangayya Appa Rau* v. *Kadiyala Ratnam*(2), and *Apparau* v. *Narasanna*(3), with *Narayana Ayyangar* v. *Orr*(4), and *Kakarla Abbayya* v. *Raja Venkata Papayya Rao*(5), but all these decisions relate to cases where the holding consists of land occupied mainly for cultivating wet or dry crops, and the question for decision was whether the melvaramdar's right would extend in any measure to the trees in the holding in the occupancy, and under the cultivation of the ryot But in the present case, the holding was at the time of the inam settlement, and has subsequently been a tope consisting of trees. In such a case there can be no doubt that the melvaramdar has a right to the trees and the ryot cannot be entitled to cut them down for his sole appropriation. The cases referred to above have therefore no application, and the learned District Judge was in our opinion in error in extending them to this case. The plaintiff must be held to be entitled to a portion of the value of the trees cut by the defendant The Judge hold that the evidence as to usage was not sufficient to entitle the plaintiff to half the value on the basis of a customary right apart from his legal right as melvaramdar. He recorded no finding on the question whether, in the view that the plaintiff is entitled to a portion of the value of the trees as melvaramdar, the evidence showed that he should receive half the value. For this purpose it is not necessary for the plaintiff to establish the requisites of a customary right not otherwise sanctioned by law. It would be enough to adduce evidence sufficient in the opinion of the Court to show that the claim in question was understood by the parties to be one of the incidents of the relationship between them. The

(1) (1907) I L R, 30 Mad, 155 (2) (1890) I L R., 13 Mad, 249.
(3) (1892) I.L.R., 15 Mad, 47. (4) (1903) I.L R, 26 Mad., 252.
(5) (1906) I.L.R, 29 Mad., 24

SRI RAJAGOPALASWAMI TEMPLE v. JAGANNADHA PANDIAJIAR, — BENSON AND SUNDARA AYYAR, JJ.

District Munsif's finding in the affirmative is amply supported by the evidence set out in his judgment including the evidence of Defence Witness No. 2, the defendant's own *kanakkan*. We accept his finding on the question. In the result we reverse the decree of the District Judge and restore that of the District Munsif with costs here and in the Lower Appellate Court.

APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Sundara Ayyar.

1913. February 13.

M. VENCATARAJU (PLAINTIFF), APPELLANT,

v.

M. RAMANAMMA (FIRST DEFENDANT), RESPONDENT.*

Res judicata—*Civil Procedure Code (Act V of 1908), sec. 11—Judgment or findings on two issues, one of which alone was sufficient—Both findings,* res judicata.

Where a judgment is based on the findings on two issues, the findings on both the issues will operate as *res judicata*, though the finding on only one would be sufficient to sustain the judgment.

Krishna Behari Roy v. *Brojeswari Chowdranee* (1875) 2 I.A., 283 and *Venkayya* v. *Narasamma* (1888) I.L.R., 11 Mad., 204, followed.

APPEAL against the order of A. RAGHUNATHA RAO PANTULU, the Subordinate Judge of Cocanada, in Appeal No. 100 of 1911, preferred against the decree of K. APPAJI RAO, the District Munsif of Peddapur, in Original Suit No. 411 of 1909.

The plaintiff's suit is for the recovery of two items of property, and the material issues framed were whether the two sale-deeds for these lands and for a third item in the name of the first defendant's father and the first defendant respectively were taken *benami* for his (the plaintiff's) benefit. These issues were decided in a former suit (between the parties) instituted by the present defendant against the plaintiff for the recovery of the third item included in the sale-deeds. The decision in the previous suit in favour of the present plaintiff proceeded both on the ground that the plaintiff was the real beneficial owner of all the three items included in the sale-deeds and on the ground that he had acquired a title by prescription.

* Appeal Against Order No. 98 of 1912.

VENCATARAJU v. RAMANAMMA.

In this suit also the plaintiff asserted his two titles, viz., that he was the real owner and that he was in adverse possession. The first defendant pleaded that the properties belonged to her and that the plaintiff did not enjoy the properties adversely to her. An issue was raised, viz., whether these pleas of the first defendant were not *res judicata*. The District Munsif holding that they were *res judicata* allowed the suit as prayed for without allowing any evidence to be adduced on the two pleas abovementioned. On appeal the Subordinate Judge reversed the decree and remanded the suit for disposal according to law holding that the question of title was not *res judicata* for two reasons—(*a*) that it was not material in the previous case to have decided the question of title to the properties as there was a finding on the other issue, viz., that the plaintiff in the present suit who was in the former suit defendant was in adverse possession of the property then in dispute and (*b*) that the finding on the question of adverse possession in the previous suit was the first in logical sequence.

The plaintiff thereupon preferred this appeal.

P. Narayanamurti for the appellant.

P. Nagabushanam for the respondent.

BENSON AND SUNDARA AYYAR, JJ.

JUDGMENT.—The Subordinate Judge's view on the question of *res judicata* cannot be supported. The plaintiff's suit is for the recovery of two items of property and the material issues framed are whether the two sale-deeds for these lands and for a third item in the name of the first defendant's father and the first defendant respectively were taken *benami* for his benefit. These issues were decided in a former suit between the parties instituted by the present defendant against the plaintiff for the recovery of the third item included in the sale-deeds. The decision in the previous suit proceeded both on the ground that the plaintiff was the real beneficial owner of all the three items included in the sale-deeds and on the ground that he had acquired a title by prescription. The same title was asserted by both the parties in the previous suit to all the three items and the issue was decided in the present plaintiff's favour. The Subordinate Judge holds that where a judgment is based on the findings of a Court on two issues, one of which would be sufficient to sustain the judgment, the finding on one only of the two issues can be *res judicata* and that that one is to be settled by finding out which

SRI RAJAGOPALASWAMI TEMPLE v. JAGANNADHA PANDIAJIAR. —— BENSON AND SUNDARA AYYAR, JJ.

District Munsif's finding in the affirmative is amply supported by the evidence set out in his judgment including the evidence of Defence Witness No. 2, the defendant's own *kanakkan*. We accept his finding on the question. In the result we reverse the decree of the District Judge and restore that of the District Munsif with costs here and in the Lower Appellate Court.

APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Sundara Ayyar.

1913. February 13

M. VENCATARAJU (PLAINTIFF), APPELLANT,

v.

M. RAMANAMMA (FIRST DEFENDANT), RESPONDENT.*

Res judicata—*Civil Procedure Code (Act V of 1908), sec. 11—Judgment or findings on two issues, one of which alone was sufficient—Both findings,* res judicata.

Where a judgment is based on the findings on two issues, the findings on both the issues will operate as *res judicata,* though the finding on only one would be sufficient to sustain the judgment.

Krishna Behari Roy v. *Brojeswari Choudranee* (1875) 2 I.A., 283 and *Venkayya* v. *Narasamma* (1888) I.L.R., 11 Mad., 204, followed.

APPEAL against the order of A. RAGHUNATHA RAO PANTULU, the Subordinate Judge of Cocanada, in Appeal No. 100 of 1911, preferred against the decree of K. APPAJI RAO, the District Munsif of Peddapur, in Original Suit No. 411 of 1909.

The plaintiff's suit is for the recovery of two items of property, and the material issues framed were whether the two sale-deeds for these lands and for a third item in the name of the first defendant's father and the first defendant respectively were taken *benami* for his (the plaintiff's) benefit. These issues were decided in a former suit (between the parties) instituted by the present defendant against the plaintiff for the recovery of the third item included in the sale-deeds. The decision in the previous suit in favour of the present plaintiff proceeded both on the ground that the plaintiff was the real beneficial owner of all the three items included in the sale-deeds and on the ground that he had acquired a title by prescription.

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* Appeal Against Order No. 98 of 1912.

VENCATARAJU v. RAMANAMMA.

In this suit also the plaintiff asserted his two titles, viz., that he was the real owner and that he was in adverse possession. The first defendant pleaded that the properties belonged to her and that the plaintiff did not enjoy the properties adversely to her. An issue was raised, viz., whether these pleas of the first defendant were not *res judicata*. The District Munsif holding that they were *res judicata* allowed the suit as prayed for without allowing any evidence to be adduced on the two pleas abovementioned. On appeal the Subordinate Judge reversed the decree and remanded the suit for disposal according to law holding that the question of title was not *res judicata* for two reasons—(*a*) that it was not material in the previous case to have decided the question of title to the properties as there was a finding on the other issue, viz., that the plaintiff in the present suit who was in the former suit defendant was in adverse possession of the property then in dispute and (*b*) that the finding on the question of adverse possession in the previous suit was the first in logical sequence.

The plaintiff thereupon preferred this appeal.

P. Narayanamurti for the appellant.

P. Nagabushanam for the respondent.

BENSON AND SUNDARA AYYAR, JJ.

JUDGMENT.—The Subordinate Judge's view on the question of *res judicata* cannot be supported. The plaintiff's suit is for the recovery of two items of property and the material issues framed are whether the two sale-deeds for these lands and for a third item in the name of the first defendant's father and the first defendant respectively were taken *benami* for his benefit. These issues were decided in a former suit between the parties instituted by the present defendant against the plaintiff for the recovery of the third item included in the sale-deeds. The decision in the previous suit proceeded both on the ground that the plaintiff was the real beneficial owner of all the three items included in the sale-deeds and on the ground that he had acquired a title by prescription. The same title was asserted by both the parties in the previous suit to all the three items and the issue was decided in the present plaintiff's favour. The Subordinate Judge holds that where a judgment is based on the findings of a Court on two issues, one of which would be sufficient to sustain the judgment, the finding on one only of the two issues can be *res judicata* and that that one is to be settled by finding out which

VENCATARAJU v. RAMANAMMA.

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of the two is logically prior to the other. This is in our opinion an entirely unsound view. See *Krishna Behari Roy* v. *Brojeswari Chowdranee*(1), *Venkayya* v. *Narasamma*(2) and *Bayyan Naidu* v. *Suryanarayana*(3), per SUNDARA AYYAR, J. We may also observe that it would often be impossible to apply the rule of logical priority. We do not consider it necessary to refer to certain decisions of the other High Courts which are contended to be in the respondent's favour. We reverse the Lower Appellate Court's order and remand the appeal for fresh disposal. The Subordinate Judge may, if he thinks fit, call for fresh findings on any of the other questions in the case or direct any evidence to be admitted which was wrongly rejected by the District Munsif. The costs of this appeal should be provided for in the revised decree.

APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Sundara Ayyar.

1912. February 13.

SRI RAJAH PRAKASARAYANIM GARU AND TWO OTHERS (LEGAL REPRESENTATIVES OF THE PLAINTIFF), APPELLANTS,

v.

Y. P. VENKATA RAO (SECOND DEFENDANT), RESPONDENT.*

Evidence—Evidence taken by a Court without jurisdiction—Effect of consent to treat it as evidence, if relevant.

Consent or want of objection to the reception of evidence which is irrelevant cannot make the evidence relevant, but consent or want of objection to the wrong manner in which relevant evidence should be brought on record of the suit disentitles parties from objecting to such evidence in a court of appeal.

Miller v. *Madho Das* (1897) I L R., 19 All., 76 at p. 92 (P.C.), followed.

The fact that it was evidence taken previously by a Court which was held to have had no jurisdiction to try the case and take the evidence and that it was consented to be treated as evidence does not affect the validity of the consent.

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(1) (1875) 2 I.A., 283. (2) (1888) I.L.R., 11 Mad., 204.
(3) (1912) 23 M.L.J., 543 at p. 564.

* Appeal Against Order No. 168 of 1912.

Quære.—Whether in a case falling under section 33 of the Evidence Act, evidence recorded by a Court can be regarded as not given in a judicial proceeding on the mere ground that the decree of the Court was subsequently set aside for defect of jurisdiction?

SRI RAJAH PRAKASARAYANIM GARU v. VENKATA RAO.

APPEAL against the order of Diwan Bahadur M. O. PARTHASARATHI AYYANGAR, the District Judge of Godavari at Rajahmundry, in Appeal No. 162 of 1909 preferred against the decree of V. SUBRAHMANYAM PANTULU, the Subordinate Judge of Cocanada, in Original Suit No. 50 of 1907.

The facts of the case are fully given in the judgment.

P. Narayanamurti and *P. Somasundaram* for the appellants.

V. Ramesam for the respondent.

The judgment of the Court was delivered by

BENSON AND SUNDARA AYYAR, JJ.

SUNDARA AYYAR, J.—This is an appeal against the order of the District Court of Rajahmundry reversing a decree of the Subordinate Judge of Cocanada and remanding the suit for fresh trial. The Subordinate Judge had disposed of the suit on the merits but solely on evidence recorded by the District Munsif's Court of Peddapur. The suit was first instituted and tried in the latter Court, but its decree was reversed on appeal on the ground that the pecuniary value of the suit was beyond the jurisdiction of a Munsif's Court and the plaint was returned for presentation to the proper Court. The plaint was subsequently represented in the Subordinate Court. The parties presented a statement at the trial of the suit consenting to the evidence recorded at the former trial by the Peddapur Munsif's Court being treated as evidence in the suit and dispensing with any further evidence. The District Judge held that notwithstanding the consent of the parties the Subordinate Court's procedure in acting on the evidence recorded in the Peddapur Court was illegal. He was of opinion that, as all the evidence in the case was illegally admitted, the suit had virtually not been tried on the merits and must therefore be remanded for fresh trial. The contention of the appellants in this appeal is that the evidence in question was not illegally admitted by the Subordinate Judge, and that the order of remand cannot therefore be upheld. It is argued that as there was no objection raised on the admission of the evidence on the ground of irrelevancy [as to which see *Miller* v. *Madho Das*(1)], and as the objection raised in the

(1) (1897) I.L.R., 19 All., 76 at p. 92 (P.C.).

SRI RAJAH PRAKASARAYANIM GARU v. VENKATA RAO.

BENSON AND SUNDARA AYYAR, JJ.

Court of Appeal related purely to the manner in which relevant evidence should be brought on the record of the suit, the consent of both parties disentitled the respondent to any objection to it in the Appellate Court. The District Judge while apparently of opinion that irregularities in the mode of taking evidence might be cured by the consent of parties, considered that this principle should not apply to the present case, as the Munsif of Peddapur, who recorded the evidence, had no jurisdiction to try the suit, and the proceedings before him were pronounced to be *coram non judice*. On appeal we are of opinion that the distinction drawn by him is not well-founded. In *Maharajah Jagutendur Banwaree* v. *Din Dyal Chatterjee*(1), and *Lakshman* v. *Amrit*(2), statements made by witnesses in a former suit were held to be admissible with the consent of parties. In *Syed Mahomed* v. *Romdah Khanum*(3), deposition not taken before the Judge who completed the trial were admitted though there was then no legislative provision allowing this to be done—see also *Naranbhai Vrijbhukandas* v. *Naroshankar Chandroshankar*(4), and *Jadu Rai* v. *Kanizak Husain*(5). In *Sreenath Roy* v. *Goluck Chunder Sein*(6), evidence given in a suit to which the person consenting was not a party and had then no opportunity to test by cross-examination, was held to be rightly admitted. In *Ramaya* v. *Devappa*(7), it was held that consent made evidence, which might be recorded illegally or without jurisdiction by the trying Judge at the disputed locality, admissible. The *ratio decidendi* in all these cases was this. The facts admitted in evidence being themselves relevant, provisions of law intended to test the credibility of witnesses or to enable the trying Judge to make the test himself are not of such an important character that parties cannot waive the benefit of those provisions. They are not rules of public policy which the parties cannot waive—see 13 American Cyclopædia of Law and Procedure, page 1014. An Appellate Court is called upon to decide facts on evidence not taken before itself. The legislature has recognized several exceptions to the rule requiring the oral evidence in a case to be taken before the trying Judge. This

(1) (1864) 1 W.R. (C.R.), 309 at p. 310
(2) (1900) I.L.R., 24 Bom., 591.
(3) (1870) 13 W.R., 164
(4) (1867) 4 B.H.C.R., 98.
(5) (1886) I.L.R., 8 All., 576 (F.B.)
(6) (1871) 15 W.R., 348.
(7) (1903) I.L.R., 30 Bom., 109.

requisite is dispensed with, in cases where a suit is transferred from one Court to another and where there is a change of Judge in the trying Court owing to death, transfer or other cause: see order 18, rule 4, Civil Procedure Code. We do not think that the circumstance that the Appellate Court in the previous suit held that the Munsif who recorded the evidence had no jurisdiction to try the suit is material. That does not affect the validity of the consent of the parties which is the reason for the admission of evidence not recorded in the suit. It is unnecessary to express an opinion on the question whether in cases falling under section 33 of the Evidence Act, evidence recorded by a Court can be regarded as not given in a judicial proceeding on the mere ground that the decree of the Court was subsequently set aside for defect of jurisdiction, over the causes although *In the matter of Rami Reddi*(1), is an authority against the admission of such evidence in subsequent proceedings between the parties. We hold that the Subordinate Judge was justified in acting on the evidence recorded in the previous suit, set aside the order of the District Judge, and remand the appeal for fresh disposal according to law. The costs of this appeal will abide the result.

APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Sundara Ayyar.

1913. February 13.

ATCHAPARAJU (DEFENDANT), APPELLANT IN BOTH CASES,

v.

RAJAH VELUGOTI GOVINDA KRISHNAYACHENDRULAVARU, RESPONDENT.*

Madras Estates Land Act (I of 1908), ss. 3 (7), 153 and 157—Proviso to section 153, effect of—'Old waste', tenant of—Ejectment from, grounds of.

The combined effect of section 153 of the Madras Estates Land Act (I of 1908) even as amended by section 8 of Madras Act IV of 1909, and of section 157

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(1) (1881) I.L.R., 3 Mad., 48.

* Second Appeals Nos. 163 and 174 of 1912.

ATCHAPARAJU v. RAJAH V. G KRISHNAYA CHENDRULAVARU

of the Estates Land Act is that a ryot of old waste cannot be ejected on the ground of expiry of a term of lease contained in a contract entered into before the Act came into force.

SECOND APPEALS against the decrees of F. A. COLERIDGE, the Acting District Judge of Kistna, at Masulipatam in Appeals Nos. 501 and 502 of 1909 respectively preferred against the decrees of C. S ANANTARAMA AYYAR (the Deputy Collector of Ellore) in Summary Suits Nos. 97 and 98 of 1909.

The plaintiff, a landholder, brought this suit under section 153 of the Madras Estates Land Act as amended by section 8 of Act IV of 1909 to eject a non-occupancy tenant on the expiry of his one year's lease. The lower Appellate Court holding that the land was "old waste" as per section 3 of clause (7) of the Act agreed with the first Court in granting a decree for ejectment under section 153 of the Act.

Defendant, the tenant, preferred these Second Appeals.

V. Ramadoss for the appellant.

K. S. Krishnaswami Ayyangar for *S. Subrahmanya Ayyar* for the respondent.

BENSON AND SUNDARA AYYAR, JJ.

JUDGMENT.—The first point argued in this Second Appeal is that, supposing the defendant is a ryot of 'old waste' as defined in section 3 of the Madras Estates Land Act, the landholder has no right to eject him, as none of the grounds mentioned in section 157 of the Act, which relates to the ejectment of such a ryot, has been alleged to exist by the plaintiff. Section 157 enacts that such a ryot cannot be ejected except on the grounds mentioned in section 153 (and certain other grounds which are immaterial for the present case) which refers to the ejectment of non-occupancy ryots generally. Five grounds for ejectment were mentioned in section 153 as it originally stood. A proviso was added to the section by section 8 of Madras Act IV of 1909 in these terms "nothing in this section shall affect the liability of a non-occupancy ryot to be ejected on the ground of expiry of the term of a lease granted before the passing of this Act." The effect of the proviso was of course to entitle a landholder to eject a non-occupancy ryot on the ground of the expiry of a lease granted before the passing of the Act. The ground of the ejectment in such a case is the expiry of the lease. Section 153 does not make the expiry of the lease a ground of ejectment but leaves it to have the effect which it would have but for the

provision in the first part of the section that the ryot shall not be liable to ejectment except on the grounds enumerated in the section. It leaves the contract of tenancy which gives the landholder the right to eject to have the operation which it would ordinarily have. Section 157 expressly deprives a contract entitling the landholder to eject a ryot of old waste of its ordinary legal effect. It also provides that the only valid grounds for the ejectment of such a ryot are those mentioned in section 153 as grounds for ejecting a non-occupancy ryot. The expiry of a lease made before the Act came into force is not one of the grounds given by section 153 for ejectment. The result is that a ryot of old waste cannot be ejected on the grounds of a contract entered into before the Act came into force. The plaintiff's suit must therefore fail if the defendant be a ryot of old waste. If the land be *kamatam,* the suit could not be maintained in the Revenue Court. In either view therefore this suit must fail. We leave the question whether the land is *kamatam* or not undecided. We reverse the decrees of the Lower Courts and dismiss the suits with costs throughout on the grounds mentioned above.

APPELLATE CIVIL.

Before Sir Charles Arnold White, Kt., Chief Justice, and Mr. Justice Tyabji.

1913 February 17 and 18.

K. KRISHNAMACHARIAR (PLAINTIFF), APPELLANT,

v

V. KRISHNAMACHARIAR (DEFENDANT), RESPONDENT.*

Hindu Law—Minor—Will—Incapacity to make—Contract, incapacity to make—Majority, age of, for making a will—Indian Majority Act (IX of 1875), sec. 3, effect of—Onus of proving majority, on propounder of a will—Onus of proof, immaterial, where whole evidence recorded—Indian Evidence Act (I of 1872), sec. 32 (5) and (6)—Recital in a father's will as to son's age, admissibility of—Indian Evidence Act (I of 1872), ss. 35 and 82—Register of births and deaths admissibility of, under—Indian Evidence Act (I of 1872), sec. 145—Document, intended to contradict witness, not put to witness, inadmissibility of—Horoscope, when admissible.

A Hindu minor though not governed by the Hindu Wills Act or the Indian Succession Act cannot make a will and the age of majority for the purposes of making a will is determined by the Indian Majority Act.

Subbayya v Kondayya (1906) 16 M.L.J., 135, *Deheram Eulleya v. Somanchi Seetharamayya* (1911) 2 M W N., 383, *Bhagirathi Bai v. Vishwanath* (1905) 7 Bom L R, 72, *Bai Gulab v. Thakorelal* (1912) I L.R., 36 Bom, 622 and *Hardwari Lal v. Gomi* (1911) I.L R, 33 All, 525, followed.

Per TYABJI, J. (C J *Obiter*)—When the defence of minority of the testator is raised to invalidate a will, the onus is on the party setting up the will to show that the testator was of full age when he made it and in the matter of onus, minority and testamentary incapacity stand on the same footing. *Smee v. Smee* (1879) 5 P.D, 84 and *Bhagirathi Bai v. Vishwanath* (1905) 7 Bom. L.R., 72, followed.

A horoscope which is not spoken to either by its writer or by one who had special means of knowledge as to its correctness is inadmissible in evidence

Per WHITE, C J —The question, on whom the onus of proof lies is not of much importance when the whole evidence has been recorded.

Chaudhry Mohammad Mehdi Hasan Khan v. Sri Mandir Das (1912) 17 C.W.N., 49 (P.C), followed.

A recital in a testator's father's will mentioning the age of the testator is admissible to prove the age of the testator under section 32, clauses (5) and (6) of the Evidence Act and illustration (l) to that section.

Oriental Government Security Life Assurance Company, Limited, v. Narasimha Chari (1902) I L R., 25 Mad., 183 at p. 207, *Ram Chandra Dutt v. Jogeswar Narain Deo* (1893) I L R., 20 Calc, 758, *Deheram Bulleyya v. Somanchi Seetharamayya* (1911) 2 M.W.N., 383 and *Subramanian Chetti v. Doraisinga* (1904) 24 M L.J., 49, followed.

* Appeal No. 108 of 1911.

KRISHNAMA-CHARIAR v. KRISHNAMA-CHARIAR.

A register of births and deaths kept under Madras Act III of 1899 is a public document and a certified copy thereof is admissible under sections 35 and 82 of the Evidence Act.

A document by which it is intended to contradict a witness will not be admissible in evidence under section 145, Evidence Act, unless it is put to the witness or unless it is otherwise admissible under the Act.

Per curiam: Under the Hindu common law a minor cannot make any disposition of property during his life-time, *e g.*, a gift, and consequently he cannot make any disposition of his property to take effect after his death.

APPEAL *in forma pauperis* against the decree of D. G. WALLER, the acting District Judge of Chingleput in Testamentary Original Suit No. 37 of 1909.

The necessary facts are given in the District Judge's Judgment, which is as follows:—

"This is a suit under the Probate and Letters of Adminis-"tration Act of 1881. Plaintiff sues as the father and guardian "of the widow of one V. Krishnamachari; the latter died "towards the end of April 1909, leaving a will (Exhibit A) in "favour of his minor widow.

"Defendant contends that the will is not genuine and that "Krishnamachari was a minor at the time of his death.

"The following issues were framed:—

"(1) Was the deceased a major or a minor at the time "of his death?

"(2) If he was a minor, can the will in question be "admitted to probate, assuming it to be genuine?

"(3) Is the will in question genuine?

"(4) To what relief, if any, is plaintiff entitled?

"*Issue* (1).—I have no doubt that Krishnamachari was a "minor at the time of his death. On plaintiff's side there is a "certain amount of oral evidence that Krishnamachari was a "major. A horoscope (Exhibit C) is also produced to show that "he was born in December 1889. It is however a worthless piece "of evidence. There is plenty of documentary evidence to the "opposite effect. Exhibit I is a will in favour of the deceased by "his adoptive father, dated 4th November 1906. In it the "deceased is described as 13. The explanation offered is that his "age was understated in order to prolong his minority, his "conduct not being satisfactory. The reply to this is that "Exhibit I contained a proviso that rendered such a precaution "unnecessary. By that proviso the deceased was to be kept in a

KRISHNAMACHARIAR v. KRISHNAMACHARIAR.

"state of tutelage for 10 years after attaining his majority. To "meet this, it is explained that the age was understated owing "to legal advice that the above proviso was not sustainable in "law. This explanation is, I think, an afterthought. Again in "Exhibit II a school admission register of 2nd October 1905 "the deceased was described as 13 years old. It is argued that it "is the practice, in this country, for school boys to understate "their ages. Even if such a practice exist, it cannot be recog-"nized or relied on.

"Again, in Exhibit III (Extract from the death register of "1909 in Sriperumbudur) the age of the deceased at his death "is given as 16. There can be no manner of doubt that this "information was furnished by one of plaintiff's own witnesses "(Plaintiff's witness No. 9).

"There can, I think, be no doubt that deceased was only "about 16 when he died. I therefore find issue (1) against "plaintiff.

"*As to issue* (2).—No reported decision on this point has "been quoted. Two unreported decisions, one from Madras and "one from Bombay *Subbayya* v. *Kondayya*(1) and *Bhagirathi* "*Bai* v. *Vishwanath*(2) have been cited. They are to the effect "that a minor cannot make a will. Following these decisions, I "would answer the second issue in the negative.

"It is unnecessary to decide whether the will is a genuine "one. In view of the finding on the first two issues, the suit "must be dismissed with costs."

Plaintiff preferred this appeal.

T. R. Ramachandra Ayyar and *T. R. Krishnaswami Ayyar* for the appellant.

S. Srinivasa Ayyangar for the respondent.

WHITE, C.J.

WHITE, C.J.—In this case I propose to deal first with the question of law. Can a Hindu minor make a will?

It was practically conceded by Mr. Ramachandra Ayyar that under the Hindu Common Law a minor cannot make any disposition of property during his life-time. There can, I think, be no question that that is so. It has been so laid down in various authorities. I need only refer to the passage in Colebrooke's Digest of Hindu Law to which Mr. Srinivasa Ayyangar called our attention this morning. Title II, Chapter 4, section 23, and

(1) (1906) 16 M.L.J., 185. (2) (1905) 7 Bom. L.R., 72.

Narada, Title I, Chapter 2, section 39. If the law is that a Hindu minor cannot make a valid gift during his lifetime it is difficult to see on what principle it can be said that he can make a valid disposition of property which is only to take effect after his death. The argument of Mr. Ramachandraier or at any rate the argument which he advanced yesterday—as I understood him, was this: The Hindu Wills Act and the Succession Act both enact that a Hindu minor cannot make a will; the question of the capacity of the man who made the will before us is not governed by either the Hindu Wills Act or the Succession Act; there is therefore no express prohibition and it follows that he can make a will. It seems to me it is only necessary to state that proposition in order to show absurdity but its unsoundness. Not only is there no authority in support of the view that a Hindu minor can make a will, but all the cases are the other way. I do not propose to discuss them but I would refer to *Subbayya* v. *Kondayya*(1), *Deheram Bulleya* v. *Somanchi Seetharamayya*(2), *Bhagirathi Bai* v. *Vishwanath*(3), *Bai Gulab* v. *Thakorelal*(4), and *Hardwari Lal* v. *Gomi*(5). These are all the authorities which hold that a Hindu minor cannot make a will. My finding with regard to the question of law is that a Hindu minor cannot make a will.

Then as to the facts; and before dealing with them it is necessary to determine, when would the minority of the man who purported to make this will have terminated? In my opinion the Indian Majority Act of 1875 applies to this case. There is a saving clause in section 2 of the Act dealing with capacity and in that saving clause it is provided that "Nothing in the Act shall affect the capacity of any person to act in certain matters (namely) marriage, dower, divorce and adoption." The question of the capacity of a person to make a will is not included in the saving clause. That means—so it seems to me, as a matter of construction,—that when a question arises as to the capacity of a person to make a will on the ground of minority the question as regards the age at which minority ceases is governed by the Indian Majority Act. The point arose in two reported cases and this was the view there taken. See *Bai Gulab*

(1) (1906) 16 M L J., 135.
(2) (1911) 2 M.W.N., 383.
(3) (1905) 7 Bom L.R., 72
(4) (1912) I.L.R., 36 Bom., 622.
(5) (1911) I.L R , 33 All , 525.

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v. *Thakorelal*(1) and *Harduari Lal* v. *Gomi*(2). I think this view is right.

We have had considerable discussion with reference to the question as to on whom the burden of proof lay on the party propounding the will or on the party opposing it. Now, if it was necessary for me to express a final opinion in the matter, I should certainly be inclined to hold that, when the defence of minority is raised, the onus is on the party setting up the will to show that the person who made the will was of full age when he made it. Speaking for myself, I cannot see why the rule which applies in the case of alleged testamentary incapacity by reason of mental deficiency should not apply where the defence alleged is testamentary incapacity by reason of not being of an age at which the law recognizes the power of a man to dispose of his property at his death. With regard to the question of onus, where the will is impugned on the ground of testamentary incapacity, I think the law is clear. In Tristram and Coote's Probate Practice on page 407, the learned authors say " where the defence of incapacity has been pleaded, the burden of proof rests upon those who set of the will," and the authority cited, *Smee* v. *Smee*(3) supports the proposition there laid down. The same view was taken in AMEER ALI and WOODROFFE'S Evidence Act, page 564, and by SIR LAWRENCE JENKINS, J., in *Bhagirathi Bai* v. *Vishwanath*(4) although it does not appear that there had been a full discussion on the question. See too Williams on Executors, 10th edition, page 12, under the heading " Persons incapable from want of discretion." In Williams on Executors the incapacity from want of discretion, that is the mental deficiency, is placed on the same footing as incapacity on the ground of minority. Further in the Indian Succession Act we find that sound mind and not a minor are bracketed together. So in view of what I have said, if it is necessary to decide this matter, I should be strongly inclined to hold that once the defence of minority is set up, it is for the party propounding the will to prove that the alleged testator was a man of full age. With regard to the cases which Mr. Ramachandrier cited, I think they were all cases of contract and in the case of contract of course if the plea of infancy is set up it is for the

(1) (1912) I.L.R., 36 Bom., 622.
(2) (1911) I.L.R., 33 All., 525
(3) (1879) 5 P.D., 84
(4) (1905) 7 Bom. L.R., 72.

party who sets up the plea to prove it. The question of capacity is, as it seems to me, a wholly different matter. However, as I have said, I do not think I need express a final opinion as to this because, where we have the whole of the evidence, it is not a matter of much importance on whom the onus lies. In this connection I would refer to a recent decision of the Privy Council in *Chaudhry Mohammad Mehdi Hasan Khan* v. *Sri Mandir Das*(1).

[Then his Lordship dealt with the question whether the testator was a major when he executed the will and in discussing the evidence thereon observed as follows] :—

The plaintiff produced a document which he says is the horoscope of the deceased. That is spoken to by his 9th witness. An objection was taken to the evidence of this witness with reference to the horoscope that the witness was not the writer and that he had no personal knowledge of its correctness . . . The man who made the horoscope is not called and apparently all that the witness says with reference to the horoscope is that the deceased man's natural father gave the horoscope to the deceased man's adoptive father and by some means or other which are not stated it got into the possession of the witness.

[After rejecting the horoscope and the oral evidence of the 9th witness thereon on the grounds of the objection above stated his Lordship went on as follows] :—

We have Exhibit I, which is relied on by the defendant, and that is a will which was executed by one Appalachari, the adoptive father of the deceased, on November 4th, 1906 . . . Now in the will of 1906 the boy is described as 13, "my adopted son, aged about 13." . . . With regard to the question of the admissibility of this document for the purpose of showing the age of the boy when he purported to make a will, I think it is admissible under section 32 of the Evidence Act. Mr. Ramachandrier called our attention to *Nil Monee Chowdhry* v. *Zuheerunissa Khanum*(2). In that case it was held that an incidental recital in a will was not evidence of age. That case was wholly different. In this case it is not an incidental statement contained in a recital, but the words are used for the

(1) (1912) 17 C.W.N., 49 (P.C.) (2) (1867) 8 W.R., 371.

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purpose of describing the adopted son of the testator, who under the testator's will was to be the sole beneficiary. I think the statement is admissible under section 32, clauses 5 and 6, of the Evidence Act and under illustration(*l*) to that section, as the authority in support of this view, I may refer to *Oriental Government Security Life Assurance Company, Limited.* v. *Narasimha Chari*(1), *Ram Chandra Dutt* v. *Jogeswar Narain Deo*(2), *Deheram Bulleya* v. *Somanchi Seetharamayya*(3) and *Subramanian Chetty* v. *Doraisinga*(4) the authorities to which Mr. Srinivasiengar called our attention this morning. . . .

The third document on which the defence relies is Exhibit III which is a certified copy of the death certificate of the deceased. The Register is a public document kept under the provisions of the Madras Act III of 1899 and the certified copy is the evidence—see sections 35 and 82 of the Act. In the certified copy the age of the deceased at the time of his death is given as 16 and the party who gave the information is stated to be plaintiff's 9th witness. . . .

. . . But for some reason or other it is difficult to know why, he (defendant's vakil) refrained from putting this certified copy of the death certificate of the deceased to the witness and from asking him in so many words, if he did not give the information to the village munsif which the entry purports to show that this witness gave. The document is not admissible in evidence under section 145, as it was never put to the witness. But it seems to me, as a certified copy of a public document it is evidence that when the boy died he was stated to be only 16. . . .

So taking the evidence as a whole—although it may possibly leave room for doubt—my view is that it has been shown that the deceased was not a major when he made the will which has been propounded. This being the conclusion at which I have arrived, I hold as a matter of law, that the will is ineffective. I think the Judge was right and that the appeal must be dismissed with costs.

The appellant will pay the Court fees due to Government which he would have paid if he had not been allowed to appeal as a pauper.

(1) (1902) I.L.R., 25 Mad., 183 at p. 207.
(2) (1893) I.L.R., 20 Calc., 758.
(3) (1911) 2 M.W.N., 383.
(4) (1901) 21 M.L.J., 49.

TYABJI, J.—The authorities on pure Hindu law unaffected by the legislative enactments of British India lay down that if a Hindu "boy or one who possesses no independence transacts anything, it is declared an invalid transaction by persons acquainted with the law" —Narada, I. 39 (Sacred Books of the East, volume XXXIII, page 52).

Similarly in Colebrook's Hindu Law Books (3rd Edn., 1864, Madras, volume I, page 453) Book II, chapter IV, section II, art. 53, it is stated from 'Narada':—"What has been given by men agitated with fear, anger, lust or *the pain of* an incurable disease, or as a bribe or in jest, or by mistake, or through any fraudulent practice, must be considered as ungiven."

"So must anything given by a minor, an idiot, *a slave or other* person not his own master, a diseased man, one insane or intoxicated, or in consideration of work unperformed." See also *ibid*, Book I, chapter V, 187 (volume I, page 201 of the same edition), where it is laid down on the authority of 'Catyayana'—that—"On the death of a father *his debt* shall in no case be paid by his sons incapable from non-age of conducting their own affairs, but at their full age of *fifteen years* they shall pay it in proportion to their shares; otherwise they shall dwell hereafter in a region of horror."

As a consequence of this rule of Hindu law, viz., that, until a Hindu attains full age, he shall be incompetent to perform juristic acts, it has been held that in British India a Hindu cannot make a will unless he has attained majority under the Indian Majority Act, section 3: *Bai Gulab* v. *Thakorelal*(1), *Deheram Bulleyya* v. *Somanchi Seetharamayya*(2), *Bai Gulab* v. *Thakorelal*(1), *Hardwari Lal* v. *Gomi*(3) and *Subbayya* v. *Kondayya*(4).

The reasoning on which the decisions laying down this proposition of law have generally proceeded is that for making a gift the attainment of majority as defined in the Indian Majority Act is necessary, and that the Hindu law of wills is an extension of the law of gifts, and that, consequently, a Hindu who is not competent to make a gift is not competent to make a will. Hence in the case of a Hindu the age of competence to make a will must be the same as the age of competence to make a gift.

(1) (1912) 14 Bom L R, 743
(2) (1911) 2 M.W.N., 383.
(3) (1911) I.L.R, 33 All, 525
(4) (1906) 16 M.L.J, 135.

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TYABJI, J.

It has been argued before us however, that though the Hindu law of wills may have originally been an extension of the law of gifts, the age of competence in regard to the two matters might yet become differentiated, inasmuch as, even if we accept that the Hindu law of gifts has in British India been altered by the operation of the legislative enactments referring thereto, still the Hindu law of succession (of which the law of wills forms part) is specifically required to be enforced in British India, and there is nothing in the legislative enactments referring to the law of wills which alters the original Hindu law in that respect—assuming of course that we are dealing with a case such as the present, to which the Hindu Wills Act does not apply. Hence it is argued that the age of testamentary competence under Hindu law as applicable in British India must be determined irrespectively of all legislative enactments and purely, in accordance with the rules of Hindu law. In support of this argument, the Indian Majority Act, the Indian Contract Act, section 11, the Transfer of Property Act, section 7, the Indian Trusts Act, section 10, and similar provisions in the Indian Succession Act and the Hindu Wills Act have been referred to, and it has been pointed out to us that there is an absence of any specific legislative provision fixing the age at which testamentary competence is attained by a Hindu (whose will is not governed by the Hindu Wills Act) and that there is no section laying down that testamentary capacity is in such a case to be subject to the provisions of section 3 of the Indian Majority Act. It has been further contended that the provisions of the Indian Majority Act cannot affect any branch of the substantive law, but that the true effect of the Indian Majority Act is merely to explain how the other legislative enactments of British India must be interpreted—in other words, that the Indian Majority Act must be taken merely as providing a definition of the words of 'majority' and 'minority.' The argument was founded on the following considerations:—Section 3 of the Indian Majority Act, which has the appearance of being the operative section of the Act (section 2 being rather in the nature of a saving clause), does no more than state that a person shall be deemed to have attained majority at 18 or 21 years; again there is an absence of any express legislative provision to the effect that the attainment of majority is necessary for competence to perform all juristic acts (except such

juristic acts as refer to matters specified in section 2 of the Indian Majority Act), and at the same time we have the fact that the legislature has deemed it necessary to enact the sections which lay down that in regard to transactions such as contracts and trusts, attainment of majority is necessary for giving them validity.

It seems to me, however, that in passing the Indian Majority Act it could not have been the intention of the legislature merely to provide definitions of the terms 'majority' and 'minority.' Had that been the case, section 2 of the said Act would not have provided that nothing contained in the said enactment shall affect the '*capacity* of any person *to act*' in the matters therein referred to. That such a provision was considered necessary clearly indicates that the enactment was intended to affect the capacity to act in regard to all other matters notwithstanding that the Act contains no affirmative provision to the effect that in all matters not saved by section 2, a person shall be deemed to have the capacity to act only when he attains majority under section 3 Again, had the Act merely provided definitions of terms, section 11 of the Indian Contract Act would not have been affected by those definitions unless there had been some statutory provision that majority for the purposes of the transactions governed by the Indian Contract Act shall be determined in accordance with the Indian Majority Act, and this is not done either by any amendment of the Indian Contract Act (the Majority Act having been passed after the Indian Contract Act) or by any provision contained in the General Clauses Act On the Indian Majority Act being enacted, it was evidently assumed that "the law to which he (viz., the person contracting) is subject" referred to in the Indian Contract Act, section 11, became the law as laid down in the Indian Majority Act. Now it has never been questioned that on the passing of the Indian Majority Act, section 11 of the Indian Contract Act became subject to the latter Act, and it seems to me to be clear that if this was so the Indian Majority Act must be taken equally to have altered the Hindu law of the age of capacity to act in all matters except in those matters which are specifically excepted in section 2 of the Indian Majority Act. If this is so, then it follows that even where the Hindu Wills Act does not apply, it is necessary for a Hindu to attain majority under the Indian Majority Act, section 3, before he can validly make a will.

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TYABJI, J.

I should have had little to add to what has been said by the learned Chief Justice as regards the facts of this particular case, had I not felt more doubt about the effect of the documents on which the respondent relies. Considering the manner in which Exhibit III was produced before the Court, the late stage at which it was produced, and that it was not put to the plaintiff's ninth witness although his cross examination was evidently based entirely on Exhibit III, and bearing in mind that the document, as it comes before us, has the appearance of being tampered with, it seems to me that Exhibit III ought to have very little weight as a piece of evidence.

In my view of this case, however, this circumstance ought not to affect our decision because I think that it is for the applicant in Probate proceedings to prove that the testator was competent to make the will which is propounded, and it seems to me to be clear, that before a person can be considered to be competent to make a will, it must be shown that he is under no disability from unsoundness of mind, but also (if and in so far as proof of the fact is necessary under the circumstances of the case) that he is under no disability from minority. There is a dictum of Sir LAWRENCE JENKINS in *Bhagirathi Bai* v. *Vishwanath*(1) which would have been of great assistance to us in coming to the same conclusion, had it not been expressed in a case where the question of minority was not directly concerned and had it not appeared that learned Judge had neither cited to him nor considered any authority on this particular point, which has the appearance of being referred to incidentally. But even with this qualification, it shows that Sir LAWRENCE JENKINS considered the attainment of the age of majority to be on the same footing for the purposes of proving the will, as possession of a sound mind. Various text-books entitled to considerable weight, on the subject of Probate Practice in England have been cited to us and they also proceed on the basis that minority is considered in England in the same light as unsoundness of mind for the purpose of deciding whether the testator was competent to make a valid will. Thus, in Tristam and Coote on Probate Practice, 14th edition, at pages 407 and 408, it is laid down that if the defence of incapacity has been

(1) (1905) 7 Bom. L R., 72 at p. 93

pleaded, then the burden of proof rests upon those who set up the will; and a reference is later on made by the same authors to the Wills Act in England, which permits the plea of minority to be raised in order to establish want of capacity in the testator. *Ibid.*, page 135. Now these passages show that in the opinion of the learned authors, though as a general rule the propounder of a will is not required or expected to give positive evidence of the testator having attained majority, yet it is in the power of those who contest the validity of a will to challenge the propounder thereof to prove in all strictness every ingredient making up competence to make a will including the fact that the testator had attained majority. The authority cited by the learned authors as the basis of this proposition [*Smee* v. *Smee*(1)] seems to me to support it, and I think that the proposition is grounded on principles which are applicable under the law in British India, no less than in England. See also Williams on Executors, 10th edition, volume I, pages 8, etc., page 12 and the Encyclopædia of the Laws of England, volume XI, page 8, and compare as regards the burden of proof in such a case, *Woomesh Chunder Biswas* v. *Rasmohini Dassi*(2), *Oriental Government Security Life Assurance Company, Limited* v. *Narasimha Chari*(3), and *Chaudhry Mohammad Mehdi Hasan Khan* v. *Sri Mandir Das*(4). Looked at from this stand-point, I cannot hold that the will in question has been proved or that probate of the will ought to be granted to the applicant. I therefore agree that this Appeal should be dismissed with costs.

(1) (1879) 5 P.D., 84 at pp. 91 and 92.
(2) (1894) I.L.R., 21 Calc., 279 at pp. 290 and 291.
(3) (1902) I.L.R., 25 Mad., 183, at pp. 207, 209.
(4) (1912) 17 C.W.N., 49.

APPELLATE CIVIL.

Before Sir Charles Arnold White, Kt., Chief Justice, Mr. Justice Miller and Mr. Justice Sadasiva Ayyar.

1913. January 20, 21 and 22 and February 24.

NATESA AIYAR AND ANOTHER (APPELLANTS),

v

APPAVU PADAYACHI AND ANOTHER (RESPONDENTS).*

Indian Contract Act (IX of 1872), ss. 39, 55, 64, 65, 73, 74 and 75—Vendor and Purchaser—Right to recover deposit 'forfeited' by terms of a contract to sell.

A entered into a contract on 24th February 1903 with *B* for the purchase of lands belonging to the latter for Rs. 41,000 Of this amount Rs. 4,000 was paid in advance, Rs. 20,000 was agreed to be paid by means of a mortgage and the balance before the 24th May 1903, when the conveyance was to be executed. The contract provided that the Rs. 4,000 was to be forfeited if there was any delay on the part of the purchaser. It was also stipulated that the vendor was to execute the conveyance either in favour of the purchaser or those nominated by him. In part performance of this contract a sale of a portion of the lands was effected in favour of *M* on the 28th March 1903. Just before the day for payment, *B* gave notice to *A* that if the sale was not completed on or before the agreed date, the contract would be avoided. *A* failed to perform the contract before that date Subsequently *B* sold the lands to third parties and realised Rs 1,500 in excess of the price stipulated by *A*. *A* brought a suit for the specific performance of the contract, or, in the alternative to recover the Rs 4,000 paid by him. The Subordinate Judge disallowed the claim for specific performance but decreed the return of the deposit of Rs. 4,000 to *A*. *B appealed.*

Held, by the Court (SADASIVA AYYAR, J., dissenting) that *A*, the plaintiff, was not entitled to a return of the deposit.* Neither section 64 nor section 74 of the Indian Contract Act (IX of 1872) is applicable to such a deposit, and a stipulation for its forfeiture in case of breach is not one by way of penalty.

The law of India on this subject does not differ from the English law.

A stipulation to forfeit 10 per cent. of the consideration in case of breach is neither unreasonable nor extraordinary.

A vendor can be given relief by way of rescission of contract and at the same time, in the absence of express stipulation to the contrary, may be allowed to retain the deposit

Howe v. Smith (1884) L. R., 27 Ch.D, 89, applied.

Per WHITE, C.J.—(1) The last rule would apply *a fortiori*, when, as in this case, there is an express agreement to forfeit the deposit.

(2) Since the Judicature Acts, the question whether time is of the essence of the contract, must be governed by rules of equity, and the purchaser is entitled in such cases, as here, to fulfil his contract within a reasonable time after the agreed date.

* Letters Patent Appeal No. 114 of 1909.

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Per MILLER, J.—(1) Time was of the essence of the contract in this case.

(2) The agreement to forfeit is not wanting in consideration as the deposit is not made as part-payment but as security for the purpose of binding the bargain.

Per SADASIVA AYYAR, J.—A was entitled to recover the deposit under the Indian Contract Act which is exhaustive as regards the Law of Vendor and Purchaser and the English law is not applicable.

A stipulation to forfeit a deposit is a stipulation to pay a penalty. Time was of the essence of the contract in this case.

APPEAL under article 15 of the Letters Patent against the decree of SANKARAN NAIR, J., who differed from WALLIS, J., in *Natesa Aiyar* v. *Appavu Padayachi*(1) on appeal preferred against the decree of T. V. ANANTAN NAYAR, the Subordinate Judge of Kumbakonam, in Original Suit No. 19 of 1900.

The following are the facts of this case:—The plaintiff in this case entered into a contract on the 24th February 1903, with the defendant for the purchase of lands belonging to the latter for Rs. 41,000. Of this amount Rs. 4,000 was paid in advance, Rs. 20,000 was agreed to be paid by means of a mortgage and the balance before the 24th May 1903, when the conveyance was to be executed. The contract provided that the Rs. 4,000 was to be forfeited if there was any delay on the part of the purchaser. It was also stipulated that the vendor was to execute the conveyance either in favour of the purchaser or those nominated by him. In part performance of this contract a sale of portion of the lands was effected in favour of a third party on the 28th March 1903. Just before the day for payment, the defendant gave notice to the plaintiff, that if the sale was not completed on or before the agreed date, the contract would be avoided. The plantiff failed to perform the contract before that date. Subsequently the defendant sold the lands to third parties and realised Rs. 1,500 in excess of the price stipulated by the plaintiff. The plaintiff brought a suit for the specific performance of the contract, or, in the alternative to recover the Rs. 4,000 paid by him. The Subordinate Judge disallowed the claim for specific performance, but decreed the return of the deposit of Rs. 4,000 to the plaintiff. The defendant appealed.

On appeal, SANKARA NAIR, J., confirmed the judgment and decree of the lower Court, while WALLIS, J., allowed the Appeal,

(1) (1910) I.L.R., 3? Mad., 375

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and dismissed the suit with costs. Their judgments are reported in *Natesa Aiyar* v. *Appavu Padayachi*(1). The defendant thereupon preferred this Letters Patent Appeal.

C. V. Ananthakrishna Ayyar for *S. Srinivasa Ayyangar* and *T. S. Rajagopala Ayyar* for the appellant.

T. R. Ramachandra Ayyar and *T. R. Krishnaswami Ayyar* for the respondent.

WHITE, C.J.

WHITE, C.J.—The contract we have to consider no doubt differs in some respects from the ordinary vendor and purchaser contract which was before the Courts in most of the cases which were discussed in the course of the argument in this appeal. The consideration for the contract in question was a sum of Rs. 41,000, of which Rs. 4,000 is stated to have been received by the vendor on the date of the agreement, Rs. 20,000 was to remain on mortgage, and the balance was to be paid on a specified date. If the purchaser failed to carry out the contract, he was to forfeit the Rs. 4,000 advance. If the vendor failed to carry out the contract he was to refund the advance and pay Rs. 4,000. There was a further provision that the vendor should execute the sale-deed before the agreed date either in favour of the purchaser or in favour of the purchasers' nominees. In pursuance of this, the vendor, before the agreed date, sold some of the lands to a nominee of the purchaser.

I do not think the fact that there was a reciprocal agreement by which Rs. 4,000 was to be forfeited to the vendor if the purchaser was in default, and Rs. 4,000 was to be paid by the vendor (besides refunding the advance) if the vendor was in default, or the fact that there was part performance of the contract before the agreed date, makes any difference for the purpose of the question we have to decide, viz., whether, in the events which have happened, the vendor is entitled to retain the Rs. 4,000.

As a matter of fact the vendor has been able to sell the unsold portion of the land, or part of it, for more than the amount provided for in the agreement. This, again, in my opinion, does not affect the question we have to decide.

I agree that the question must be determined with reference to the provisions of the Indian Contract Act and that if they

(1) (1910) I.L.R., 33 Mad., 375.

are in conflict with the English law as laid down in the English authorities, we must follow the statute.

I think, however, it may safely be premised that in a question such as this it was not the intention of the Legislature to depart from what was understood to be the English law at the time the Indian Contract Act was passed. It is also to be observed, as WALLIS, J., points out, that though several cases as to the right to recover deposits have been decided in India since the Contract Act was passed, in none of these has it been suggested that under the provisions of that enactment the law of India differed from that of England with reference to this question.

In the contract before us we have an express agreement that, in default by the purchaser, the Rs. 4,000 was to be forfeited. Unless, therefore, the defaulting party can obtain relief on grounds of equity, or under some statutory enactment, he is bound by his bargain. In *Howe* v. *Smith*(1) FRY, L.J., said: "Money paid as a deposit must, I conceive, be paid on some terms implied or expressed. In this case no terms are expressed, and we must therefore inquire what terms are to be implied. The terms most naturally to be implied appear to me in the case of money paid on the signing of a contract to be that in the event of the contract being performed it shall be brought into account, but if the contract is not performed by the payer it shall remain the property of the payee. It is not merely a part payment, but is then also an earnest to bind the bargain so entered into, and creates by the fear of its forfeiture a motive in the payer to perform the rest of the contract." The learned Lord Justice was dealing with a case where there was no express agreement. Here we have an express agreement, and the observations, as it seems to me, apply *a fortiori*. If time was of the essence of the contract into which the parties entered (and, in the opinion of WALLIS, J., and of the Subordinate Judge, it was) it seems to me clear that (unless the plaintiff can establish that the provisions of the Contract Act give him a right to recover, and I will deal with this later) effect should be given to the intention of the parties as expressed in the agreement.

(1) (1884) L.R., 27 Ch D., 89 at p. 101.

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There is, so far as I know, no reported case, English or Indian, since *In re Dagenham (Thames) Dock Company, Ex parte Hulse*(1) (where the deposit was half the purchase price) of a vendor and purchaser contract in which it has been held that, notwithstanding an express agreement, the deposit is to be forfeited on default by the purchaser; it has been held that the deposit can be recovered back. In *Betts* v. *Burch*(2), there was no deposit.

But, so far as the English law is concerned, as is pointed out in the judgments in *Howe* v. *Smith*(3), since the Judicature Acts where the question whether time is of the essence of the contract arises all contracts must be governed by the rules of Equity. I deal with this case, therefore, on the footing that the purchaser would have been entitled to fulfil his contract within a reasonable time after the agreed date.

In *Howe* v. *Smith*(3), it was held that the purchaser was not entitled to a return of the deposit. There, there was no express agreement that the deposit should be forfeited, and the question was considered on the footing that time was not of the essence of the contract. Here we have an express agreement as to the forfeiture In his judgment in *Howe* v. *Smith*(3), BOWEN, L.J., said "The question as to the right of the purchaser to the return of the deposit money must, in each case, be a question of the conditions of the contract In principle it ought to be so, because of course persons may make exactly what bargain they please as to what is to be done with the money deposited. We have to look to the documents to see what bargain was made." If any authority were wanted to prove that in each case it is a question of construction (I do not think it is wanted) it would be found in *Palmer* v. *Temple*(4) the case to which COTTON, L J., has referred, and which—whatever may be the value of the case as an authority on the construction of the contract in that case, as to which I agree with everything that has fallen from COTTON, L.J —adopts the principle that in each case we must consider what was the bargain. At page 520 there is this observation: "The ground on which we rest this opinion is, that in the absence of any specific provision,

(1) (1872) 8 Ch. App., 1022. (2) (1859) 4 H. & N., 506.
(3) (1884) L.R., 27 Ch.D., 89 at p. 97. (4) (1839) 9 Ad. & E., 508.

the question, whether the deposit is forfeited, depends on the intent of the parties to be collected from the whole instrument." Again on page 99, "We have to look to the conduct of the parties and to the contract itself, and, putting the two things together, to see whether the purchaser has acted not merely so as to break his contract, but to entitle the other side to say he has repudiated and no longer stands by it." The question of the return of a deposit came before EVE, J., in *Hall* v. *Burnell*(1) on a motion by the plaintiff (the vendor) that the agreement of sale should be rescinded and the deposit forfeited to the vendor. Here, again, there was no agreement for the forfeiture of the deposit. The learned Judge observes that the decision in *Howe* v. *Smith*(2) negatives the purchaser's right to recover the deposit in a case where he has repudiated the contract and establishes the right of the vendor in such circumstances to retain it. He also observes (page 556) that *Howe* v. *Smith*(2) establishes that there is nothing inconsistent in a vendor being given relief by way of rescission and at the same time, in the absence of express stipulation to the contrary, being allowed to retain the deposit.

The learned Judge points out that in *Jackson* v. *DeKadich*(3) FARWELL, J., had declined to make an order for a return of the deposit on the ground that a claim for rescission was inconsistent with a claim for damages under the contract and that in *Howe* v. *Smith*(2) there was no rescission. EVE, J., then proceeds to point out that there had in fact been rescission in *Howe* v. *Smith*(2) since the vendor had re-sold the property under his absolute title and not under a clause in the contract authorising him to sell on the purchaser's default, and that he had justifiably elected to treat the contract as rescinded. It may, I think, be put thus: If the purchaser repudiates the contract, the vendor may retain the deposit. If where time is not of the essence of the contract the vendor rescinds after the agreed date, it is for the purchaser to show that he was ready and willing to perform the contract within a reasonable time after the agreed date. If time is not of the essence of the contract, failure to perform on the agreed date does not in itself amount

(1) (1911) 2 Ch., 551 at p. 555. (2) (1884) 27 Ch.D., 89 at p. 93.
(3) (1904) W.N., 168.

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to repudiation, but express intimation by the purchaser that he repudiates his contract is surely not necessary. And if the party in default fails to fulfil his contract on the agreed date, I think the *onus* is on him to show he does not intend to repudiate. In the present case, some days before the agreed date, the vendor gave the purchaser express notice that he was not prepared to give him an extension of time (Exhibit V) and on the day of the agreed date or the day after the vendor gave the purchaser express notice that the purchaser had forfeited the deposit and that the vendor was going to sell the land to third parties. The purchaser made no offer, did not ask for an extension of time and did not answer the letter. The letter to Ramaswami Ayyar (Exhibit VI) to which the Subordinate Judge refers cannot be treated as a notice to the vendor. SANKARAN NAIR, J., observes in his judgment that the Subordinate Judge finds that the purchaser's conduct shows his willingness to carry out the contract after May 24. I do not find any such finding though I may have overlooked it. But assuming it to be the case, this seems to me to be immaterial since it is not suggested that his readiness and willingness was intimated to the vendor. I think, on the facts of this case, the vendor was entitled on May 25 to elect to rescind. He did so elect and he gave the purchaser express notice he had so elected. Afterwards he re-sold the lands under his absolute title. The Subordinate Judge held and WALLIS and SANKARAN NAIR, JJ., agreed with him that the subsequent sales were not under the original agreement.

In *Howe* v. *Smith*(1) FRY, L.J., observes that the effect of section 25 of the Judicature Act is "that the purchaser seeking damages is no longer obliged to prove his willingness and readiness to complete on the day named, but may still recover if he can prove such readiness and willingness within a reasonable time after the stipulated day." But he goes on to observe: "and the inquiry therefore arises whether the purchaser in the present case could aver and prove such readiness and willingness within a reasonable time." So far as I can see, the purchaser neither averred nor proved his readiness and willingness within a reasonable time, and I do not think he is relieved from this

(1) (1884) 27 Ch.D., 89 at p. 103.

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obligation because he had received express notice from the vendor that the latter intended to hold him to his bargain.

Then as to the Contract Act I do not think section 64 helps the purchaser. If the question had been *res integra*, I should have been inclined to hold that this section only applies where the contract is voidable under the law (*e.g.*, as falling within section 19 or 19 (*a*), Indian Contract Act) or where the contract itself in terms gives an option to avoid, to one of the parties. However, the decisions would seem to be the other way.

I do not think the section applies to the case of a deposit made to secure the performance of a contract. It has been suggested that illustration (c) to section 65, Indian Contract Act, ought to have found a place as an illustration to section 64. Assume this to be so, it is clear the "benefit" in the illustration was a benefit under the contract. Here the benefit of having some security that the purchaser would fulfil his contract was ancillary to the contract for the sale of the land. I do not think it was "thereunder" within the meaning of the section, and I do not think the rescission of what may be called the main contract by the vendor involves the rescission of the ancillary contract that, in default by the purchaser, the vendor should be entitled to retain the deposit.

I also think that section 74, Indian Contract Act, does not apply. The sum of Rs. 4,000 is named in the contract as an "advance," not as the amount to be paid in case of breach. Why should it be assumed that it was paid with a different intention from that stated in the contract? Further, if, as seems to me to be the right view, it is paid partly by way of part-payment of the purchase money and partly by way of security or guarantee for the performance of the contract, it cannot be regarded as a sum named in the contract as the amount to be paid in case of breach. Again, if we are to deal with this case according to the letter of the section, this, as was pointed out by MILLER, J., in the course of the argument, is not a question of the amount of compensation which the vendor is entitled to *receive* by reason of the breach, but a question whether the vendee is entitled, under the contract, to recover an amount which has been already paid.

If we examine the illustrations to section 74, Indian Contract Act, it seems to me the present case comes nearer to illustrations

(c) and (d) where the contract can be enforced according to its terms than to the other illustrations where the stipulation is by way of penalty.

There are two or three Indian decisions I should like to refer to. In *Bishan Chand* v. *Radha Kishan Das*(1) and *Balvanta* v. *Bira*(2), both cases in which there was no express agreement for the forfeiture of the deposit, the Courts in this country held, following the English Rule, that the deposit could not be recovered. *Srinivasa* v. *Rathnasabapathi*(3) was not a case of vendor and purchaser but a case where a contract provided that a deposit made by a contractor who had agreed to do certain work should be forfeited if he failed to do the work. There the stipulation as to the deposit was treated as a stipulation by way of penalty and it was held that the plaintiff's assignee was entitled to recover the difference between the amount of the deposit and the damages sustained by the defendants.

In *Manian Patter* v. *The Madras Railway Company*(4), the Court held that, where the instrument referred to a sum deposited as security for performance, the bargain of the parties should be carried out except where the forfeiture is relieved against on terms which the Court imposes to meet the justice of the case where the circumstances warrant the grant of such equitable relief. These two decisions might perhaps be reconciled on the ground that, in the former case, the "deposit" having regard to the value of the contract was proportionately larger than in the latter case. But I doubt if this distinction on the facts can be drawn as regards the latter case. The proposition as to the *reasonableness* of the sum deposited as security is in accordance with the passage in Sedgwick on Damages which the learned Judges cite If the question of reasonableness is a matter which can be taken into account, I am certainly prepared to hold that a 10 per cent. deposit, as in this case, on the purchase price (I do not overlook the fact that Rs. 20,000 was to remain on mortgage), is reasonable. In *In re Dagenham (Thames) Dock Company Ex parte Hulse*(5) where it was held the vendor could not retain the deposit, the deposit was half the purchase money. There, as WALLIS, J.

(1) (1897) I.L.R., 19 All., 489 (2) (1899) I.L.R., 23 Bom., 56.
(3) (1893) I.L.R., 16 Mad., 474. (4) (1906) I.L.R., 29 Mad., 118.
(5) (1873) L.R., 8 Ch. App., 1022.

points out, the amount was so large as to take it out of the ordinary class of deposits. There is certainly nothing extraordinary in a 10 per cent. deposit under an agreement for the sale of land.

I agree with WALLIS, J., and I think this appeal should be allowed.

MILLER, J.—I am of the same opinion. On the facts, I agree with WALLIS, J., that the sum of Rs. 4,000 for which the plaintiff is suing can be regarded as a deposit by way of guarantee or security of the performance of the contract of sale, and (agreeing with WALLIS, J., and the Subordinate Judge) that of that contract time was of the essence.

On those facts I do not see how to avoid the conclusion that the plaintiff on his failure to be ready with the purchase money at the essential time, must be held to have abandoned the contract, having put it out of his power to perform it. That brings the case within the English authorities among which *Howe* v. *Smith*(1) is conspicuous, and if we follow those cases the present suit must fail.

The weight of authority both in this country and in England is against the contention that the plaintiff is entitled to claim the return of the deposit as having been paid in pursuance of a penal stipulation: that is clear from the judgments of both the learned Judges who heard the appeal and it is needless for me to discuss the authorities.

There may be cases where the Courts must find that the amount of the deposit or payment in advance is so great in comparison with the amount payable under the contract, that the parties cannot have intended it as a mere security for performance, but rather as a punishment for non-performance of the contract, and in those cases the Court may doubtless refuse to allow the retention of the whole of the deposit; but where there is no such disproportion and nothing unreasonable in regarding the deposit as a security, then the defaulter will not be allowed to recover back what he has paid on an express stipulation that it shall be forfeited in the event of default. This is the rule which was accepted in *Manian Patter* v. *The Madras Railway Company*(2) as being in accordance with the English cases, and it is a rule which I am prepared to accept, as being obviously calculated to do

(1) (1884) L.R., 27 Ch.D., 89. (2) (1906) I.L.R., 29 Mad., 118.

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justice. Here I do not think it was seriously contended that the sum of Rs. 4,000 was excessive or unreasonable as a security for performance of the contract, and the fact that the vendor was able after breach of the contract by the vendee to effect a sale on terms even better than those contained in the broken contract is not evidence sufficient to support an inference that the deposit was unreasonable in amount. Unless then we are prevented by something in the Indian Contract Act from following these authorities I am of opinion that the appeal must be allowed. For the reason given by WALLIS, J., I do not think section 74 is applicable to this suit, and the only other section which need be considered is section 64—the second sentence of that section. I agree with WALLIS, J., that that section does not apply to the circumstances of this case.

It is as a forfeited security for the performance of the contract and not as part-payment of the price that the defendant seeks to retain the deposit, and it will not be denied that a benefit which he has obtained by reason of a breach of the contract is not a benefit 'under' the contract.

SANKARAN NAIR, J., takes the view that there is only one contract and the stipulation with regard to the deposit is a part of the consideration, and consequently, as I understand the learned Judge, the defendant, when he rescinded the contract rescinded with it the stipulation; the benefit which he has received under the stipulation is therefore a benefit received 'under' the rescinded contract. WALLIS, J., on the other hand holds that the stipulation may be regarded as collateral to the contract of sale, and thus, as I understand him, it is not rescinded with the rescission of the contract of sale and therefore section 64 cannot apply. This view seems to me to be the better.

Let us assume that the stipulation represents an agreement as to the damages payable under section 75 of the Contract Act: in that case it seems to me it would be unreasonable to hold that with the rescission of the contract, that agreement is also rescinded; but if it is not rescinded section 64 cannot apply to it. And if in that case it would be held, as I think it necessarily would be held, that the stipulation is not rescinded with what I may call the main contract, there is no reason why the same conclusion should not be reached when the stipulation relates to a security for the performance of the contract.

Both stand on the same footing: both are stipulations which depend for their operation not upon the fulfilment of the main contract but on its breach, and the provisions of section 64 are, it seems to me, inapplicable to them.

SANKARAN NAIR, J., is of opinion that the stipulation, if it is not an integral part of the contract of sale, must fail for want of consideration, but that difficulty, I venture to think, will arise only if the deposit is regarded solely as a part-payment: if it is a security placed in the hands of the vendor for the purpose of binding the bargain, there seems to be no want of consideration.

I agree also with WALLIS, J., that we cannot regard the deposit as the amount of damages agreed upon by the parties. It is very difficult to my mind to believe that the vendor would have limited his demand for damages to the sum of Rs. 4,000, in the circumstances of the case, and there is nothing in the language of the contract to compel us to hold that he did so. On the contrary the contract rather shows that that was not the intention.

I am for these reasons of opinion that the second part of section 64 is not applicable to the case and that being so I find nothing in the Contract Act to prevent our following the authority of *Howe* v. *Smith*(1) which as has been pointed out by EVE, J., in *Hall* v. *Burnell*(2) permits a vendor to rescind the contract as well as at the same time to retain the deposit

I would therefore allow the appeal and dismiss the suit.

SADASIVA AYYAR, J.—I have the misfortune to differ from the judgment of the majority of the Bench in the case.

SADASIVA AYYAR, J.

The Indian Contract Act was the result of the labours of several years' deliberation. It was drafted in England by the Indian Law Commission, it was revised and elaborated by the Legislative Department in India (which even borrowed certain provisions from the New York draft code) and it was lastly considered and revised with great care by that eminent jurist, Sir James Fitzjames Stephen, who was the then Law member of the Governor-General's Council. It was enacted "in order to define and amend certain parts of the law relating to contracts." Though there might be some portions of the law of contracts not covered by the Act, I do not think that, so far as

(1) (1884) L.R., 27 Ch.D., 89. (2) (1911) 2 Ch., 551.

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the general principles are concerned, the learned Legislator would have failed to indicate them with sufficient clearness and fullness for the guidance of Indian Courts. (The Indian Evidence Act which also we owe to the same eminent jurist has been universally praised for its thorough grasp of the principles of the Law relating to Evidence and for the exhaustive and clear manner in which such principles have been applied in the enactment of the rules of evidence embodied in the Act.) Pollock mentions the case of Damdupat in the Bombay Presidency and in the town of Calcutta in connection with the case of loans contracted by Hindus. He also refers to the provisions as to the awarding of interest as damages under the Hindu Law in Bombay; *Saunadanappa* v. *Shivbasawa*(1), and then remarks "Such cases are very few and the native Law of Contract may, for all practical purposes, be regarded as having been superseded by the Indian Contract Act, etc." SHEPHARD, J., in his Contract Act refers to some special and subsidiary portions of the Law of Contracts such as that of the Law of Master and Servant, Consignor and Carrier, the law regulating promissory notes and bills of exchange, the Law of Contracts specially affecting land, the law as to specific performance and some few similar technical matters as intentionally omitted from the direct scope of the Act, some of these matters being afterwards embodied in enactments like the Negotiable Instruments Act and the Transfer of Property Act. But as regards the enunciation of the *general* and *universal* principles of the Law of Contracts, I think that the Contract Act was intended to be as exhaustive as possible.

I am therefore naturally reluctant to hold that the Indian Contract Act contains no provisions applicable to the very common cases where a vendor and a purchaser agree that the earnest money deposited with the vendor should be treated as part of the purchase money, if the sale is completed by the purchaser, but should be forfeited to the vendor if the purchaser makes default in completing the purchase. After going through the Contract Act, I think that the provisions of sections 39, 55, 64, 65, 73, 74 and 75 of the Act, when read together, indicate in sufficient fullness and clearness the principles applicable to

(1) (1907) I.L.R., 31 Bom., 354

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the decision of the question, now in dispute, relating to the rights and duties of a vendor who rightly rescinds a contract of purchase and with whom a portion of the purchase money agreed upon had been deposited with a stipulation for its forfeiture for the purchaser's default. The rule enacted by section 39 of the *Contract Act* gives a right to the vendor to rescind the contract if the purchaser has "disabled himself from performing the contract." The result of applying section 55 is that, if time is of the essence of the contract and if the purchaser fails to pay the balance of the purchase money within the time agreed upon for the completion of the purchase, the vendor might rescind the contract and the vendor will "be entitled to compensation from the purchaser for the losses occasioned" to the vendor by the purchaser's failure. Under section 64, it seems to me that the vendor who properly rescinds the contract according to section 55 on account of the purchaser's failure, should "if he (the vendor) have received any benefit thereunder" (that is, from the contract of sale and purchase) "restore such benefit to" the purchaser. Section 65 indicates that when a contract *of sale becomes void (which might happen by the vendor lawfully* rescinding it) the vendor, if he has received any advantage under the contract, is bound to restore it or to make compensation for that benefit to the purchaser. Illustration (*c*) to this section is very instructive. It is as follows:—"A, a singer, contracts with B, the manager of a theatre, to sing at his theatre for two nights in every week during the next two months, and B engages to pay her a hundred rupees for each night's performance. On the sixth night, A wilfully absents herself from the theatre, and B, in consequence, rescinds the contract. B must pay A for the five nights on which she had sung." Section 73 merely confirms the right given by section 55 to the vendor to claim compensation from the purchaser for the loss occasioned by the latter's failure. Thus the obligation to restore the benefit received or to make compensation for it is laid down absolutely, *even where A has made wilful default*. If B sustained any loss by A's wilful default, he is, of course, entitled to make a cross claim for it from A under sections 55 and 73 but this cannot affect the absolute obligation laid on B to restore the benefit received by him from A under the rescinded contract.

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Section 74 is a very important section. It treats of stipulation by way of penalty. We know how Courts in India followed too closely the English decisions which made refined distinctions between penalty and liquidated damages and which treated a provision for enhanced interest from date of bond as a penalty but not a provision for enhanced interest from date of default. The amendment of section 74 and the new illustrations added to it did away with all these distinctions imported into India from England and treated all stipulations in a contract "by way of penalty" on the same footing to be relieved by Courts according to justice, equity and good conscience, directing, however, the Courts to award "reasonable compensation" against the party guilty of the breach of contract, not exceeding the amount named as penalty or (as the case may be), the penalty stipulated for (if the penalty is any stipulation other than a sum named as to be paid for breach). [I have had occasion recently to consider this section 74 at length in *Muthukrishna Iyer* v. *Sankaralingam Pillai*(1), and again in the Full Bench reference made in that appeal.] The very use of the expression "forfeit the deposit") (the agreement of sale in this case uses the word "forfeit" conveys to my mind the notion of a "stipulation by way of penalty" referred to in section 74. A man forfeits a thing as punishment or penalty for a fault, and hence every stipulation for forfeiture must be a stipulation by way of penalty. This view seems to me to be materially strengthened by the exception clause attached to section 74 and the illustration (*c*) which relates to that exception. It is clear from the illustration that when A "forfeits" his recognizance in Rs. 500 to appear in Court, he must pay the whole "penalty" of Rs. 500. In short, I find myself unable to dissociate in my mind the idea of a stipulation by way of forfeiture from the idea of a stipulation by way of "penalty" or of "liquidated damages," if we retain in our mind the distinction between penalty and liquidated damages made in the English decisions. Section 75 of the Contract Act confirms the provisions in sections 55 and 73 entitling the vendor to recover compensation from the purchaser for the latter's breach of contract.

On the facts of this case, I agree that the plaintiff (purchaser) did commit breach of contract by not paying the balance of

(1) (1913) I.L.R., 36 Mad., 229 (F.B.)

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purchase money within the stipulated period. I differ (with respect) from the opinion of SANKARAN NAIR, J. (if such be his opinion, as I am not quite sure) that, even when time is of the essence of the contract and the stipulated time is allowed by the purchaser to expire, the vendor cannot rescind the contract unless the purchaser had also "no intention of performing the contract or repudiates it." Observations tending to that effect in *Howe* v. *Smith*(1) cannot affect the law as laid down in the Indian Contract Act. As remarked by Pollock in the preface to his book on the Contract Act "In many of the arguments and some of the judgments in the reports of the Indian High Courts, there appears, if I mistake not, a tendency to follow the English authorities too literally, though (in any case) these are not positively binding on Indian Courts." As to the allowing of a further "reasonable time after the stipulated date" before the vendor could rescind the contract (a doctrine also evolved from loose expressions used in some of the English decisions), I do not see how, when time is of the essence of the contract and the vendor therefore has the legal right to rescind the contract on the expiry of the stipulated time without the purchaser having performed his promise, a further reasonable time could be allowed so as to deprive the vendor of his legal right to rescind the contract as soon as the purchaser's breach of thelatter's promise takes place.

Granting then (as I must) that the vendor rescinded the contract properly in this case, what are the respective rights and liabilities of the parties consequent on such rescission? The English Courts have, in many cases, treated these stipulations for forfeiture of deposit money as standing on a different footing altogether from stipulations for penalty and stipulations for liquidated damages but in other cases they have treated such stipulations as standing on the footing of stipulations for liquidated damages. I shall refer to only a few of these cases. In *Wallis* v. *Smith*(2), JESSEL, M.R., held that in such cases "the bargain of the parties is to be carried out." In an English case, a learned Judge is reported to have gone so far as to say "There is no breach of contract at all. You have taken your chance with respect to your deposit and you are not

(1) (1884) 27 Ch.D., 89. (2) (1882) 21 Ch.D., 243.

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entitled to have that deposit back." The position that "there is no breach of contract at all" shows how widely the principles of the Indian Contract Act by which Indian Courts are bound differ from the technical considerations which have guided the English Judges in some of the English cases. Surely there has been a clear breach of contract under the Contract Act and the bargain between the parties is not a mere game of chance in which one party has lost his deposit according to the rules of the game as agreed upon.

But against these cases is *In re Dagenham (Thames) Dock Company, Ex parte Hulse*(1) where it was held that a stipulation that half the purchase money (paid in advance) should be forfeited was a penalty and should be relieved against. I do not see how, on principle, a deposit to be forfeited should be treated as a penalty if it is 50 per cent. of the purchase money, but it should be treated as money to be retained by the vendor according to the bargain between the parties, if it is of a less proportion than half. If once you admit that the reasonableness of the sum agreed upon to be forfeited for breach can be considered in arriving at the conclusion whether the stipulation is to be treated as a penalty or not, I think it is impossible to treat such stipulations on any other footing than the footing of stipulations for penalty (if the amount is harsh or unconscionable) or stipulation for liquidated damages (if the amount is a reasonable one). In *Wallis* v. *Smith*(2) itself, FRY, J., in the original trial held that the deposit money must be treated as *liquidated damages* if it was a reasonable amount. So also in Sedgwick on Damages, seventh edition, volume I, page 593 (quoted in *Manian Patter* v. *The Madras Railway Co.*(3), it is said that the forfeiture will not be interfered with *if reasonable in amount.* As I said, the introduction of the idea of the reasonableness or otherwise of the sum is consistent (at least to my mind) only with the principle that the amount is considered as reasonable compensation for the damage sustained by the vendor owing to the purchaser's breach of contract

The distinction between penalty and liquidated damages has been abolished by the Indian Contract Act, section 74, and the Court has got full power to do equitable justice between the parties.

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(1) (1873) 8 Ch., App, 1022. (2) (1882) 21 Ch. D, 243.
(3) (1906) I.L.R., 29 Mad, 118

Where the probable damages sustained are uncertain, the Court will usually give the whole deposit money as compensation if it is a reasonable sum. In the English Courts, this reasonable sum is, in some cases, styled liquidated damages and it was so held in *Palmer* v. *Temple*(1), and *Wallis* v. *Smith*(2). (See FRY, J's. judgment in the original trial.) In cases (as in this case) where it is proved as a fact that no damages at all have been sustained, the Court would, if the defendant claims it, give a nominal amount as compensation out of the stipulated sum, because it has been held that some compensation should be given, if claimed under section 74 of the Contract Act. [See *Annamalai Chetty* v. *Veerabadram Chetty*(3).] That the sum to be forfeited is, even under the English decisions, "damages" due to the vendor is clear from the fact that, when the vendor finds that he has sustained damages beyond the forfeited amount, he could admittedly sue *only for the balance* and cannot sue for the whole amount of damages excluding altogether the forfeited amount from consideration. Usually, the earnest or deposit money is a very small proportion of the price fixed. The probable damages consequent on the breach by the purchaser are uncertain in most cases as the vendor rarely cares to sell the land at once to other purchasers. Courts would therefore be fully justified in treating the whole deposit amount (or *Acharapanam* in Tamil) as reasonable compensation in most cases. But this fact (as I think) should not make us forget the principle that the deposit money is a stipulated (that is, agreed upon) penalty and that the provisions of section 74 of the Contract Act are, therefore, applicable to it and must govern it. Even according to *Howe* v. *Smith*(4), earnest money is intended to create by the *fear* of its forfeiture, a motive in the purchaser to fulfil the contract. Just as the word 'forfeiture' inevitably raises the idea of 'penalty' in my mind, the word 'fear' raises the very same idea. Whatever may be the view of the other High Courts, *Srinivasa* v. *Rathnasabapathi* (5) decided by this Court treats such stipulations as stipulations by way of penalty.

As I said in the beginning, I find it difficult to hold that no principle was laid down by any of the sections of the Indian Contract Act which could be applied to stipulations for forfeiture

(1) (1839) 9 Ad. and E., 508.
(2) (1882) 21 Ch.D., 243.
(3) (1903) I.L.R., 26 Mad., 111.
(4) (1884) 27 Ch.D., 89.
(5) (1893) I.L.R., 16 Mad., 474.

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of deposit money except the general principle that the bargain between the parties must be strictly enforced. Sections 64 and 65 of the Contract Act are worded quite generally and their Lordships of the Privy Council did not hesitate to hold that section 65 of the Contract Act applied to the facts of *Bassu Kuar* v. *Dhum Singh*(1), where an agreement became wholly ineffectual as one party to it properly threw it up altogether on account of the other party not admitting the existence of 'other unwritten terms' alleged by the former. I must confess that I have been unable to follow the arguments advanced by the appellants' learned vakil to the effect that sections 64 and 65 of the Contract Act could not be applied because the deposit money retained by the defendant was not a 'benefit' or 'advantage' received under the contract of sale. One of the terms of the contract for sale was that the deposit money was to be treated as part of the purchase money under the contract, having been expressly paid as such. It, no doubt, contained another term that the deposit money was to be treated as forfeited for the defendant's benefit if the plaintiff failed to fulfil his promise to pay the remainder of the purchase money within a stipulated time. But the advantage which accrues to the vendor of retaining the deposit money by such failure of the purchaser is clearly an advantage derived under the terms of the original contract. The contract might contain some provisions which might be called "main provisions" and others which might be called "ancillary provisions," and this provision about the retaining of the deposit money by the vendor might be an ancillary provision, but the benefit derived from this provision is, it is clear to my mind, a benefit derived under the contract. Again Sedgwick, who is relied on *Manian Patter* v. *The Madras Railway Company*(2) heads his chapter 12 (in which section 414 occurs) as a chapter on "Liquidated Damages" and begins section 414 as follows:— "Deposit to be forfeited on default—the forfeiture, if reasonable in amount, will be enforced as *liquidated damages*." To my mind, it is impossible to put it on any other footing but that of liquidated damages and, as the Contract Act does away with the distinction between penalty and liquidated damages, it must come under a stipulation by way of penalty.

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(1) (1889) I.L.R., 11 All., 47. (2) (1906) I.L.R., 29 Mad., 118.

It is therefore clear to my mind, that just as in *Bassu Kuar* v. *Dhum Singh*(1), the book-debt amount retained by the vendor-debtor as part of the purchase money was treated as a benefit which the said vendor got under the contract and which he must give up under section 65 of the Contract Act on the contract having become ineffectual, so, the defendant in this case was bound to refund the benefit of the deposit money on the contract becoming ineffectual, his only right against the plaintiff being to make a counter-claim under sections 55, 73 and 75 of the Contract Act for compensation for the damages, if any, caused to him by the plaintiffs' breach and, where no actual damages have been really sustained (as in this case), to make a counter-claim for some compensation out of the stipulated penalty under section 74 of the Contract Act. That the provisions of section 65 of the Contract Act as to restitution of benefits is distinctly wider than the rules laid down in English decisions is admitted by Pollock in the last paragraph of his commentaries to section 65 of the Contract Act. I am also not disposed to limit the wide provisions of section 74 of the Contract Act (especially after the Legislature was obliged to amend it, owing to the unfortunate introduction, by Indian Courts of the "artificial and more or less arbitrary rules of construction" concerned with penalty and liquidated damages laid down by English decisions); I am not disposed to limit the wide provisions of section 74 by drawing a further distinction between a "penalty" and a "deposit" paid with a condition of forfeiture or a distinction between a deposit of a reasonable proportion of the purchase money and a deposit of an unreasonable proportion of the purchase money, or a distinction between what is called "liquidated satisfaction" in an English case *Societe Generale De Paris* v. *Walker*(2), and "damages" or "penalty" on the other and so on and so forth. (There seems to me to be no magic in the word "liquidated" or in the word "deposit".) Suppose that in this case two alternative states of facts were proved:—

(*a*) that the plaintiff had paid all but Rs. 1,000 of the purchase money of Rs. 41,000 before the due date.

(*b*) that the plaintiff had paid only the Rs. 4,000 first deposited and not a single pie of the remaining Rs. 37,000.

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(1) (1889) I.L.R., 11 All., 47. (2) (1886) 11 A.C., 20 at p. 34.

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In either case, the whole Rs. 4,000 should be forfeited according to the terms of Exhibit A and I cannot conceive that such a provision is not a penalty.

Having read sections 39, 64, 65, and 75 of the Contract Act together, my mind is clear that the framers of the Contract Act intended that money received by a vendor under a rescinded contract of sale (rescinded properly by the vendor) should be returned to the purchaser, leaving full liberty to the rescinding vendor to recover damages from the purchaser for the latter's breach of contract. *We have got the authority of Mr. Stokes* for saying that the illustrations (*b*) and (*c*) to section 65 of the Contract Act properly belong to section 64 to that Act. It is further very significant that the very same set of facts is mentioned in the illustration (*a*) to section 39, illustration (*c*) to section 65 and the illustration to section 75. I shall here set down the three illustrations to the three sections together, and they make it almost conclusive to my mind that the obligation of the vendor to return the deposit money was intended to be quite independent of his right to recover damages sustained by him by the purchaser's default, though, of course, the said obligation and the said right can be put in issue and dealt with in the same suit. The three illustrations to the three sections are :—

A, a singer, enters into a contract with *B*, the manager of a theatre, to sing at his theatre two nights in every week during the next two months, and *B* engages to pay her Rs. 100 for each night's performance. On the sixth night *A* wilfully absents herself from the theatre. *B* is at liberty to put an end to the contract [illustration (*a*) to section 39].

A, a singer, contracts with *B*, the manager of a theatre, to sing at his theatre for two nights in every week during the next two months and *B* engages to pay her Rs. 100 for each night's performance. On the sixth night, *A* wilfully absents herself from the theatre and *B*, in consequence, rescinds the contract. *B* must pay *A* for the five nights on which she had sung [illustration (*c*) to section 65].

A, a singer, contracts with *B*, the manager of a theatre, to sing at his theatre for two nights in every week during the next two months and *B* engages to pay her Rs. 100 for each night's performance. On the sixth night, *A* wilfully absents herself from the theatre and *B*, in consequence, rescinds the contract. *B* is

entitled to claim compensation for the damages which he has sustained through the non-fulfilment of the contract (illustration to section 75).

For the above reasons, I hold that the conclusion of SANKARAN NAIR, J., is right and I would affirm his decision and dismiss this appeal.

The Court.—The result is the appeal is allowed and the suit is dismissed with costs throughout.

APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Sundara Ayyar.

A BALASUBRAMANIA CHETTI AND THREE OTHERS (JUDGMENT-DEBTORS), APPELLANTS,

1913. February 25 and 26.

v.

SWARNAMMAL AND ANOTHER (DECREE-HOLDERS), RESPONDENTS.*

Execution—Civil Procedure Code (Act V of 1908), sec 141, O II, r 2—Non-applicability of, to execution applications—Consolidating statute, construction of.

The dismissal of a suit on the ground that no suit would lie to recover mesne profits subsequent to the date of a previous decree which awarded subsequent mesne profits is no bar to a claim thereto in execution of that decree

The fact that a decree-holder made a previous application for execution to recover mesne profits only for three years subsequent to the plaint and not for a further period also is not a bar under Order II, rule 2, Civil Procedure Code, or section 141, Civil Procedure Code, as now enacted, to another execution application for recovery of mesne profits for the further period

Thakur Prasad v *Fakir-ullah* (1895) I.L R , 17 All., 106 (P.C); s.c., 22 I.A. 44, followed.

Safdar Ali v. *Kishan Lal* (1910) 12 C L J , 6, not followed.

There is nothing in the Code of Civil Procedure to prevent a decree-holder from presenting successive applications for realising different portions of his decree.

When the words of a consolidating statute are clear their effect cannot be cut down by a comparison with the language of earlier statutes.

Section 141, Civil Procedure Code, is intended to apply to proceedings in Civil Courts such as probate, etc.

APPEAL against the order of K. KRISHNAMACHARIYAR, the Subordinate Judge of North Arcot, in Civil Miscellaneous

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* Appeal Against Order No. 259 of 1911.

BALASUBRAMANIA CHETTI v. SWARNAMMAL.

Petitions Nos. 216 and 184 of 1911 in Execution Petition No. 8 of 1911 filed in Original Suit No. 4 of 1904 on the file of S. GOPALA ACHARIYAR, the District Judge of Salem.

The necessary facts are given in the judgment. The judgment-debtors, whose objections to the execution of the decree were over-ruled, preferred this appeal.

L. A. Govindaraghava Ayyar for the appellants.

C. V. Ananthakrishna Ayyar for the respondents.

BENSON AND SUNDARA AYYAR, JJ.

JUDGMENT.—This appeal relates to proceedings in execution of a decree The decree which was passed in a suit for possession of immoveable property and mesne profits, awarded mesne profits till the date of plaint, *i.e.*, till the 23rd March 1904 and subsequent profits "till the date of delivery or for three years, whichever is the shorter period." It is clear that there is here an *inadvertent omission of the words "from the date of the decree"* after the words "three years" We agree with the Subordinate Judge in holding that the sentence must be construed as entitling the plaintiff to mesne profits for three years from the date of the decree. But it is contended that the plaintiff is barred from making this claim on account of certain prior proceedings. One bar pleaded is that the decree in Original Suit No. 1185 of 1909 on the file of the District Munsif's Court of Tiruppattur, which was instituted by the plaintiff for mesne profits for three years from the date of the plaint precludes this application. This objection was not pressed in the Lower Court and it was conceded that the suit was dismissed on the preliminary ground that a fresh suit for mesne profits subsequent to the date of the decree was not sustainable. It is now argued that it was also dismissed on the ground that the plaintiff ought to have included his present claim in his previous suit and, not having done so, he was barred from sueing again by Order II, rule 2, Civil Procedure Code. Assuming that this was the case, the Court merely held that a fresh suit could not be sustained. This does not preclude the plaintiff from claiming subsequent profits in execution of his previous decree. It is next contended that in any event Order II, rule 2, Civil Procedure Code, bars the present claim, because the plaintiff made a previous application for execution in which he sought to recover mesne profits only for three years subsequent to the plaint and not for the further period included in the present application.

It is argued that section 141, Civil Procedure Code, makes the rule applicable to execution petitions by laying down that the procedure prescribed in this Code in regard to suits shall be followed, as far as it can be made applicable, in all proceedings in any Court of Civil Jurisdiction and reference is made to *Safdar Ali* v. *Kishan Lal*(1) in support of the argument, where the Calcutta High Court held that rule 9 of Order IX of the Civil Procedure Code providing for the restoration of a suit dismissed for default was applicable to an order passed under Order XXI either under rule 98 or rule 99. We shall presently deal with this. But we do not think that the change in the language of section 647 of the old Code of Civil Procedure was intended to make any alteration in the law. The Privy Council held in *Thakur Prasad* v. *Fakir-ullah*(2) that execution proceedings must be regarded as a continuation of the suit and that section 647 of the old Code of Civil Procedure (Act XIV of 1882) which enacted that the procedure prescribed in the Civil Procedure Code should be applicable in all proceedings other than suits and appeals did not make the Code applicable to execution proceedings. An explanation was added to the section by section 4 of Act VI of 1892 to make this clear. This explanation has been omitted in section 141 of the present Code. We do not think that this shows that it was intended to declare that execution proceedings are not a continuation of the suit. It was on general principles that the Privy Council held that a suit includes proceedings in execution, and the word "suit" in section 141 must therefore be understood as including execution. This is the view adopted by Messrs. Woodroffe and Ameer Ali in their notes to section 141. When the words of a consolidating statute are clear, their effect cannot be cut down by a comparison with the language of earlier statutes—see article 180 of the Limitation Act which shows that several successive applications may be made for the execution of a decree. That also shows that it could not have been the intention of the legislature to apply to execution proceedings provisions laid down with regard to suits only. The procedure to be followed in appeals and execution applications is specifically laid down in the Civil

(1) (1910) 12 C.L.J., 6

(2) (1894) 22 I.A., 44; s.c. (1895) I.L.R., 17 All., 106 (P.C).

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Procedure Code. Section 141 is intended to apply to other proceedings in Civil Courts such as probate, etc.

With regard to *Safdar Ali* v. *Kishan Lal*(1) it does not appear whether the order dismissing the previous application was passed under rule 98 or rule 99 of Order XXI of the Code of Civil Procedure. If it was passed under rule 99, section 141 might perhaps be applicable, as the proceedings would not be between parties to the suit and the application might perhaps be treated as an independent original proceeding. If the order was under rule 98, then section 141 would not be applicable. The facts of the case are not stated in the report. We do not therefore feel pressed by the decision. This case was distinguished in its facts in the later case—*Asim Mandal* v. *Rajmohan Das*(2) and the observations with regard to section 141 are dissented from. We hold that the application is not barred by Order II, rule 2 of the Code of Civil Procedure, which is not made applicable to execution applications by the Civil Procedure Code. We see nothing in the Code to prevent a decree-holder from presenting successive applications for realising different portions of what he is entitled to under his decree. Lastly, it is argued that the fourth defendant is not liable to be personally arrested in execution of the decree. The plaintiff waives his right, if any, to arrest him. He will therefore be declared not liable to be arrested. We dismiss the appeal with costs with the modification mentioned above.

(1) (1910) 12 C.L.J., 6. (2) (1911) 13 C.L.J., 532.

APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Sundara Ayyar.

L. CHINNAYYA (DEFENDANT), PETITIONER,

1912, April 30 and 1913 March 10.

v.

K RAMANNA (PLAINTIFF), RESPONDENT.*

Fraud—Suit to set aside a judgment for fraud—Discretionary relief—What acts constitute fraud—Obtaining decree by deliberate perjury, whether liable to be set aside as fraudulent

A judgment in a previous suit cannot be set aside by a new suit based on an allegation that the decree-holder obtained it by practising a fraud on the court, in the absence of the judgment-debtor, viz, by suppressing certain material evidence in the case; for it was the duty of the judgment debtor to have got produced all his evidence in the previous suit, suppression of material evidence is not fraud within the meaning of the rule enunciated in *The Duchess of Kingston's Case* (1776) 2 Sm. L C., 11th Edn, 731 at p. 738 which is to the following effect —

In order that fraud may be a ground for vacating a judgment, it must be a fraud that is extrinsic or collateral to everything that has been adjudicated upon but not one that has been or must be deemed to have been dealt with by the Court.

The power of the Court to set aside a judgment on the ground of fraud is a discretionary one which will be exercised in favour of the petitioner only if he had been free from fraud or any turpitude, or laches, sloth or lack of diligence in protecting his own interests.

Quære :—Whether a judgment can be set aside for fraud on the ground that the successful party was guilty of deliberate perjury or suborning perjury?

English and Indian case law on the subject discussed.

Examples of fraud which will vitiate a judgment, given.

PETITION praying that the High Court will be pleased to direct E. B ELWIN, the Government Agent at Godavari, to review his judgment in Appeal No. 3 of 1910.

This suit was instituted to restrain the defendant by a permanent injunction from executing a decree for Rs. 643 which the defendant had obtained against the present plaintiff, in Original Suit No. 16 of 1906, on the ground that the defendant obtained the decree by means of fraud practised on the Court. The only allegation of fraud that was insisted on at the hearing in this

* Civil Miscellaneous Petition No. 2455 of 1910.

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case was that the defendant having bought from the plaintiff timber worth Rs. 1,026 did not give him credit for the whole amount but only for Rs. 610. The lower Appellate Court deciding that the defendant's accounts were inaccurate, allowed the plaintiff's case to the extent of Rs. 416, the difference between Rs. 1,026 and Rs. 610, and held that the defendant must be held to have obtained his decree to that extent, viz., Rs 416, fraudulently and restrained the defendant from executing his decree to that extent. Against this decision the defendant preferred this petition by way of appeal to the High Court.

The other facts are given in the following order of the Court.

P. Narayanamurti for the petitioner.

T. Prakasam for the respondent.

BENSON AND SUNDARA AYYAR, JJ.

ORDER.—This is an application made under rule 8 of the rules applicable to the Godavari Agency asking us to direct the Agent to review his judgment in an appeal by which he confirmed the decree of the Assistant Agent of Bhadrachalam. The facts which led up to the case may be very briefly stated. The appellant, who was the defendant in the first Court, instituted Original Suit No. 16 of 1906 in that Court for the recovery of a sum of Rs. 643-9-0 from the present plaintiff alleged to be due on dealings between the parties. The present plaintiff filed a written statement alleging that some items in the account sued on had been wrongly debited against him and denying the accuracy and reliability of the accounts put in by the present defendant. A Commissioner was appointed to scrutinise the accounts and to report on the result. The present plaintiff did not put in an appearance on the day fixed for the hearing of the suit. The present defendant was examined as a witness and a decree was passed in his favour for the amount sued for. An appeal was preferred by the present plaintiff to the Agent, but the decree was confirmed by him, and this Court also refused to interfere with the appellate decree of the Agent. The present suit has been instituted to set aside the former decree on the ground that it was obtained by fraud and for an injunction to restrain the defendant from executing it. The only allegation of fraud that was insisted on at the hearing was that the defendant, having bought from the plaintiff timber worth Rs. 1,026-14-0 did not give him credit for the whole amount but only for

Rs. 610-2-0. It will be observed that this allegation is at variance with the defence made by the present plaintiff in Original Suit No. 16 in which his allegation was that certain items were wrongly debited against him in the defendant's account. In answer to the present suit, the defendant alleged that the contract for the sale of timber referred to by the plaintiff was made on his behalf by his son in his absence, that it was a part of the agreement that the timber should be of a certain quality, that what was supplied by the plaintiff was not of the quality agreed to, that he, in consequence refused to ratify the sale, and that the plaintiff agreed to an arrangement whereby the defendant sold the timber at Rajahmundry and credited the actual sale proceeds (Rs. 610-2-0), after deducting the expenses, to the plaintiff's account The Assistant Agent at first dismissed the suit on the ground that it was barred by the rule of *res judicata* in consequence of the previous judgment and that the ground alleged by the plaintiff for setting aside the decree did not amount to such fraud as would entitle him to get the previous judgment vacated. On appeal, the Agent set aside that judgment on the ground that the plaintiff's allegation in the plaint that the defendant fraudulently kept back certain accounts from examination by the commissioner was an averment of fraud which would entitle him to have the previous judgment vacated, if he could prove the allegation. After remand, witnesses were examined on both sides. The defendant also put in two documents in support of his case. The Assistant Agent, however, came to the conclusion that the defendant did not succeed in proving the arrangement set up by him. He did not find that any accounts were withheld by the defendant from the Commissioner at the trial of Original Suit No. 16 as alleged in the plaint. Having thus found that the defendant ought to have given credit, for Rs. 1,026-14-0, and not for Rs. 610-2-0, to the plaintiff, he observed, "To this extent, therefore, the entry in defendant's accounts was fraudulent and defendant was not entitled to the decree he obtained in Original Suit No. 16 of 1906 against plaintiff on the strength of these accounts." He, therefore, set aside the decree and granted an injunction restraining the defendant from executing it. He concluded with a somewhat unintelligible observation: "As there is good reason to conclude that the litigation in this suit is merely fictitious each

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party will bear his own costs throughout." On appeal, the Agent modified the Assistant Agent's judgment by restraining the appellant from executing the decree in Original Suit No. 16 only to the extent of Rs. 416-12-0, the amount of the loss which the plaintiff sufferred by the incorrect entry in the defendant's account. His finding of fraud was expressed in these terms. "As appellants swore to the accuracy of the accounts and they have been proved inaccurate to the extent of Rs. 416-12-0, he must be said to have obtained his original decree fraudulently and respondent was entitled to have it set aside to that extent." The learned Vakil for the petitioner in this Court contends that no fraud such as would entitle the plaintiff to get the decree in Original Suit No. 16 set aside has been proved, that all that has been found by the lower Courts is that the decree in Original Suit No. 16 was incorrect, and that this finding is based on evidence let in by the plaintiff which he might, and ought to, have let in in Original Suit No. 16 and which he, by his own carelessness, failed to adduce then. The respondent contends that, on the finding of the lower Courts, the evidence given on oath by the defendant at the trial of Original Suit No. 16 was perjured testimony and a decree obtained by perjured evidence may be set aside on the ground of fraud. It is indisputable that a decree may be vacated on the ground that it was obtained by the successful party by fraud. The question is what would amount to fraud which would entitle an unsuccessful litigant to get the decree vacated. He cannot, it is clear, be allowed to get round the rule of *res judicata* and to prove that the judgment given by the Court was wrong because it came to a wrong conclusion on the evidence before it. It follows from this that the Court's conclusion both on the construction to be put on the evidence placed before it and on the inference to be drawn from such evidence as well as on the trustworthiness of the evidence should be regarded as final. If the Court acts erroneously in forming its judgment on any of these matters, the proper remedy is to invoke the help of the appellate tribunal where an appeal is allowed by law. Another mode of rectifying an erroneous judgment is to apply for review of judgment. The unsuccessful party has, in such an application, an opportunity to adduce any evidence which he failed to adduce at the hearing and which he could not, with all proper diligence

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have then adduced. It cannot be doubted that, in such cases, he cannot institute a fresh suit to get the judgment vacated. The allegation of fraud for vacating a judgment, therefore, must be extraneous to everything which has been adjudicated on by the Court and not any fraud which has already been dealt with by the Court. The rule allowing the vacating of a judgment for fraud is not an exception to the rule of *res judicata*, but is independent and outside the scope of that principle. In *The Duchess of Kingston's Case*(1), Sir WILLIAM DEGREY, Lord Chief Justice, observed with regard to the judgment of a competent Court, "But if it was a direct and decisive sentence upon the point, and, as it stands, to be admitted as conclusive evidence upon the Court, and not to be impeached from within; yet, like all other acts of the highest judicial authority, it is impeachable from without: although it is not permitted to show that the Court was mistaken, it may be shown that they were misled. Fraud is an extrinsic, collateral act; which vitiates the most solemn proceedings of Courts of justice. Lord Coke says, it avoids all Judicial acts, ecclesiastical or temporal." [See *The Duchess of Kingston's Case*(1).] The effect of this pronouncement is that the correctness of the judgment of a Court of competent jurisdiction cannot be impeached, but it may be shown that the value of the judgment, assuming it to be correct, is destroyed by collateral or extrinsic fraud in the obtaining of it. Now the judgment of a Court includes the decision of the questions whether the testimony of any witness is true or false and whether a document produced in evidence is genuine or not. These questions are not extraneous or collateral to the judgment, but are steps which lead to the final adjudication of the Court, quite as much as its opinion as to the effect of the evidence adduced and the inference to be drawn from it. The parties in a suit are entitled to convince the Court that the evidence given by their respective witnesses is true and prove the contentions they urge. It stands to reason, therefore, that the unsuccessful party cannot be allowed to resort to a fresh suit in order to make a fresh attempt to show that the evidence which was insisted on by his opponent as true was, in [illegible]ty, false and to characterise such insistence as fraud in

(1) (1776) 2 Sm. L.C., 11th Edn., 731 at p. 738.

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obtaining the judgment. Nor can he be permitted to do so by adducing fresh evidence for the purpose, for it was his duty to place all his evidence before the Court at the former trial. In *Patch* v. *Ward*(1) Lord CAIRNS, L J., observed, "Now, it is necessary to bear in mind what is meant and what must be meant by fraud when it is said that you may impeach a decree signed and enrolled on the ground of fraud. The principle on which a decree may be thus impeached is expressed in the case which is generally referred to on this subject, *The Duchess of Kingston's Case*."(2) Then his Lordship cites the passage already quoted above and proceeds to explain it. "The fraud, there spoken of must clearly, as it seems to me, be actual fraud, such that there is on the part of the person chargeable with it the *malus animus*, the *mala mens* putting itself in motion and acting in order to take an undue advantage of some other person for the purpose of actually and knowingly defrauding him." There can be no undue advantage taken of another by a party in putting any matter before the Court to be adjudged by it to be true or false. Both parties are entitled to invoke the judgment of the Court and to convince it of the truth of the evidence adduced by them respectively. It is true that parties ought not to let in false evidence, and that it is highly improper and immoral to do so, but it is the function of the Court to decide whether the evidence is true or false. If the adducing of false evidence can be spoken as a fraud, then the Court, in deciding the case, must be taken to have adjudged whether such fraud has been committed or not, and what it has once adjudged, it cannot be called upon to decide again. The test to be applied is, Is the fraud complained of not something that was included in what has been already adjudged by the Court, but extraneous to it? If, for instance, a party be prevented by his opponent from conducting his case properly by tricks or misrepresentation, that would amount to fraud. There may also be fraud upon the Court if, in a proceeding in which a party is entitled to get an order without notice to the other side, he procures it by suppressing facts which the law makes it his duty to disclose to the Court. But where two parties fight at arm's length, it is the duty of each to question the allegations made by the other and to adduce

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(1) (1867) 3 Ch. App, 203. (2) (1776) 2 Sm L.C. 11th Edn.,731.

all available evidence regarding the truth or falsehood of it. Neither of them can neglect this duty and afterwards claim to show that the allegation of his opponent was false. Assuming that he could prove the charge, that would not amount to proving fraud on the part of his opponent, because the Court has already decided that his opponent's allegation was true and not false. If he could show that his opponent prevented him by an independent collateral wrongful act, such as by keeping his witnesses in confinement, or by stealing his documents from adducing his evidence, that would be an act of fraud which would entitle him to get the Court's decree set aside. Fraud must be something which would destroy or seriously impair the value of the judgment by showing that one of the parties was prevented by the other from conducting his litigation fairly or by being deprived of the materials which he was entitled to place before the Court. BLACK, in his article on "Judgments" in 23, Cyclopædia of American Law and Procedure, includes the following acts as fraud which would vacate a judgment. Misrepresentation or tricks practised upon defendant, keeping him away from the trial, preventing him from claiming his rights in the premises or setting up an available defence, acting contrary to an agreement between the parties that the case should not be continued or that defendant's time to answer should be extended or that the action should be dismissed as the result of compromise or settlement, or that the case would not be pressed to a judgment. The same learned author says in his treatise on "Judgments," volume I, section 321. "There may well be cases of fraud in the cause of action, or in the manner of procuring the instrument in suit where the Courts would not withhold relief on motion, as, where the complainant was kept in ignorance of the fraud until it was too late for him to plead it in defence, and could not have discovered it by due diligence, or where he was fraudulently prevented from setting it up at the proper time," but a judgment *cannot be set aside for fraud on the ground that one* of the parties to the suit acted improperly in the conduct of it when such conduct falls within the purview of adjudication by the Court. The right of a party to insist on his opponent acting with truth and honesty in the conduct of the suit must in the interests of finality of litigation be taken to be exhausted with the adjudication by the Court. He may for instance

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compel his opponent to produce all documents relevant to the suit, but it would be dangerous to hold that he may set aside the Court's judgment on the ground of fraud because his opponent did not produce them. He may compel him to give evidence on his behalf, but he must be satisfied with what he can do for this purpose in the course of the suit itself. The law has prescribed means for the punishment of a person who perjures himself or fails to produce documents which he is legally bound to produce, but there would be no end to litigation, if his improper conduct in these matters can be made the means of setting aside the judgment of the Court by a fresh suit. He might go on re-agitating the same matter by successive suits till the end of his life, and his heirs might then take it up as an inheritance. Moreover, he might, after a superior Appellate Court has adjudicated against him, institute a suit in an inferior Court to set aside the superior Court's judgment as he would be entitled to institute his suit in the lowest Court competent to try it. See *Nistarini Dassi* v. *Nundo Lal Bose*(1) and *Sarthakram Maite* v. *Nando Ram Maite*(2). It must be admitted that there is a conflict in the opinions of eminent Judges as to what exactly would constitute fraud in any particular case for the purpose of the vacating of a judgment. But the principle appears to be laid down with clearness in *The Duchess of Kingston's Case* (3) as something which is collateral to the matters adjudged by the Court. In *The Bank of Australasia* v. *Nias*(4) a decree was obtained in Australia on a contract. The decree-holder then brought a suit in England on the judgment of the Colonial Court. The defendant pleaded that the alleged contract on which the decree was passed was not true, and that, if true, it was obtained and procured by fraud and covin by the plaintiffs and others in collusion with them. LORD CAMPBELL, delivering the judgment of the Court of the Queen's Bench disallowed those pleas, holding that they do not amount to an averment of fraud. He observed "The pleas demurred to might have been pleaded, and, if there be any foundation for them, they ought to have been pleaded in the original action. They must now be taken to have been in due manner decided against

(1) (1903) I.L.R., 30 Calc., 369. (2) (1906) 11 C.W.N., 579.
(3) (1776) 2 Sm. L.C., 11th Edn., 731. (4) (1851) 6 Q.B., 717; S.C., 117 E.R., 1055.

the defendant . . . we are bound to take judicial notice that by the law and constitution of this Empire, there is an appeal from it (that is the decision of the Australian Court) to Her Majesty, who would refer the appeal to the Judicial Committee of Her Privy Council. I will not take notice of the fact of there having been an appeal; but I may say that either there has or there has not been an appeal: and in either case, it seems contrary to principle and expediency for the same questions to be again submitted to a jury in this country. A regular mode having been provided by which an erroneous judgment of a Colonial Court may be examined and reversed, that mode ought to be pursued. Before the Judicial Committee, the Judges there presiding would fairly examine the judgment, and only set it aside if it was unjust. But, although perfectly regular and just, it may be set aside if the same questions are again to be submitted to a jury. Although the *onus probandi* is now to be shifted to the defendant, he is to be at liberty to adduce new witnesses, whom he may suborn, to prove that the company never made the promises which were the foundation of the judgment, or that these promises were obtained by the fraud and covin of the plaintiffs." *Flower* v. *Lloyd*(1) is an important case on the question There the plaintiffs brought an action against the defendants to restrain alleged infringements of a patent process. It was ultimately dismissed by the Court of Appeal. They then instituted another action to have it declared that the judgment on appeal had been obtained by fraud and for consequential relief. The alleged fraud consisted in the defendant's keeping back from an expert, who had been appointed to inspect the defendant's process, certain materials relating to the process in his possession and in making a false statement relevant to the matter of the enquiry. The Court of Appeal held that the plaintiff had failed to prove his allegation; but JAMES, L.J., with the concurrence of THESIGER, L.J., proceeded to make certain important observations as to the nature of the fraud to be proved in such a case. He observed "Assuming all the alleged falsehood and fraud to have been substantiated, is such a suit as the present sustainable? That question would require very grave consideration

(1) (1878) 10 Ch.D., 327.

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indeed, before it is answered in the affirmative. Where is litigation to end if a judgment obtained in an action fought out adversely between two litigant *sui juris* and at arm's length could be set aside by a fresh action on the ground that perjury had been committed in the first action, or that false answers had been given to interrogatories on a misleading production of documents or of a machine, or of a process had been given?" "There are hundreds of actions tried every year in which the evidence is irreconcilably conflicting, and must be on one side or other wilfully and corruptly perjured. In this case, if the plaintiffs had sustained on this appeal the judgment in their favour the present defendants in their turn might bring a fresh action to set that judgment aside on the ground of perjury of the principal witness and subornation of perjury: and so the parties might go on alternately *ad infinitum*. There is no distinction in principle between the old Common law action and the old Chancery suit and the Court ought to pause long before it establishes a precedent which would or might make, in numberless cases, judgments supposed to be final only the commencement of a new series of actions. Perjuries, falsehoods, frauds, when detected, must be punished and punished severely, but in their desire to prevent parties litigant from obtaining any benefit from such foul means the Court must not forget the evils which may arise from opening such new sources of litigation, amongst such evils not the least being that it would be certain to multiply indefinitely the mass of those very perjuries, falsehoods, and frauds." BAGGALLAY, L.J., did not agree in those observations but reserved for himself an opportunity of fully considering the question of law. In *Ex parte Alice Cockerell*(1), an application to set aside on the ground of fraud an order obtained by a married woman for permission to convey her interest in the property bequeathed to her was dismissed. LORD COLERIDGE, C.J., observed: "If it can be shown that the order was obtained by fraud or by the suppression of information which it was essential that the Court should have, the Court will undoubtedly set aside the order." The decision cannot be taken to lay down that that every party is bound to bring voluntarily before the Court all matters that have

(1) (1878) 4 C.P.D., 9.

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a material bearing on the question at issue and that every suppression of information by a litigant would make a decree in his favour liable to be set aside. It does not appear whether any notice was given to the husband before the order was passed. If the wife was entitled to an *ex parte* order, it was her duty to place certain facts before the Court, her suppressing them would be a ground for setting the order aside; generally an *ex parte* order could be recalled on sufficient grounds being shown by the opponent, apart from any question of fraud. *Abouloff* v. *Oppenheimer*(1), perhaps makes a departure from the view taken in *Flower* v. *Lloyd*(2). A suit was filed in England on a judgment obtained in a Russian Court. The judgment was one directing the defendant to return to the plaintiff certain goods belonging to him, or in default, that the plaintiff should recover their value. The defendants did not admit that judgment was obtained in Russia by the plaintiff, but alleged that, if it was, it was obtained by the gross fraud of the plaintiff and of her husband because the goods in question were, at the time of the suit and of the judgment in the possession of the plaintiff and of her husband and that fact was concealed from the Court. The Court held that the plaintiff was entitled to have this plea tried. It is not quite clear how far the judgment of COLERIDGE, C.J., was due to the fact that the suit was on a foreign judgment. BRETT, L.J., and BAGGALLAY, L.J., were apparently of opinion that the same rule would be applicable whether the action was on the judgment of a Court in England or upon a foreign judgment. It will be observed that the question raised in the action in the English Court was whether goods belonging to the plaintiff were really detained by the defendant at the time of the action in the Russian Court, that is, whether the claim adjudged by the Russian Court to be a good one was in reality a fraudulent claim and that no collateral fraud was alleged. BRETT, L.J., observed. "It has been contended that the same issue ought not to be tried in an English Court which was tried in the Russian Courts, but I agree that the question whether the Russian Courts were deceived, never could be an issue in the action tried by them. That question may be raised in the Russian Courts in order to determine the matters

(1) (1882) 10 Q.B.D., 295. (2) (1878) L.R., 10 Ch.D., 327.

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which were in issue; but I think it true to say that the judgment of KNIGHT BRUCE, V.C., in *Barrs* v. *Jackson*(1) does show that the mere fact of evidence having been brought forward to substantiate or defeat one issue, does not prevent a party from bringing forward the same evidence in a subsequent action between the same parties, either to maintain or to defend other issues therein raised. In the present instance, the issue in the Russian Courts would be whether the defendants were wrongfully detaining the goods of the plaintiff. The question of fact whether the plaintiff had the goods in her possession at the moment when the action was commenced, would be a circumstance very material to be considered in order to determine that issue; but in the present action, upon this paragraph of the defence the only issue is whether the judgment of the Russian Courts was obtained by the fraud of the plaintiff successfully perpetrated on those Courts. The issues in the two actions are not the same; and therefore the defendants are not estopped from setting up in the action the same evidence that was adduced at the trial of the action in the Russian Courts. I wish to say, however, that I am strongly of opinion that in the present action no question can be raised whether the judgment of the Russian Courts was erroneous; . . . the only manner in which that foreign judgment can be rendered ineffective upon the ground of fraud is, by proving that it was obtained by the fraud of the plaintiff who now relies upon it." There can be no doubt that, if the issue in the two actions was different, there would be no question of *res judicata*, although the same evidence might bear upon both the issues. But were the issues different? The question in the Russian action was whether the plaintiff's goods were wrongfully detained by the defendants. If they were not, the plaintiff's claim was fraudulent. The only fraud complained of in the English action was that the claim was fraudulent in that it sought to recover goods which were really in the plaintiff's own possession. That was the identical issue tried by the Russian Court. That Court decided that the claim was not fraudulent. There was no fraud on the Court unless the making of fraudulent claims is a fraud on the Court. BRETT, L.J., distinguishes *Flower* v. *Lloyd*(2), on the facts of the case. One distinction drawn is that, in

(1) (1842) 62 E.R., 1028. (2) (1878) L.R., 10 Ch D., 327.

Flower v. *Lloyd*(1), fraud was committed not before the Court itself at the trial of the action, but previously to the case being brought to a hearing before the Court. But is this the right test to be applied? Is not the proper test whether the fraud complained of was or was not adjudged by the Court in the previous suit itself to be not made out? COLERIDGE, C.J., appears to have based his judgment, in part at least, on the ground that a judgment when impeached was a foreign judgment, with respect to which it has been often held that it is only *prima facie* evidence of the fact established by it. [see *Ochsenbein* v. *Papelier*(2)]. This is the view taken of *Abouloff* v. *Oppenheimer*(3), by the Supreme Court of the United States in *United States* v. *Throckmorton*(4). In *Vadala* v. *Lawes*(5), *Abouloff* v. *Oppenheimer*(3) was accepted as correct but apparently only on the ground that it was binding on the Court. LINDLEY, L.J., observed that there was no distinction between a foreign judgment and a domestic judgment when it was impeached on the ground of fraud. The facts relied on in the case as constituting fraud were not quite similar to those in *Abouloff* v. *Oppenheimer*(3). LINDLEY, L.J., observed that there were two rules which ought to be borne in mind: first that a party to an action can impeach a judgment in it for fraud, and secondly, the merits of an action which have been tried cannot be re-opened. The question was which rule was to prevail. He went on and observed "Until *Abouloff's* case—*Abouloff* v. *Oppenheimer*(3)—the difficulty of combining the two rules and saying what ought to be done where you could not enter into the question of fraud to prove it without re-opening the merits had never come forward for explicit decision. That point was raised directly in *Abouloff* v. *Oppenheimer*(3), and it was decided. I cannot fritter away that judgment, and I cannot read the judgments without seeing that they amount to this that if the fraud upon the foreign Court consists in the fact that the plaintiff has induced that Court by fraud to come to a wrong conclusion, you can re-open the whole case, even although you will have in this

(1) (1878) L.R., 10 Ch D., 327. (2) (1873) 8 Ch. App., 694.
(3) (1882) L.R., 10 Q B D., 295 (4) 98 United States, 93.
(5) (1890) L.R., 25 Q B.D., 310.

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Court to go into the very facts which were investigated and which were in issue in the foreign Court. The technical objection that the issue is the same is technically answered by the technical reply that the issue is not the same because in this Court you have to consider whether the foreign Court has been imposed upon. The Counsel for the plaintiff have pointed out, and I think unanswerably, that that is really frittering away, if you look at it from one point of view, the general rule on which they are relying that you cannot re-try the merits." Referring to the judgment of BRETT, L.J., he said that the proposition laid down by his Lordship can only be applicable to cases when there is what is called extraneous fraud, such as imposition on the Court itself; but he held that the effect of the judgment in that case was to enable the defendant to re-open the judgment by showing that it was based on false evidence. He observed referring to the judgment of BAGGALLAY, L.J., "That is to say, not only where there has been a fraud on the Court by what is called extrinsic circumstances, such as the alleged shuffling of the bills of exchange, but where the plaintiff has obtained judgment by the use of perjured evidence, that is such a fraud as would enable the defendant to impeach the foreign judgment." His Lordship concluded as follows:—"It appears to me, therefore, impossible, in the face of that case, to differ from the view taken by the Divisional Court." In *Baker* v. *Wadsworth*(1), on the other hand, the Court refused to set aside the decree on the ground that it was obtained by perjured evidence. WRIGHT, J., observed, "There is no authority that the mere proof that a verdict and judgment have been obtained by perjury is sufficient to induce the Court to set the judgment aside and the expressions of the Lords Justices in *Flower* v. *Lloyd*(2) are strongly against such a proposition." In *Cole* v. *Langford*(3), where judgment had been given in default of pleading by the defendant, the plaintiff made a motion to set aside judgment on the ground of fraud. The allegation of fraud was that the judgment was obtained by exhibiting to the Court and the jury certain false and counterfeit documents and certain memorandum books containing false and fraudulent entries touching the matters in issue in the action.

(1) (1898) 67 L.J.Q.B., 301. (2) (1878) L.R., 10, Ch D., 327.
(3) (1898) 2 Q.B., 396.

The judgment was set aside. RIDLEY, J., gave no reasons for doing so. PHILLIMORE, J, relied on *Priestman* v. *Thomas*(1). But that case merely decided that the question whether a will was a forgery or not, was *res judicata* by a judgment passed in prior proceedings between the parties setting aside on the ground of fraud. The result of the English cases is that until *Abouloff* v. *Oppenheimer*(2), it was held that the fraud complained of should not be a matter already adjudged by the Court, but should be collateral to it. But, in that case, it was held that notwithstanding a prior adjudication that the fraud complained of was not true or not proved, a subsequent complaint of the same fraud without any further allegation raised a new issue whether the previous judgment was obtained by fraud. This rule was not acted upon in *Baker* v *Wadsworth*(3) at any rate so far as fraud consisting in perjured testimony being put before the Court was concerned. In the American Courts, although there appears to be some conflict of judicial opinion on the question whether perjured testimony of the party to the litigation or subornation of perjury by him could be regarded as fraud for the purpose of vacating a judgment, the Supreme Court held in *United States* v. *Throckmorton*(4) that it could not be so regarded (see 23 Cyclopædia of American Law and Procedure, page 921, note 75). MILLER, J., delivering the opinion of the Court, expounded the scope of the rule that a judgment may be set aside for fraud thus: "In cases where, by reason of something done by the successful party to the suit, there was in fact no adversary trial or decision of the issue in the case; where the unsuccessful party has been prevented from exhibiting fully his case, by fraud or deception practised on him by his opponent, as by keeping him away from Court, by a false promise of a compromise; or where the defendant never had knowledge of the suit, being kept in ignorance by the acts of the plaintiff, or where an attorney fraudulently or without authority assumes to represent a party and connives at his defeat, or where the attorney regularly employed corruptly sells out his clients' interest to the other side,—these and similar cases which show that there has never been a real contest in the trial

(1) (1884) 9 P.D, 210
(2) (1882) L R., 10 Q B.D., 295.
(3) (1898) 67 L J.,Q B., 301.
(4) 98 United States, 93 at p. 96.

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or hearing of the case, are reasons for which a new suit may be sustained to set aside and annul the former judgment or decree and open the case for a new and fair hearing." The learned Judge has reviewed both the English and the American authorities on the question. *Greene* v. *Greene*(1) explained the position thus : "The maxim that fraud vitiates every proceeding must be taken like other general maxims to apply to cases where proof of fraud is admissible. But where the same matter has been actually tried or so in issue that it might have been tried, it is not again admissible; the party is estopped to set up such fraud because the judgment is the highest evidence and cannot be contradicted." In America it has also been held that a decree cannot be set aside for fraud on the ground that the successful party bribed his witness to swear falsely. (See Black on Judgments, volume I, section 323, note 204, with regard to the bribing of witnesses to swear falsely.)

In *Mahomed Golab* v. *Mahomed Sulliman*(2), Sir COMER PETHERAM, C.J. and GHOSE, J., were of opinion that a decree could not be set aside for fraud on the ground that it was obtained by perjury committed by, or at the instance of, the other party. The learned Judges followed *Flower* v. *Lloyd*(3), PETHERAM, C.J., observed, "where a decree has been obtained by a fraud practised upon the other side by which he was prevented from placing his case before the tribunal which was called upon to adjudicate upon it in the way most to his advantage, the decree is not binding upon and the decree may be set aside by a Court of Justice in a separate suit and not only by an application made in the suit in which the decree was passed to the Court by which it was passed; but I am not aware that it has ever been suggested in any decided case, and in my opinion it is not the law, that, because a person against whom a decree has been passed alleges that it is wrong and that it was obtained by perjury committed by, or at the instance of, the other party, which is of course fraud of the worst kind, that he can obtain a rehearing of the questions in dispute in a fresh action by merely changing the form in which he places it before the Court, and alleging in his plaint that the first decree was obtained by the perjury of the

(1) 2 Gray, 361. (2) (1894) I.L.R., 21 Calc., 612.
(3) (1882) L.R., 10 Ch. D., 327.

person in whose favour it was given. To so hold would be to allow defeated litigants to avoid the operation not only of the law which regulates appeals, but that of that which relates to *resjudicata* as well. The reasons why this cannot be the case are very clearly stated by JAMES, L.J., in the passages I have quoted." *Abouloff* v. *Oppenheimer*(1), and *Vadala* v. *Lawes*(2), do not seem to have been brought to the notice of the learned Judges. But the case is valuable as indicating the correct principle of law to be applied in their opinion. This decision has been followed in *Abdul Huq Chowdhry* v. *Abdul Hafez*(3), and in *Munshi Mozuful Huq* v. *Surendra Nath Roy*(4), though a different view was taken in *Lakshmi Charan Saha* v. *Nur Ali*(5). In *Venkatappa Naick* v. *Subba Naick*(6), deliberate perjury committed by the successful party was regarded by BODDAM and MOORE, JJ., as a ground on which a judgment might be set aside on the authority of *Abouloff* v. *Oppenheimer and Company*(1), and *Vadala* v. *Lawes*(2), was not brought to the notice of the Court. The correctness of the decision was questioned in *Kumaresam Chetty* v *Kamakshiammal*(7), but the point did not arise for decision then. There appear to be no decisions of the Privy Council bearing on this question. In *Khajendra Nath Mahata* v. *Pran Nath Roy*(8), the Judicial Committee held that, where an *ex parte* decree is attacked, not merely on the ground of irregularity or insufficiency of the service of summons, but also on the ground that the plaintiff prevented the defendant from defending the suit by getting him declared a lunatic and forcing him by his threats to leave his home and stay elsewhere in secrecy, it could be set aside on the ground of fraud, but there no attempt was made to impeach the judgment on the ground of any fraud which formed the subject of prior adjudication by the Court. In *Tika Ram* v. *Daulat Ram*(9), *Mahomed Golab* v. *Mahomed Sulliman*(10) was approved though the case itself was one in which the only substantial complaint was taken to be that summons had not been properly served on him.

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(1) (1882) L.R., 10 Q.B.D., 295
(2) (1890) 25 Q.B.D., 310.
(3) (1910) 14 C.W.N., 695
(4) (1912) 16 C.W.N., 1002.
(5) (1911) I.L.R., 38 Calc., 936.
(6) (1906) I.L.R., 29 Mad., 179.
(7) (1912) 23 M.L.J., 187
(8) (1902) I.L.R., 29 Calc., 395.
(9) (1910) I.L.R., 32 All., 145.
(10) (1894) I.L.R., 21 Calc., 612.

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In this state of the authorities, if it were necessary to decide whether a judgment could be set aside for fraud on the ground that the successful party was guilty of deliberate perjury or suborning perjury, we might have to consider whether it is desirable to refer the question to a Full Bench of the Court for an authoritative pronouncement. But, we do not think that it is necessary in the circumstances of this case to decide that broad question. In the first place, the fraud alleged in the plaint was that some items were wrongly debited in the defendant's account against the plaintiff. The judgment of the lower Courts, on the other hand, is based on the fact that the defendant failed to prove that there was an agreement between him and the plaintiff, that the timber alleged by the defendant to have been sold to the plaintiff for Rs. 1,026-14-0 should be taken at the price for which they were sold by the defendant. Secondly, it can hardly be held that the Lower Courts have found that the defendant was guilty of deliberate perjury in obtaining the judgment in Original Suit No. 16. They have, no doubt, held that the defendant failed to prove the agreement set up by him, considering the evidence adduced for the purpose to be insufficient. But this is considerably short of finding deliberate perjury on his part. As laid down in *Patch* v. *Ward*(1), what the Court is to find is "malicious and fraudulent design to mislead the Court." See also *Jogam Prashad* v. *Roseux Sahoo*(2). *Abouloff* v. *Oppenheimer*(3) does not lay down that the mere fact that the evidence formerly believed is found on the strength of the evidence of other witnesses to be unacceptable is sufficient to set aside the judgment on the ground of fraud. Thirdly, the power of the Court to set aside a judgment on the ground of fraud is a discretionary one [see *Baker* v. *Wadsworth*(4)]. BLACK observes that to entitle a party to have a judgment vacated he must show a sufficient reason why he did not assert and enforce his rights at the proper time and in the regular manner and that his whole conduct throughout has been free from fraud or any turpitude, and he must free himself from all imputation of laches, for the judgment will not be disturbed if it appears to have been entertained as a result of his own heedlessness, sloth or lack of diligence in protecting his own

(1) (1867) L.R., 3 Ch. App., 203.
(2) (1903) 8 C.W.N., 172.
(3) (1882) L.R., 10 Q.B.D., 295.
(4) (1898) 67 L.J.Q.B., 301.

interests. Here the Assistant Agent found that the plaintiff was absent at the hearing of Original Suit No. 16 without due cause. It would be extremely undesirable to allow such a person to prove, under the guise of an allegation of fraud, that the claim of the defendant was unsupportable and the finding of the Court wrong. We allow the petition and direct the Agent to review his decree in the light of this judgment. The respondent will pay the petitioner's costs in this Court.

ORIGINAL CIVIL.

Before Mr. Justice Bakewell.

SUIKEENA KATUM SAHIBA (PLAINTIFF),

1913. February 4.

v.

HAJEE MAHOMED ABDUL AZEEZ BADSHA SAHIB BAHADUR (PARTNER OF THE FIRM OF MESSRS. HAJEE MAHOMED BADSHA SAHIB & Co., MADRAS, DEFENDANT (JUDGMENT-DEBTOR) *

Ratable distribution—Rival decree-holders—Right of one to impeach another's decree only in suit and not in execution—Civil Procedure Code (Act IX of 1908), sec. 73, applicability of—Order XXI, rule 52, enquiry under

Where several decree-holders against the same judgment-debtor apply for satisfaction of their decrees out of the same fund, any one of them is entitled to show that his rival's decree is a fraudulent or sham one but it is not open for him to do so in execution proceedings.

Sudindra v. *Budan* (1886) I.L.R., 9 Mad., 80, followed.

Section 73, Civil Procedure Code, is applicable only if an application for *execution* of the decree in the prescribed form had already been made, *before* the receipt of the assets and the fund out of which rateable distribution is asked for is one *realised* in execution.

Where holders of decrees of several Courts apply for satisfaction of their decrees, out of a fund in the custody of a court, the proper order governing their respective titles or priorities is Order XXI, rule 52, Civil Procedure Code; and they are entitled to share it ratably as in the case of administration of the estate of a deceased person or of an insolvent, as attachment does not under the present law give any priority to the first attaching creditor, but only prevents alienation.

Soobul Chunder Law v. *Russick Law Mitter* (1888) I.L.R., 15 Calc., 202 at p. 209, followed.

The shares due to holders of decrees of other Courts than the one which has the custody of the fund are to be distributed only according to the orders of those courts.

* Civil Suit No. 237 of 1908.

KATUM SAHIBA v. HAJEE BADSHA SAHIB.

C. P. Ramaswami Ayyar for the plaintiff in Civil Suit No. 315 of 1911.

S. Alasingaracharivar for Latchiminarayana Tawker, plaintiff in Small Cause Suit No. 12787 of 1912 and attaching creditor herein and for Heera Lal Sowcar, plaintiff in Small Cause Suit No. 11931 of 1912 and attaching creditor herein.

S. Guruswami Chetti for the plaintiff.

A. E. Rencontre for the defendant.

The defendants in Civil Suits Nos. 315 of 1911 and 381 of 1912 did not appear in person.

The facts of the case appear in the judgment below.

BAKEWELL, J. JUDGMENT.—Four applications have been made by four judgment-creditors of the plaintiff in this suit for payment to them of a fund to the credit of the suit, which was paid into Court by the defendant in satisfaction of the decree.

The dates of the decrees of the several creditors and of attachments of the fund are as follows:—

26th October 1911, attachment before judgment in Suit No. 315 of 1911;

15th October 1912, decree;

6th November 1912, decree in Suit No. 381 of 1912;

9th November 1912, attachment;

30th August 1912, decree in Suit No. 11931 of 1912 on the file of Court of Small Causes of Madras;

12th September 1912, attachment;

16th September 1912, decree in Suit No. 12787 of 1912 of the same Court;

27th September 1912, attachment.

It has been argued firstly that the applicants are entitled to adduce evidence that the decrees obtained by their rivals are fraudulent and void, and secondly, that their respective attachments are entitled to priority.

On the first point, two decisions *In re Sunder Dass*(1) and *Chhaganlal* v. *Fazaráli*(2) and an unreported judgment of SPENCER, J., in *Narayanan* v. *Karuppan Chetty*(3) were cited. In the first case, the Calcutta High Court held that the Lower Court rightly directed an inquiry whether the assignee of a decree held it *benami* for the judgment-debtor, and was therefore not

(1) (1885) I.L.R., 11 Calc., 42. (2) (1889) I.L.R., 13 Bom., 154.
(3) Civil Revision Petition No 727 of 1910.

entitled to share in the distribution of assets under section 295 of the Code of Civil Procedure, 1882. This is entirely different from an inquiry whether the decree itself is fraudulent and void as against creditors, but undoubtedly the learned Judges held that the Court was bound to see whether the claimants under that section were *bonâ fide* or merely sham decree-holders; and this ruling was followed by the Bombay High Court in the second case, where the decree itself was alleged to be fraudulent.

It has, however, been already laid down by this Court in *Sudindra* v. *Budan*(1) that the question whether a decree was obtained by fraud or collusion is not one which relates to the execution of the decree and can only be raised by a separate suit; and this decision was not apparently referred to in the case before SPENCER, J., who merely followed the cases already mentioned.

In the present case, this Court is not executing the two decrees of the Court of Small Causes, which have not been transferred to this Court for execution, and for this reason they do not fall within section 47 of the Code. None of the applicants is party to the suits in which the decrees which they impugn were passed, nor to the suit to the credit of which the fund in question stands; nor can any of them be said to be the representative of the judgment-debtor in these suits, unless an unsecured creditor can be said to be the representative of his debtor in any matter which may affect the ability of the latter to pay his debts.

I think it is clear that the question now sought to be raised does not fall within section 47, and that, if the applicants desire to set aside any of these decrees, they must institute proceedings for that purpose.

I have also come to the conclusion that section 73 of the Code corresponding to section 295 of the Code of 1882 under which the cases cited were decided, does not apply to the present case; but I may point out that their Lordships of the Privy Council, in *Shankar Sarup* v. *Mejo Mal*(2) appear to regard an order under that section as an order of course, and the appropriate method of adjudication upon the rights of the parties to be a suit under sub-section (2).

It is also obvious that various difficulties of jurisdiction and otherwise might arise if the decrees of other courts were allowed

(1) (1886) I.L.R., 9 Mad., 80. (2) (1901) I.L.R., 23 All., 313 at p. 322 (P.C.).

KATUM SAHIBA v. HAJEE BADSHA SAHIB.

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BAKEWELL, J.

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(1) (1885) I.L.R., 11 Calc., 42. (2) (1889) I.L.R., 13 Bom., 154.
(3) Civil Revision Petition No 727 of 1910.

Code of Civil Procedure, 1859, section 270, as regards the first attachment, but was modified with respect to any surplus by a provision for the rateable distribution thereof amongst other persons who had taken out execution (section 271). That Code did not apply to the Supreme Courts, whose officer, the Sheriff, would doubtless be in the same position as an English Sheriff and administer the same law, though I am not aware of any direct authority on the point.

The previous law has now been replaced by the provisions of the Code of Civil Procedure which applies to all Civil Courts and it cannot now be contended that an attachment by an officer of Court confers any priority upon the attaching creditor. [Section 64 of the Code of 1908; *Frederick Peacock* v. *Madan Gopal*(1) and *Sankaralinga Reddi* v. *Kandasami Tevan*(2).] Much less can it be contended that an order of the Court under rule 52 confers any priority upon the person at whose instance the order was passed, since it amounts at most to an injunction restraining any dealing with the fund (See form No. 21, Appendix E of the first schedule of the Code) and merely renders any payment to the judgment-debtor, contrary to the attachment thereby effected, void as against all claims enforceable under the attachment, including claims for the rateable distribution of assets (section 64).

For these reasons, I am of opinion that none of the applicants has established any priority by virtue of his attachment, and that the fund in Court must be distributed on the principle followed by the Court in the administration of the assets of a deceased person or an insolvent, that is, rateably amongst the creditors who have put in claims thereto. [See *Soobul Chunder Law* v. *Russick Lall Mitter*(3).]

There remains a question as to the procedure to be followed with respect to the payment of the shares of the holders of decrees of the Court of Small Causes, who have applied for payment to them directly. It is, I think, obvious that this cannot be done, because this Court cannot record satisfaction of those decrees, which may moreover be themselves attached or already satisfied. The case has been provided for by rule 180 of the Civil Rules of Practice, 1902, but not by the rules of this Court

(1) (1902) I.L.R., 29 Calc., 428. (2) (1907) I.L.R., 30 Mad., 413.
(3) (1888) I.L.R., 15 Calc., 202 at p. 209.

KATUM SAHIBA v HAJEE BADSHA SAHIB.

BAKEWELL, J.

or the Court of Small Causes, and it is not clear what is the proper procedure. The shares of these creditors must therefore be carried to separate accounts entitled in the matter of their respective decrees, and be subject to the order of the Court of Small Causes of Madras.

The application of Hajee Mahomed Sait Shirajee is not correctly entitled, because it should have been made in Suit No. 237 of 1908, to the credit of which the fund stands; since, however, no objection has been raised, I direct the application to be amended by entitling it in that suit.

The shares of the judgment-debtors in suits Nos. 315 of 1911 and 381 of 1912 will be paid to the credit of those suits.

The plaintiff in this suit is a Muhammadan woman, and several of the decrees against her appear to have been made by consent; having regard to these facts and the allegations made against each other by the several applicants, and in order to give them an opportunity of establishing those allegations in other proceedings, I direct that this order be not issued by the Registrar for ten days.

Each party will add the costs of his application to his decree amount.

APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Sundara Ayyar.

1913. February 19 and March 5.

MOTTAYAPPAN *alias* SELAMBA GOUNDAN (PLAINTIFF), APPELLANT,

v.

PALANI GOUNDAN AND ANOTHER (DEFENDANTS), RESPONDENTS.*

Indian Evidence Act (I of 1872), sec. 92, provs 1 and 3—Sale-deed—Property, vesting of—Oral evidence contrary to its tenor, admissibility of—Document operative at once—Evidence as to vesting of property at a future time, inadmissible—Rule of English Law, different

An executant of an instrument (which was not a sham document but intended to operate at once), cannot be permitted to set up or prove that the instrument, which according to its tenor vested the property in the grantee at once, was in reality intended to vest it only at a future time or after the death of the executant.

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* Second Appeal No. 731 of 1912.

MOTTAYAPPAN v. PALANI GOUNDAN.

Section 92, proviso 1 of the Indian Evidence Act has no application to a case where the instrument represents what the parties intended to put down in writing, though it might not be in accordance with what they intended to do and with the legal effect that they secretly wanted to bring about but which for some reason they did not want to put in writing

The rule of English Courts of Equity permitting evidence to be given to show that a document was intended to operate in a manner different from the plain and apparent meaning of its language cannot be followed in India, as it is contrary to the provisions of section 92 of the Indian Evidence Act.

Balkishen Das v. *Legge* (1900) I L R, 22 All, 149 (P.C.), *Achutaramaraju* v. *Subbaraju* (1902) I L R., 25 Mad., 7, *Dattoo* v. *Ramchandra* (1906) I.L.R, 30 Bom., 119 and *Challa Venkata Reddy* v *Devabhaktuni Mruthunjayadu* (1912) M.W.N., 164, followed.

Jilun Nissa v. *Asgar Ali* (1890) I.L.R, 17 Calc, 937 (P C.), referred to

Chaudhri Mehdi Hasan v *Muhammad Hasan* (1906) I L R, 28 All., 439 (P C.), *Ramalinga Mudali* v *Ayyadorai Naicker* (1905) I L R, 28 Mad, 124 and *Amirthathammal* v *Periasami Pillai* (1909) I.L.R., 32 Mad, 325, distinguished.

SECOND APPEAL against the decree of E. L. THORNTON, the District Judge of Trichinopoly, in Appeal No 108 of 1911 preferred against the decree of A. V. RATHNAVELU PILLAI, the District Munsif of Karur, in Original Suit No. 797 of 1909.

The suit was brought for a declaration that the sale-deed executed by the plaintiff in favour of his deceased daughter Angammal on the 21st September 1906 was a nominal transaction unsupported by consideration, for the cancellation and the getting back of the document and for recovery of possession of the suit lands from the first defendant (who was the husband of the said Angammal who had died on the 6th April 1909) and the second defendant who was the father of the first defendant. The plaint alleged that the first defendant obtained possession of the lands in question after the death of his wife Angammal and that the plaintiff did not receive any consideration for the sale or put the vendee in possession of the lands. The plaint set out the purpose for which the sale-deed was executed in the following terms :—"As the plaintiff had no male issue and in order that there might be no objection subsequently from his senior wife and from his *dayadhis*, he executed the sale-deed in favour of his daughter nominally." The defence was that the first defendant was the real vendee that his wife was only a benamidar for him and that the deed evidenced a genuine sale. The District Munsif held that the sale in favour of Angammal was a nominal transaction, not supported by consideration and that the plaintiff who was the real owner of the property was entitled to

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cancel the document and recover possession of the lands. The defendants appealed to the District Court. On appeal the learned District Judge found 'that the plaintiff intended by the sale-deed to give his daughter a title to the property conveyed thereunder after his death though not in his life-time, and that the recitals in, and the execution of, Exhibit II, which was a registered patta razinamah executed in favour of the plaintiff's daughter by the plaintiff over a year after the execution of Exhibit I (the sale-deed) showed that the latter deed was partially acted upon.' The learned Judge consequently held that the sale-deed was not a sham but was partially acted upon and that, under the rulings in *Amirthathammal* v. *Periasami Pillai*(1) and *Ranga Ayyar* v. *Srinivasa Ayyangar*(2) and other cases, the plaintiff was not entitled to show that the sale-deed was intended to operate contrary to the apparent tenor of its terms, and that the plaintiff could not recover the property. The learned Judge reversed the decree of the District Munsif and dismissed the suit. The plaintiff preferred this Second Appeal.

S. Srinivasa Ayyangar and *A. Subbarama Ayyar* for the appellant.

T. Natesa Ayyar for the respondents.

BENSON AND SUNDARA AYYAR, JJ.

JUDGMENT.—The suit out of which this Second Appeal arose was instituted by the plaintiff for a declaration that a sale-deed (Exhibit I) executed by him in favour of his deceased daughter, the wife of the first defendant, was a nominal transaction and inoperative against him and to recover possession of the properties from the two defendants in the suit, the second defendant being the first defendant's father. The sale-deed was executed on the 21st September 1906. The vendees, the first defendant's wife died on the 6th April 1909. The plaintiff alleged that the first defendant obtained possession of the land in question after the death of his wife. The defendant's answer was that the real vendee was the first defendant himself, his wife being a benamidar for him, and that the deed evidenced a genuine sale. The District Munsif found that the first defendant's deceased wife was not a benamidar, that no consideration passed for the sale, that the consideration recited, viz., Rs. 1,000, was much less than the real value of the lands and that it was executed, not with the intention of vesting title in the vendee

(1) (1904) I L R, 32 Mad., 325 (2) (1898) I L R, 21 Mad., 56.

immediately but to ensure her succession to the land on his death *and to make it impossible for his first wife, who was* alive, or for his *dayadis* to claim it in preference to the apparent vendee who was his daughter by his deceased second wife He held also that Exhibit II, dated the 2nd December 1907, by which the plaintiff consented to the transfer of patta for the land in favour of his daughter, was also intended to be a nominal transaction, the plaintiff executing it owing to improper pressure on the part of the defendants, and on the assurance of his daughter that it should not have any legal operation. He passed a decree in the plaintiff's favour. The District Munsif's finding was in accordance with the allegation in paragraph 4 of the plaint, "As the plaintiff had no male progeny and so that there may be no objections afterwards by the first wife and the *dayadis*, the plaintiff executed this nominal sale-deed mentioning a small price and not for anything else." On appeal, the District Judge was of opinion that "the plaintiff intended by the sale-deed (Exhibit I) *to give his daughter a title to the property conveyed thereunder after his death, though not in his life-time,* and both the recitals in and the execution of Exhibit II, registered patta razinamah executed in favour of the plaintiff's daughter by the plaintiff over a year after the execution of Exhibit I, show that the latter deed was partially acted upon."

Apparently, the Judge meant by the statement that Exhibit I was partially acted upon, that the intention to give the daughter a title to the property after the plaintiff's death was confirmed by Exhibit II. We do not understand him to mean that, on the date of Exhibit II, the plaintiff intended to vest the land at once in his daughter, although his original object in executing Exhibit I was to enable her to succeed to the land on his death. We shall consider the legal result of these findings presently. The Judge held that the plaintiff could not be permitted to aver that an instrument which, according to its tenor, vested the property in the grantee at once, was in reality, intended to vest it only at a future time or after the death of the executant. On this view, he dismissed the suit.

The proposition of law enunciated by the Judge is, in our opinion, correct. The rule that the parties to an instrument cannot set up a contemporaneous parol agreement varying or contradicting its terms necessarily involves this We are unable to accept the argument of Mr. S. Srinivasa Ayyangar, the learned

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Vakil for the appellant, that it is open to a party to show that an instrument was intended to have legal operation not according to its tenor (which he interprets to mean in the manner its terms would operate) but in a different manner. The contention is clearly opposed to the terms of the section. Mr. Srinivasa Ayyangar argues that proviso (1) to the section 92 of the Indian Evidence Act would cover his contention. He says that an agreement that an instrument should operate in a way different from what its terms import is a fact which would entitle the party alleging the agreement to a decree or order relating to the instrument similar to fraud, intimidation, etc., which, according to the section, may be alleged as a ground for invalidating the document or entitling the party to a decree or order relating thereto. The argument is obviously unsound. The facts which may be proved, according to the proviso, must be such as to show, either that the legal requisites for a valid agreement did not exist in the case at all, or that one of the parties did not give his free consent to it or that the document does not express what was really intended to be embodied in it. It has no application to a case where the instrument represents what the parties intended to put down in writing, though it might not be in accordance with what they intended to do and with the legal result that they secretly wanted to bring about, but which for some reason they did not wish to put in writing. The very object of the section is to prevent one of the parties from asserting that they intended to do something different from what they conjointly and deliberately stated in the instrument. In this case, both the parties stated in the instrument that the property was to vest in the daughter at once. The contention that it was really to vest not at once but at a future time could not be set up or proved. The English Courts of Equity have sometimes allowed evidence to be given in some cases that a document was intended to operate in a manner different from the plain and apparent meaning of its language, such as, that an instrument of sale was intended to have effect only as a mortgage. They allowed proof to be adduced not only of fraud in the bringing about or the engrossment of the instrument but in enforcing it in a manner which would be in accordance with the mode in which both the parties deliberately stated and intended to state that it should operate, but not in accordance with the mode in which they secretly intended that it should

operate. The Judicial Committee of the Privy Council has decided that this could not be allowed in India, it being prohibited by section 92 of the Evidence Act. See *Balkishen Das* v. *Legge*(1), *Achutaramaraju* v. *Subbaraju*(2), *Dattoo* v. *Ramchandra*(3), *Challa Venkata Reddy* v. *Devabhaktuni Mruthunjayadu*(4).

We do not think that *Jibun Nissa* v. *Asgar Ali*(5) or *Chaudhri Mehdi Hasan* v. *Muhammad Hasan*(6), lays down a different rule. In the former case, it was held by the Calcutta High Court that a patta (lease) and a *kobala* (sale) executed by a Muhammadan lady in favour of her nephews were brought about by fraud and without proper consideration. The grantees contended with reference to the patta that even if it was not intended to give an immediate leasehold interest by the executant, she intended by means of the instrument that her nephews should, by means thereof, succeed to her property in preference to her legal heirs.

WILSON, J., observed (p. 941): "Now, in order to give effect to this contention, it must be held that, although under the terms of the deed, Mehdi was to have a vested interest from the dates of their execution, in fact he was not to have it till after the death of Delrus. There are several objections to this view: first, it would directly contradict the deeds, secondly, it would conflict with the case put forward by the defendants themselves in their pleadings and evidence." Their Lordships of the Privy Council agreed with the reasons given by WILSON, J., for the conclusion arrived at by the High Court that no effect could be given to the deed in favour of the grantor's nephews. The case is a clear authority for the position that a party cannot be permitted to show contrary to the terms of the instrument that the estate given under it immediately to the grantee should vest in him only at a future time. It, in no way, helped the argument alleged on behalf of the appellant. The Privy Council did not hold that the patta was in fact intended to have effect after the grantor's death or lay down that, inasmuch as it was not intended to operate till then, the executant could impeach it as void. Their Lordships' judgment proceeded on the ground that

(1) (1900) I.L.R., 22 All., 149 (P.C.)
(2) (1902) I.L.R., 25 Mad., 7.
(3) (1906) I.L.R., 30 Bom., 119.
(4) (1912) M.W.N., 164.
(5) (1890) I.L.R., 17 Calc., 937 (P.C.).
(6) (1906) I.L.R., 28 All., 439 (P.C.).

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any more than the defendant could be permitted to claim under the instruments a right different from that which it purports to convey. The difficulty still remains, what is the real substance of the finding of the District Judge. Does it amount to this, that the plaintiff intended that, by virtue of the instrument in question, the property should vest in the grantee on the plaintiff's death? If so, he could not be allowed to set it up or prove it. Nor could he prove an agreement that the grant should operate only if his daughter survived him, or that it should cease to operate if she predeceased him. The Judge apparently accepts the plaintiff's contention that the object of Exhibit I was only to prevent his senior wife and his *dayadis* from succeeding to the property and that it was to have no other effect. The plaintiff was to retain the right to dispose of the property, if he chose, during his life-time. The grantee could not claim that a vested reversion was given to her so as to prevent the plaintiff from doing so. At the same time the plaintiff's object was, not that his daughter should be able to claim the property after his death (that is not as a legatee) but as a vendee who acquired her title on the date of the sale deed. In substance, the deed was intended to furnish false evidence against the plaintiff's wife and *dayadis*, of the land having vested in the daughter on the date of the sale deed. The plaintiff did not intend that she should take it as a bequest. There was nothing to prevent him from making a will in her favour if that was his intention. An agreement that a gift should operate only as a will could not be proved.

But the agreement in this case was really not that the land should vest in the daughter from a future date, that is, on the death of the grantor but that she should hold it in order to prove that she obtained a title operating from the date of its execution. In other words, it was not to operate as a present conveyance, but as false evidence, to be used in future, of a conveyance operating from the dates borne by it. But as the result of such false evidence, the daughter was to derive a benefit, as she was to use it for getting hold of the property on the plaintiff's death. The result may be shortly put thus. The document was not to be a mere sham, the plaintiff's daughter was to take a benefit under it, she was to take the property eventually as vesting in her on the date of the sale, but subject to the plaintiff having the entire right to enjoy it during his life-

time and subject also to her right being defeated at the plaintiff's option. It was, therefore, intended to create some rights in favour of the vendee but different from what it purported to create. This does not come within the rule that an instrument may be shown not to have been intended to create any rights at all but was brought about entirely with the indirect object of creating false evidence against third parties, or within the rule that a party may set up and prove a parol agreement constituting a condition precedent to the attaching of any obligation under it.

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The case set up by the plaintiff and found by the Lower Appellate Court is, therefore, contrary to the terms of section 92 of the Evidence Act. The result is that the document must be allowed to have operation according to its terms.

We dismiss the Second Appeal with costs.

APPELLATE CIVIL.

Before Mr. Justice Miller and Mr. Justice Sadasiva Ayyar.

1913. March 11 and 12.

SRI SRI SRI GAJAPATI KRISHNA CHANDRA DEO GARU, PROPRIETOR OF NANDIGAM ESTATE, BEING A MINOR UNDER COURT OF WARDS BY HIS NEXT FRIEND THE COLLECTOR OF GANJĀM (PLAINTIFF), APPELLANT,

v.

P. SRINIVASA CHARLU (DIED), LEGAL REPRESENTATIVE OF THE LATE DIWAN BAHADUR P. ANANDA CHARLU, C.I.E., AND TWO OTHERS (DEFENDANTS—LEGAL REPRESENTATIVE AND HIS LEGAL REPRESENTATIVES), RESPONDENTS. *

(Indian) Contract Act (IX of 1872), sec. 70, applicability of, regardless of English decisions

Plaintiff's father made a gift of a village to the defendant, the condition being "we (the plaintiff's father) should get the village sub-divided in your (donee's) name, you should pay to the Government the peshkash fixed thereupon according to the said subdivision."

Held that the defendant was bound to pay his portion of the peshkash only from the time of the subdivision when alone the exact amount due by defendant was ascertained; and that plaintiff, who had paid the whole peshkash

* Appeal No. 25 of 1909.

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was entitled to recover from the defendant under Section 70 of the Indian Contract Act whatever the defendant was liable to pay after the sub-division

Section 70 of the Indian Contract Act should be applied in all cases where the requirements of the section are fulfilled whatever might be the English law on the subject.

A person must be said to have enjoyed the benefit of an act within the meaning of section 70 of the Indian Contract Act, when he in fact enjoyed the benefit by accepting or adopting it, without objecting to it.

Section 70 does not require that the defendant must have an option of declining the benefit if that means that before the benefit is conferred he must be given the choice of accepting or declining it.

Per MILLER, J —The fact that plaintiff's interest also might have suffered if the act was not done will not make the act any the less one done *for* the defendant.

Narayanaswami Naidu v. *Sree Rajah Vellanki Sreenivasa Jagannadha Rao* (1910) I L.R, 33 Mad., 189 and *Yogambal Boyee Ammani Ammal* v. *Naina Pillai Markayar* (1910) I L.R, 33 Mad., 15, referred to.

Per SADASIVA AYYAR, J. *Obiter*:—If the benefit conferred is inseparably accompanied by onerous obligations that a reasonable man would refuse to accept it, section 70 will not apply.

Damodara Mudaliar v. *Secretary of State for India* (1895) I.L.R, 18 Mad., 88 and *Jognarain* v *Badri Das* (1912) 16 C.L J., 156, followed.

Yogambal Boyee Ammani Ammal v. *Naina Pillai Markayar* (1910) I.L R, 33 Mad., 15, dissented from.

Abdul Wahid Khan v. *Shaluka Bibi* (1890) I.L R, 21 Calc, 496 (P.C) and *Ram Tuhul Singh* v. *Biseswar Lall Sahoo* (1875) 2 I.A, 131, distinguished.

Rajah of Vizianagaram v. *Rajah Setrucherla Somasekhararaz* (1903) I.L R, 26 Mad., 686, referred to.

APPEAL against the decree of E. L. VAUGHAN, the District Judge of Ganjām, in Original Suit No. 13 of 1907.

The facts of this case appear from the judgment of the District Judge given below:—

"In 1890, plaintiff's father, a Zamindar, executed a deed "of gift (Exhibit A) to defendant of a village in his zamindari. "Plaintiff's father died eight years later (1898). The village "was separately assessed in 1904. Plaintiff's father and after him "the plaintiff paid peshkash for the whole zamindari till then. "Plaintiff claims a reimbursement of the peshkash paid between "the date of plaintiff's father's death and separate registration, "*i e.*, 1898 to 1904. Admittedly, that plaintiff paid up till the "date of separate assessment, the whole peshkash due on the "estate; defendant denies that any payment was in his (defend-"ant's) behalf or that he (defendant) is liable to make any "payment to plaintiff.

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"Issue II is the main issue. [The second issue in the case "was: 'was defendant bound to make the said payment either on "the terms of the deed of gift or by law?']. Plaintiff claims "under sections 69 and 70 of the Contract Act on the ground "that defendant was bound to pay the peshkash and that the "wording of the document shows that plaintiff's father never "intended to pay it gratuitously. Under the ruling laid down in "*Bhoja Sellappa Reddy* v. *Vridhachala Reddi* (1) defendant was "clearly not bound to pay even though it might have been in his "interests to do so. It is further to be inferred from the docu-"ment and plaintiff's father's subsequent conduct that plaintiff's "father made the payments gratuitously. Exhibit A is not a "document of the nature of a contract but is a deed of gift "made out of gratitude to defendant for services rendered. "It recites that plaintiff's father 'will apply for separate regis-"tration and according to that sub-division, you (defendant) "must be paying Government the peshkash as fixed as per such "division'. This to my mind means as soon as sub-division "was made, defendant should begin his payments. Plaintiff's "father may have contemplated applying for separate regis-"tration at once but as a matter of fact till his death eight "years later he took no action and apparently went on paying "the full peshkash without, so far as the evidence goes, objection "of any kind. Even for three years after his death, plaintiff "himself took no action and so far as the evidence goes, made no "objection. It appears from Exhibit B, that subsequently the "then manager took action, but plaintiff's case is not based upon "that action but on the wording on the gift deed A. The amount "to be paid was not even fixed till late in 1908, and even then it "might possibly have been objected to as an *ex-parte* calculation. "As the suit must fail upon this issue it is unnecessary to discuss "the remaining issues. The suit is dismissed with costs."

The necessary portion of the deed is given in the beginning of MILLER, J's. judgment.

C. V. Napier and *Dr. S. Swaminathan* for the appellant.

C. P. Ramaswami Ayyar for respondents Nos. 2 and 3.

MILLER, J. MILLER, J.—The District Judge decided the case on the second issue only and has construed Exhibit A as meaning that the plaintiff's father made a gift of the village free of land-tax to the donee

(1) (1907) I.L.R., 30 Mad., 55.

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until the donor obtained separate registration of the village by the Collector and apportionment of the peshkash. The condition in the gift is, "We should get the village sub-divided in your name (we being the Zamindar). You should pay to the Government the peshkash fixed thereupon according to the said sub-division." The Zamindar made the gift in 1890, and died in 1898, and during all that time the donee remained in possession of the village and paid no portion of the land-tax. The conduct of the Zamindar which may be looked to, to aid in construing the document, supports the construction which the District Judge has put upon it, and that is, that so long as the village remained an unseparated part of the zamindari, the Zamindar was to pay the land-tax. But he had the option of obtaining from the Collector separate registry, and that may well imply an obligation on the donee to concur in his application to the Collector for that purpose. Then in 1901, the manager of the estate under the Court of Wards, on behalf of the plaintiff, applied for the separate registration. Notices were published, in accordance with the provisions of the Madras Act I of 1876, in the District Gazette, and on the 19th of September 1903, the Collector fixed the proportionate peshkash at Rs. 206-5-3, and on that date notice thereof was sent to the donee calling upon him to state if he was willing to agree to the apportionment. The donee made no answer to several letters calling upon him to reply, and in 1904 the Collector for want of his concurrence refused to order the separate registry. Subsequently, in September 1904, the donee consented to separate registry, and it was made finally in 1905. In construing the document, as the District Judge has done, that the donee was under no obligation to pay the land-tax before the sub-division of the village, the 19th September 1903 is the first date, so far as I can see, on which any obligation can be laid upon the defendant. There is nothing in the evidence to show that the peshkash could have been fixed earlier by the Collector unless he had been applied to earlier by the Court of Wards. There is nothing to suggest that the delay was due, in any way, to any action of the defendant or to any contention of his, that peshkash ought not to be apportioned: consequently on the terms of the gift, the 19th of September 1903 is the earliest date from which the liability to pay peshkash could commence. On that date or a day or two later the donee received a notice from the Collector that the peshkash had

been fixed and that the sub-division has been concluded subject to his consent. It may be, therefore, that from that date the sub-division contemplated by the deed of gift was complete and that the donee was bound to pay the amount fixed, in which case all subsequent payments made by the plaintiff may be recoverable under section 69 of the Indian Contract Act. But it is unnecessary for us to decide the case on that section. It may be safer to rely, as the plaintiff also relies in his plaint, upon section 70. From the date on which the peshkash was fixed, it seems clear that the peshkash paid by the plaintiff to the amount of Rs. 206–5–3 was made for the donee. No doubt, it is possible that, if the plaintiff had not paid it, his own interest might have suffered; though it is probable that the Collector, inasmuch as the Court of Wards was the payer, might have come down upon the given village for any arrears which the Court of Wards might assent to be due in respect of that village; that, however, is a matter which I need not go into; it is undoubtedly possible that the plaintiff's interest might have suffered, but that I think, will not, in the circumstances make the payment the less a payment for the defendant. The amount of the peshkash which had been fixed was payable by the defendant, and it was paid as such and as being due upon that property. Therefore, though it might have been in the interest of the plaintiff to pay it, it does not seem to me, that there is any reason to say that it was not on that ground a payment made for the defendant. It is perfectly clear, of course, that once the sub-division was effected, the amount paid by the plaintiff could not have been intended to be left unrecovered, that the payment was not intended to be made gratuitously.

Then, the only other point that has to be considered in deciding whether the section is applicable in its language seems to be: 'Did the defendant enjoy the benefit thereof?' He undoubtedly did enjoy the benefit thereof; he never objected to accepting the benefit; he remained in possession of the village until the permanent registration was effected; and he never showed that he did not wish the payment to be made. On the contrary, he finally accepted the sub-division and the apportionment. It is true no doubt, that, in his written statement, he suggests that the amount was excessive; but so far as the evidence shows, he does not seem to have said so to the

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Collector or to the plaintiff or to any one before the suit was filed. Consequently, I think that he clearly accepted the benefit: he enjoyed the land and let the plaintiff pay the land-tax which he must have known was being paid for him. It does not seem to me that anything further is required in order to make the amount recoverable under the section. We have been referred to some cases as showing that this section does not materially depart from the English Law with regard to voluntary payments. I do not know that I need discuss them. We must of course proceed on the language of the section as it stands, unless we are bound by some decision to put a particular interpretation on it. What is necessary under the section? It is necessary, no doubt, that the plaintiff should prove first that he is doing something lawful when he is making the payment. That provision has been interpreted in various cases but here there is no question about the lawfulness of the payment. Then, he will have to show that he did not intend to pay gratuitously. That is also clear here. He will have then to show that what he did was done for the defendant, and it clearly may be very difficult for him to show that in some cases, especially in cases where his own interest is manifestly predominent. If he pays in his own interest, he will not ordinarily be held to have made the payment for the defendant, but whether he did so or not is, it seems to me, a question of fact in each case. Then finally the plaintiff will have to show that what he did did actually confer a benefit upon the defendant and that the defendant enjoyed the benefit. It would seem to be a sufficient answer to the plaintiff's claim if the defendant declined the benefit which it was proposed to thrust upon him. He may be taken to be the best judge of what is beneficial to himself in ordinary cases and could not in such cases be said to have enjoyed a benefit which was no benefit. On this ground or on the ground that in such cases the payment is not really made for the defendant may be rested the cases which show that, unless the defendant is willing to accept the benefit, the payment will not be recoverable under the section. No case has, I think, been cited during the argument. There is a case, *Narayanaswami Naidu* v. *Sree Rajah Vellanki Sreenivasa Jagannadha Rao*(1), in

(1) (1910) I.L.R., 33 Mad., 189.

which it is pointed out that, at any rate, the law of section 70 of the Indian Contract Act is certainly not narrower than the English Law, and, though in that case we held that we could imply a request to pay, I do not know that there is anything in section 70 which requires us to deal with the matters as one of an implied contract; but here, I think, that from the condition of the gift accepted by the defendant we might well imply an undertaking that anything that might be paid on his behalf after sub-division (which he was bound to facilitate) would be repaid by him.

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I do not think that what I have laid down is opposed to any of the cases, though perhaps I go somewhat farther than *Yogambal Boyee Ammani Ammal* v. *Naina Pillai Markayar*(1). I do not think it can be held under section 70 of the Indian Contract Act that the defendant must have an option of declining the benefit if that means that before the benefit is conferred he must be given the choice of accepting or declining it. Here as I have said the defendant adopted the benefit. It seems to me that we are clearly in this case within section 70 of the Indian Contract Act and therefore, I hold that, from the date on which the sub-division was settled by the Collector, *i.e.*, from the 19th of September 1903, though the registration could not be made then, the payments were made by the plaintiff for the defendant and that in respect of them the latter is bound to reimburse the former the amount of the payments up to the 18th April 1904 (the last payment), with interest at 6 per cent. per annum from the date of the suit till payment. Proportionate costs are to be paid, and received in, both the Courts.

SADASIVA AYYAR, J.

SADASIVA AYYAR, J.—On the construction of the gift deed, I agree that the defendant would, under its terms, become liable to pay the proportionate kist on the village gifted to him only from the date when the Collector divided off the village as a separate estate and fixed the separate revenue due upon that village. But there was clearly an implied obligation imposed under the gift deed on the defendant to give facilities for such separate registry whenever the donor takes steps to have such separate registry and separate apportionment of peshkash made by the Collector. All payments made before the date (about the 20th September 1903), when the Collector fixed

(1) (1910) I.L.R., 33 Mad., 15 at p. 21.

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the separate revenue payable in respect of the village and sent notice to the defendant, cannot therefore be recoverable by plaintiff from defendant, having regard to the provisions of the gift deed. As regards the payments of peshkash made after September 1903, the circumstances clearly indicate that the payment of the whole peshkash including the *portion* chargeable upon the defendant's village (according to the Collector's estimate) was made by the plaintiff not only on his (plaintiff's) own behalf, but also on behalf of the defendant. Much reliance was placed by the respondent upon the case decided in *Yogambal Boyee Ammani Ammal* v. *Naina Pillai Markayar*(1) by MUNRO and SANKARAN NAIR, JJ. A portion of the head note runs thus: "Where the person paying is interested in making the payment, he cannot be presumed, in the absence of evidence to show that he intended to act for the other party also, to have acted for such other party." I fully accept the statement of the law so laid down. In that case, there seems to have been such absence of evidence—I take 'evidence' to include 'surrounding circumstances'—to show that the plaintiff in that case intended to act for the other party also. *Abdul Wahid Khan* v. *Shaluka Bibi*(2) was, again, decided on the particular facts of that case, *i.e.*, the circumstances in that case similarly indicated that the payment by the plaintiff in that case was not also on behalf of the other party sought by the plaintiff to be made liable to pay contribution. I do not think that these cases intended to lay down generally that, where a person is interested in making a payment, it cannot be held *under any circumstances* that he intended to act for the other party also. On the contrary, the observations in *Yogambal Boyee Ammani Ammal* v. *Naina Pillai Markayar*(1) clearly show that from the circumstances it might be inferred that the plaintiff intended "*also* to act for the defendant." I think the facts and the circumstances of the present case clearly show that all payments made after September 1903 were intended by the plaintiff to be both on behalf of the plaintiff and of the defendant. There are of course, other observations in *Yogambal Boyee Ammani Ammal* v. *Naina Pillai Marakayar*(1) to the effect that section 70 of the Indian Contract Act merely

(1) (1910) I.L.R., 33 Mad., 15. (2) (1894) I.L.R., 21 Calc., 496 (P.C.).

reproduces the English Law as laid down in *Lampleigh* v. *Brathwaite*(1) with all the restrictions imposed by other English decisions following it, and that a person sought to be made liable must not only have benefited by the payment but also have had an opportunity of accepting the payment. I respectfully dissent from such observations, and I am inclined to agree more with the judgment in *Jognarain* v. *Badri Das* (2), in which the too narrow interpretation put upon section 70 of the Indian Contract Act in the above case (*Yogambal Boyee Ammani Ammal* v. *Naina Pillai Markayar*(3), is dissented from. The words of section 70 of the Indian Contract Act do not oblige us to import all the restrictions imposed by the English decisions, upon the equitable right of a person, who honestly does something for another without an intent to do so gratuitously, to recover compensation from that other for the benefit so conferred upon and enjoyed by that other person. *Damodara Mudaliar* v. *Secretary of State for India*(4), did not favour the imposition of such restrictions. It is stated in *Yogambal Boyee Ammani Ammal* v. *Naina Pillai Markayar*(3), that the decision in *Damodara Mudaliar* v. *The Secretary of State for India*(4) is opposed to the decision of the Privy Council in *Abdul Wahid Khan* v. *Shaluka Bibi*(5). I have already shown that the decision in *Abdul Wahid Khan* v. *Shaluka Bibi*(5) rested on the particular facts of that case. As regards the observations of the Privy Council in *Ram Tuhul Singh* v. *Biseswar Lall Sahoo*(6), not only was the payment in that case made in 1868 (before the Indian Contract Act became law), but it was found in that case that the payment was a voluntary payment "*against the will of the party benefiting* and made in the course of a speculative transaction in which the interest of the appellant was *directly* opposed to that of the respondents." Of course, a few restrictions ought to be placed on the words of section 70 of the Indian Contract Act, if they are so wide that it could not have been possibly intended by the legislature that the words should be given such a wide scope. For instance, if the benefit is conferred *notwithstanding notice of protest of the man benefited that he did not want the benefit*

(1) (1616) 1 Sm. L C, 141 at p.163. (2) (1912) 16 C.L.J., 150.
(3) (1910) I.L.R., 33 Mad., 15. (4) (1895) I.L.R., 18 Mad., 88.
(5) (1894) I.L.R., 21 Calc., 496 (P.C.). (6) (1875) 2 I.A., 131.

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proposed to be conferred on him, the act could not be said to have been done on his behalf. That seems to have been laid down in *Damodara Mudaliar* v. *Secretary of State for India*(1), and also in the Privy Council case in *Ram Tuhul Singh* v. *Bisesuar Lall Sahoo* (2). Also, if the benefit conferred is so inseparably accompanied by onerous obligations that a reasonable man might reasonably (and not in a wholly capricious way) refuse to accept, the benefit burdened with those obligations, there also section 70 may not apply. But subject to these and other similar restrictions, (it is impossible to predict and lay down exhaustively all the restrictions which it is advisable to lay down) I think that Courts in India ought to be guided more by justice, equity and good conscience than by the English precedents and should not cut down the beneficent provisions of section 70 of the Indian Contract Act which are intended to apply to all cases of benefit *bonâ fide* conferred by one person upon another and which benefit is enjoyed by the other person. It has been held in *Rajah of Vizianagaram* v. *Rajah Setrucherla Somasekhararaz*(3), that, so far as a charge is claimed by one co-sharer on the property of another co-sharer when both shares are benefited by a payment made by the first co-sharer, such a charge can be imposed by law notwithstanding certain English decisions which refuse to give such a charge to the co-sharer. In this connection, I wish to quote the following passage from the judgment of Sir SUBRAMANIA AYYAR, J., in that case; "This case convinces me that there is far less likelihood of any unsound rule being laid down in this country in consequence of the supposed deceptive character of the phrase 'Justice, equity and good conscience' than there is of Judges refusing to accept a sound rule from, I say with all deference, what is little short of a prejudice to that time-honoured phrase, introduced of old by wise legislators and universally accepted as words compendiously denoting those ultimate principles of what is right and proper, fair and reasonable, and good and expedient,—principles which Judges here as elsewhere, cannot help resorting to in dealing with the difficult questions, not directly governed by existing precedents, which often arise in the course of

(1) (1895) I.L.R., 18 Mad., 88. (2) (1875) 2 I.A., 131.
(3) (1903) I.L.R., 26 Mad., 686.

the administration of justice. It is quite true that for the enunciation of such principles, we mainly and generally look to English decisions and text-books of repute. But I fail to see why we are precluded from, when necessary, considering and following rules laid down in the " sister island of Ireland, where the same system of common law and equity is administered by a judiciary neither less able nor less learned than that in England, if such rules appear to us to be the best suited to the conditions and requirements of this country. In order to show that the view *adopted* in *Seshagiri* v. *Pichu*(1), and since then more than once followed in this Court, is not a *pseudo* equitable doctrine peculiar to Ireland, but true equity accepted and enforced as such without any reference to any analogy that may or may not be furnished by the principle of maritime salvage lien, in jurisdictions remote from Ireland, but administering the same common law and equity, I may also draw attention to what is alluded to in the passage cited by BHASHYAM AYYANGAR, J., from Freeman on Co-tenancy, and quote a fuller statement by another writer of the law on this point in those parts of the United States where it has arisen. " If a charge on property could be created because it is in consonance with justice, equity and good conscience, I do not see why an obligation, though it will be personal, cannot also be created if consonant with justice especially when section 70 of the Indian Contract Act, interpreting its terms in their ordinary meaning, also favours the plaintiff's right to obtain contribution from the defendant. *Rajah of Vizianagaram* v. *Rajah Setrucherla Somasekhararaz*(2), was decided "without any reference to any analogy that may or may not be furnished by the principle of maritime salvage lien." Let us take a not infrequent case of two neighbouring agriculturists. One of them is absent in a distant town on private business. His land requires well-water irrigation for one day emergently in order to produce a fair twelve annas crop, though even without the irrigation, it may yield a four annas crop and will not totally fail. His neighbouring land-owner, while spending five rupees for irrigating his own neighbouring land, does the neighbour service of spending five rupees for irrigating his neighbour's land also on that day, believing that, as a reasonable man, his neighbour, when he

(1) (1888) I.L.R., 11 Mad., 452. (2) (1903) I.L.R., 20 Mad., 686.

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returns from the distant place where he is unavoidably detained would repay him the five rupees as he is bound to do in justice, equity and good conscience. Is it to be said that section 70 does not apply to such a case because, though defendant enjoyed the benefit of the twelve annas crops (say benefited to the extent of Rs. 50), he had had no option to accept or reject the benefit? I think not. The Roman Law is admittedly wider than the English Law in this matter, and section 70 was suggested rather "by the note to *Lampleigh* v. *Brathwaite*(1), and perhaps, indirectly by the Roman Law" than by the strict rules laid down in English cases. (As Mr. Stokes has remarked) no doubt, the introduction of considerations as to what a "reasonable man" or "a man of ordinary prudence" would do for another or would accept as properly done for himself when done by a third person, introduces an uncertain element, and gives some discretion to Courts of Justice, but the Contract Act, in several sections, introduces such expressions as "ordinary prudence," "reasonable diligence," "similar skill as is generally possessed" consideration, (see sections 151, 189, and 212 of the Indian Contract Act) and Courts could not shirk the duty of dealing out justice because difficulties in determining what ordinary prudence or reasonable diligence, etc., would dictate under particular circumstances would have to be encountered in deciding some cases. I may add that Mr. Shepherd in his Indian Contract Act says (page 425) that not only does section 70 of the Contract Act, "make a departure from the principle" (of the English decisions) "that a man cannot be charged for services rendered to him by another, unasked and without authority" but that section 189 also makes a similar departure in favour of an agent who acts in an emergency without authority. In the result I agree in the decree passed by my learned brother.

(1) (1616) 1 Sm L.C., 141.

APPELLATE CIVIL.

Before Mr. Justice Sankaran Nair and Mr. Justice Oldfield.

SAYED SILIMAN SAIB AND ANOTHER (PLAINTIFFS), APPELLANTS, 1913. January 28 and March 26.

v.

BONTALA HASSON AND FOUR OTHERS (DEFENDANTS), RESPONDENTS.*

Civil Procedure Code (Act V of 1908), O II, rr 1, 2 and 3—Previous suit for declaration, dismissal of, for want of prayer for possession—Later suit for declaration and possession, maintainability of

The dismissal of a previous suit for a declaration of title to certain properties on the ground that the plaintiff was found entitled to possession is no bar to a suit for possession based on the same title as the causes of action, for which the allegations in the plaints must be looked to, are different in the two cases.

Chand Kour v. Partab Singh (1889) I.L.R., 16 Calc, 98 (P C), *Thrikaikat Madathil Raman v. Thiruthiyil Krishnan Nair* (1906) I L R, 29 Mad, 153, *Ramaswami Ayyar v Vythinatha Ayyar* (1903) I.L.R., 26 Mad., 760, *Nonoo Singh Monia v. Anand Singh Monda* (1886) I L R., 12 Calc, 291, *Jibunti Nath Khan v. Shib Nath Chuckerbutty* (1882) I.L.R, 8 Calc., 819, and *Mohan Lal v. Bilaso* (1892) I.L.R, 14 All, 512, followed.

Muthu Narayana Reddi v Rayalu Reddi (1896) 6 M.L.J., 51, and *Rangasami Pillai v. Krishna Pillai* (1899) I.L.R., 22 Mad, 259, not followed.

SECOND APPEAL against the decree of N. LAKSHMANA RAO, the Subordinate Judge of Kurnool, in Appeal No. 160 of 1909, preferred against the decree of P. N. SATAGOPA NAYUDU, the District Munsif of Kurnool, in Original Suit No. 244 of 1908.

In Original Suit No. 208 of 1907, the plaintiffs in the present suit, who were also plaintiffs in that suit, sued for a declaration of their right to certain properties; that suit was dismissed solely on the grounds that the plaintiffs were not in possession of those lands and that a mere suit for a declaration when the plaintiffs were entitled to ask for possession also, was not maintainable. The issue relating to the title of the plaintiffs was not decided. The plaintiffs now filed the present suit for a declaration of their title to and for possession of the very same properties. Besides the issue as to title, the following issue, viz., "whether Original Suit No. 208 of 1907 bars this suit" was raised. Both

* Second Appeal No. 1994 of 1911.

SULIMAN SAIB v. HASSON.

SANKARAN NAIR AND OLDFIELD, JJ.

"the cause of action was the denial of the plaintiff's right to the property accruing on the death of Sellathammal, and Sreenivasa taking possession of the property on the strength of the order of the authorities though he claimed that such order of the Government and the action taken under it should not affect his title nor the possession he had by virtue of the leases." So, the plaint in the first suit disclosed the fact that the plaintiff had been deprived of actual possession. He should have therefore claimed possession. The learned Judges also refer to the judgment of the Judicial Committee in *Chand Kour* v. *Partab Singh*(1) to the effect that the cause of action refers entirely to the grounds set forth in the plaint.

We are of opinion therefore that the decrees of the lower Courts should be set aside, and the Munsif be directed to restore the suit to his file and dispose of it according to law. Costs will be provided for in the final decree.

APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Sundara Ayyar.

1913. March 20 and 28.

KAYAROHANA PATHAN (PLAINTIFF), APPELLANT,

v.

SUBBARAYA THEVAN AND ANOTHER (DEFENDANTS Nos 2 AND 10), RESPONDENTS.*

Hindu Law—Inheritance—Leprosy, anaesthetic, not a ground of exclusion from—Incurability, not a safe test—Grounds of exclusion in texts, some obsolete.

Under the Hindu Law a person suffering from the anaesthetic form of leprosy, though considered incurable by medical men, is not disentitled to inherit.

Obiter:—Both under the Hindu Law texts and the decided cases it is only the agonizing, sanious or ulcerous type of leprosy that is a disqualification to inherit.

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(1) (1889) I.L.R., 16 Calc., 98.

* Second Appeal No. 695 of 1912.

Deformity and unfitness for social intercourse arising from the virulent and disgusting nature of the disease are the tests for exclusion from inheritance.

Janárdhan Pándurang v. *Gopál Pándurang* et al (1868) 5 B.H.C.R., (A.C.J.), 145, *Ananta* v. *Ramabai* (1877) I.L.R., 1 Bom., 554, *Rangayya Chetti* v. *Thanikachalla Mudali* (1896) I.L.R., 19 Mad., 74 and *Helan Dasi* v. *Durga Das Mandal* (1908) 4 C.L.J., 323, distinguished.

Ranchod v. *Ajoobai* (1907) 9 Bom., L.R., 1149, referred to.

Many of the grounds of exclusion referred to in the texts would not now be enforced by the Courts and are practically obsolete

SECOND APPEAL against the decree of J. S. GNANIYAR NADAR, Temporary Subordinate Judge of Negapatam, in Appeal No. 708 of 1910, preferred against the decree of G. J. QUARISHI, the Acting District Munsif of Tirutturaipundi, in Original Suit No. 113 of 1909.

The following facts are taken from the Lower Appellate Court's judgment:—

"The plaintiff in the suit which gave rise to this appeal, is the sister's son of one Viraswami Pathan. The first defendant is Viraswami's paternal uncle's son who is suffering from leprosy. The plaintiff claims Viraswami's properties with mesne profits alleging that the first defendant is not entitled to the properties on account of his being a leper . . The District Munsif gave a decree for the plaintiff.

"The points for determination are:—Whether the first defendant is disqualified from inheriting Viraswami's properties on account of his leprosy?

"*Though the first defendant denied in his written statement* that he was a leper, there can be no doubt that he is suffering from leprosy. He himself has admitted in his evidence that his fingers have become shortened and black though he states that he is suffering from syphilis only. Major E. H. Wright, I.M.S. (Plaintiff's Witness No. 1), proves that the first defendant is suffering from nervous leprosy and that the disease is incurable. According to the witness the leprosy the first defendant is suffering from, is the anaesthetic form of leprosy and it is in the medium stage. The question is whether the first defendant is disqualified under these circumstances from inheriting Viraswami's properties . . . Incurable leprosy in a mild form does not entail forfeiture of rights . . .

KAYAROHANA PATHAN v. SUBBARAYA THEVAN.

"The decree of the Court is reversed and the suit dismissed with costs in this Court and in the Lower Court."

Plaintiff preferred this Second Appeal.

C. S. Venkatachariar for the appellant.

C. V. Ananthakrishna Ayyar for the respondents Nos. 2 and 10.

BENSON AND SUNDARA AYYAR, JJ.

JUDGMENT.—The question for decision in this Second Appeal is whether the defendant is disentitled to inherit his paternal uncle's son's estate by reason of his suffering from leprosy. The plaintiff is the sister's son of the deceased owner. The medical evidence is that the defendant is suffering from the anaesthetic form of leprosy and that it is in the medium stage. The District Munsif decided against the defendant on the ground that according to the opinion of the medical witness the disease was incurable. The Subordinate Judge held that the defendant was not excluded, because the disease was not of the sanious or ulcerous type and was not virulent and he was not regarded as unfit for association by his castemen. The Mitakshara, which is the predominant authority applicable in this presidency, does not expressly mention leprosy as a ground of exclusion from inheritance. It states "An impotent person, an outcaste, and his sons, one lame, a madman, an idiot, a blindman, and persons afflicted with an incurable disease and others (similarly disqualified) must be maintained excluding them, however, from participation." Mitakshara, ch. II, s. 10, pl. 1. Placitum 6 states with regard to the persons enumerated in pl. 1. "That is they are debarred of their shares, if their disqualification arose before the division of the property. But one, already separated from his co-heirs, is not deprived of his allotment." Placitum 7 provides "if the defect be removed by medicaments or other means at a period subsequent to partition, the right of participation takes effect, on the same principle on which when the sons have been separated, one, who is afterwards born of a women equal in class, shares the distribution, is based." Of the Smrithi writers the only one who expressly excludes a leper is Devala. Manu excludes one who is a Nirindriya, that is devoid of an organ, after expressly mentioning eunuchs and outcastes, one born blind or deaf, an insane, an idiot and a dumb man, but a leper is not referred to by him (see Buhler, chapter IX, sloka 201). Apastamba and Vasishta do not exclude him. Narada excludes persons

flicted with a chronic or acute disease (see 'Sacred Books of the East,' volume 33, page 194) or as otherwise translated an acute or agonizing distemper. Atrophy or pulmonary consumption is instanced as a chronic and leprosy as an acute, disease in the Ratnakara. Yajnavalkya and Vishnu exclude persons suffering from an incurable disease. So far as leprosy is concerned, the later Hindu Law books generally lay down, that to be a ground of exclusion, it must be of the sanious or ulcerous and not of the anæsthetic type. See *Janardhan Pandurang* v. *Gopal Pandurangetal* (1), *Ananta* v. *Ramabai*(2) and *Rangayya Chetti* v. *Thanikachalla Mudali*(3). The ancient texts apparently base the exclusion on the ground of the incapacity of the sufferer to perform the funeral and other obsequial rites of the deceased The texts relate in terms to the right to partition on the distribution of an estate amongst several sons of a deceased owner; and the Mitakshara expressly provides that the share of the excluded sufferer should be restored to him if he is subsequently cured. It may be doubted whether the rule of exclusion would apply to a case of strict inheritance, as a person who is once excluded from inheritance, which consequently vests in another, is not entitled to claim it again subsequently. All the reported cases on the subject, *Muthuvelayuda Pillai* v. *Parasakthi*(4), *Ananta* v. *Ramabai*(2), *Rangayya Chetti* v. *Thanikachalla Mudali*(3) and *Helan Dasi* v. *Durga Das Mandal*(5) relate to the right to partition In *Ranchod* v. *Ajoobai*(6), the question was one of inheritance proper. The leprosy in that case was held to be of the anæsthetic type, and it was held that the sufferer was not excluded. The question whether the texts were applicable to a case of real inheritance was not raised at the arguments in the case. The precedents cited in West and Buhler's Digest of Hindu Law also refer to cases of partition. In one case the Pandit was asked whether the nephew of a deceased person was entitled to the certificate of heirship in preference to his son who was insane. In his answer he expressly referred to the fact of the son and nephew being united in interest as the ground for

(1) (1868) 5 B H.C.R. (A.C J.), 145. (2) (1877) I L.R., 1 Bom., [illegible]
(3) (1896) I.L.R., 19 Mad., 74. (4) (1860) Madras Sudder Decisions, [illegible]
(5) (1900) 4 C.L.J., 323. (6) (1907) 9 Bom. L.R., [illegible]

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holding that the nephew was entitled to preference. It cannot, however, be denied that the texts have been applied to the right of inheritance in the case of blindness and dumbness although not in the case of leprosy. It must be noted that the ancient writers excluded various other persons from inheritance to the paternal estate along with those specifically enumerated in the Mitakshara. The author refers to them by the expression "others similarly disqualified." How wide the reasons for exclusion were will appear from Colebrooke's Digest, volume 2, pages 424 to 435. Many of the grounds of exclusion would not now be enforced by the Courts, and are practically obsolete. See Mayne's Hindu Law, paragraph 592, and *Vedanayaga Mudaliar* v. *Vedammal*(1). In *Venkata Subba Rao* v. *Purushottam*(2) BHASHYAM AYYANGAR and MOORE, JJ., abstained from expressing an opinion on the question whether lameness was a ground of exclusion, although a "pangu" is expressly named by Yajnavalkya amongst excluded persons. Sir Thomas Strange refers to the opinion of Colebrooke that all the texts of exclusion cannot be said to have been abrogated or to be obsolete, although the courts would not go into proof of several of them, such as the claimant being addicted to vice or profusion or being guilty of neglect of obsequies and duties towards ancestors. "But" Colebrooke observed, "expulsion from caste, leprosy, and similar diseases, natural deformity from birth resulting from an uncanonical marriage, would doubtlessly now exclude; and, I apprehend, it would have to be so adjudged in our Adawluts." (See Strange's Hindu Law, volume I, page 159.) It is doubtful how far the injunctions contained in the books are now actually enforced in different parts of the country. In Steel's Law of Castes it is observed that the rules of exclusion are largely qualified by custom, and that in seventy-two castes at Poona it was found that insanity excluded only unmarried persons, and that in eighty-three castes blind persons married and having families might inherit. In *Bai Amrit* v. *Bai Manik*(3) a boy bordering on idiocy was allowed to transmit a heritable right to his widow. (See West and Buhler's Digest, Introduction, page 155.)

(1) (1903) I.L.R., 27 Mad., 591 at p. 598. (2) (1903) I.L.R., 26 Mad., 133.
(3) (1875) 12 B.H.C.R., 79.

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Again there is a difference of opinion amongst Hindu writers whether the disability to inherit could not be removed by the performance of expiatory ceremonies. According to some authors, expiation, though productive of spiritual benefit, would not in cases of major sins and serious diseases indicative of such sins, render the sufferer fit for social intercourse or to inherit. This was the view taken in Bengal Sudder Adalat Decisions, volume 2, page 108, referred to in the Vyavasthachandrika, volume 2, Precedents, page 492. But others are of a different opinion. These considerations would have to be borne in mind, if we had to pronounce a definite decision on the question whether in a case of inheritance proper leprosy of the sanious or ulcerous type would be a ground of disqualification in this Presidency at the present day; but it is not necessary to do so, as the finding is that the defendant in this case is not suffering from leprosy of that type. It is contended for the appellant that, as according to the medical opinion the disease is incurable, the case is one which falls within the text of the Mitakshara; but the question is not whether according to modern medical opinion the disease is curable, though of the anæsthetic type. Both the texts of the Hindu Law and the decided cases fully establish that it is only the agonizing sanious or ulcerous type of leprosy that can be regarded as a ground of exclusion. It may be that it is only that type that was regarded as incurable by the Hindu writers. It is not safe to adopt the test whether the disease is curable or not. That is very much a matter of opinion, on which the medical profession itself might be divided. The test would moreover be an indefinite one for legal purposes, as what is at one time regarded as curable may at other times be regarded as incurable. Deformity and unfitness for social intercourse arising from the virulent and disgusting nature of the disease would appear to be what has been accepted in both the texts and the decisions as the most satisfactory test. The result is that we must *dismiss the Second Appeal with costs.*

APPELLATE CIVIL.

Before Sir Charles Arnold White, Kt., Chief Justice, and Mr. Justice Tyabji.

1913. March 18, and April 1.

BATCHA SAHIB (FIRST DEFENDANT), APPELLANT,

v.

ABDUL GUNNY *alias* ABDUL KARIM SAHIB AND ELEVEN OTHERS (PLAINTIFFS, DEFENDANTS NOS. 2 TO 12), RESPONDENTS.*

Award—Judgment and decree in accordance with award—Appeal—Civil Procedure Code (Act V of 1908), sch. II, cl. 15 and 16—Revision, non-maintainability of—Civil Procedure Code, Act V of 1908, sec. 115, no formal petition necessary for revision under.

No appeal lies from a decree which is in accordance with an award except upon grounds mentioned in clause 16 (2) of the second schedule to the Civil Procedure Code (Act V of 1908). This was also the law under the old Civil Procedure Code (Act XIV of 1882) and it is *a fortiori* under the new Civil Procedure Code according to which an application could be made under clause 15 (c) to set aside an award on the new ground, viz., "the award being otherwise invalid."

Suryanarayana Rao v. Sarabhaiah (1911) 21 M.L.J., 263, followed.

Kanakku Nagalinga Naik v. Nagalinga Naik (1909) I.L.R., 32 Mad., 510, referred to.

When an application is made to set aside an award but refused and a judgment is pronounced according to the award, the judgment so pronounced is final under clause 16 (2).

A revision petition to set aside an award is more objectionable than an appeal.

Ghulam Khan v. Muhammad Hassan (1902) I.L.R., 29 Calc., 167 (P.C.), followed.

Velu Pillai v. Appasami Pandaram (1911) 1 M.W.N., 141, distinguished.

Obiter. If an application is made to set aside an award but refused, it would be open to the Court to pronounce judgment even though the ten days allowed for such an application had not expired. The words "after the time for making such application had expired," apply only where there has been no application made to set aside the award.

If the application is made after the period of limitation, viz., ten days, the Court can refuse to set aside the award.

A formal application for revision under section 115, Civil Procedure Code, is not necessary.

APPEAL against the decree of H. O. D. HARDING, District Judge of Coimbatore, in Original Suit No. 83 of 1908.

The facts of the case appear from the judgment of WHITE, C.J.

*Appeal No. 15 of 1911.

T. R. Ramachandra Ayyar and *T. R. Krishnaswami Ayyar* for the appellant.

C. V. Ananthakrishna Ayyar for respondents Nos. 1, 4 and 6 to 9.

WHITE, C.J.—This is an appeal against a decree on a "judgment according to the award" under paragraph 16 of the second schedule to the Code of Civil Procedure. The decree is impeached by the appellant on two grounds: it is said first that there has been no award, secondly, that, on the application to the District Judge to pronounce judgment according to the award, the learned Judge ought to have given an opportunity to one of the arbitrators, who is described by the learned Judge as the "dissenting arbitrator" to give evidence, that he did not give that opportunity and that being so the judgment according to the award is bad.

On behalf of the respondents a preliminary objection was taken that no appeal lies. It seems to me that on the authority of the Full Bench decision which is reported in *Suryanarayana Rao* v. *Sarabhaiah*(1), the preliminary objection is good and should be upheld. The judgment of the Full Bench was with reference to a case which arose under the Code of 1882. Now the doubts which had arisen under the provisions of the old Code were removed by certain amendments being made in the corresponding provisions of the second schedule to the new Code. Paragraph 15 (which corresponds to section 521 of the old Code) provides that no award should be set aside "except on one of the following grounds." In paragraph 15 (1) (*c*) we have a new ground, namely, the award having been made after the expiration of the period allowed by the Court. At the end of the paragraph we have the general words added "or being otherwise invalid." Those amendments of the law were made for the purpose of removing doubts which had arisen. If on the authority of the Full Bench case, the objection that no appeal lies would have been good under the old Code, *a fortiori* it is a good objection as the law now stands. The time prescribed for an application to set aside an award is ten days from the submission of the award (Limitation Act, 1908, schedule I, article 158) under paragraph 15 of the II schedule to the

(1) (1911) 21 M.L.J., 263.

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Code of Civil Procedure, as amended; the Court might have set aside the award in the present case on the ground that it was otherwise invalid, if the application had been made in time. In the present case, the award would seem to have been submitted on the 29th of June. The application to set it aside was made on July 18th, 1910. This would seem to have been overlooked. The order refusing to set aside the award appears to have been made at the same time (September 2, 1910) as the judgment according to the award under paragraph 16 of the II schedule to the Code of Civil Procedure (which corresponds to section 522 of the old Code) was given. In the present case the judgment according to the award was pronounced after the time for making the application to set aside the award had expired. But even if this had not been so, as it seems to me, inasmuch as an application to set aside the award had been made and refused it would have been open to the Court pronounce judgment even though the ten days had not expired. The words "after the time for making such application had expired" would seem to apply only where there has been no application made to set aside the award. The law is thus stated by Mr. Banerji in his book on the Law of Arbitration in India, and I think correctly, on page 293—"In order to secure finality to the judgment and decree the necessary conditions are that there has been no order remitting the award, and that no application has been made to set aside the award within the ten days, or if an application has been made it has been refused after judicial determination by the Court."

In the present case the Court refused to set aside the award. The judgment pronounced under paragraph 16 (1) is therefore final under paragraph 16(2).

Then we are asked to deal with the matter by way of revsion. There is no formal application before us to revise but, as has been pointed out, under section 115 of the Code, a formal application is not necessary. In *Ghulam Khan v. Muhammad Hassan*(1) the Privy Council observed: "Their Lordships are inclined to agree with the view of CLARK, J., in (2) that in the case of an award revision would be more objectionable than an appeal." We are asked to interfere on the ground

(1) (1902) I.L.R., 29 Calc., 167 at p. 185. (2) ( ) 84 P.R., 1901.

that the learned Judge ought to have given one of the arbitrators an opportunity to give evidence on the hearing of the application to set aside the award. Speaking of this arbitrator, the Judge said, "he was here on the 11th August. Now he has been summoned, but cannot be found. Petitioner's case turns on that man, yet petitioner took no steps to secure his presence on the last occasion." Then he says "I see no reason to adjourn this matter further; panchayatdars have given an award, but all that has really happened is that the third, the absent man, does not agree with them in some points and so did not sign the award." If it were quite clear that the learned Judge has exercised discretion wrongly in this case, we might be prepared to take the strong step of interfering on revision but the general policy of the legislature is clear that in these matters the judgment in accordance with an award should be final. Mr. Ramachandra Aiyar has been unable to call our attention to any case in which this Court has interfered by way of revision where a decree has been passed in accordance with an award given by arbitrators, excepting a case decided by WALLIS, J., *Velu Pillai* v. *Appasami Pandaram*(1). In that case it does not appear that there was any application to set aside the award and judgment was pronounced two days after the award was submitted. It was not a case of impeaching an award but a case where the express provisions of paragraph 16 of schedule II of the Code of Civil Procedure had been contravened. I may refer to a decision of MUNRO and ABDUR RAHIM, JJ., in *Kanakku Nagalinga Naik* v *Nagalinga Naik*(2). There it was held under the old section that no appeal lay against a decree passed in accordance with an award excepting on the grounds stated in the section and that no appeal will lie on the ground that an award is void *ab initio*. I refer to this case for the purpose of pointing out that it was never suggested there that the Court should or could interfere in the exercise of its power of revision. I think we should uphold the preliminary objection and dismiss the appeal with costs and I think we should decline to interfere by way of revision.

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TYABJI, J.—I agree.

TYABJI, J.

(1) (1911) 1 M.W.N., 141. (2) (1909) I.L.R., 32 Mad., 510.

APPELLATE CIVIL.

Before Mr. Justice Miller and Mr. Justice Sadasiva Ayyar.

1913.
March 12
and
April 2.

KALIBA MOVULVIJA MUHAMMAD USAN KADIRI ABKAN SAHIB AND ANOTHER (PLAINTIFFS), APPELLANTS,

v.

SORAN BIVI SAIBA AMMAL AND THREE OTHERS (DEFENDANTS), RESPONDENTS.*

Indian Limitation Act (XI of 1877), art. 120—Suit by an ex-trustee for re-imbursement governed by—Rights of bonâ fide de facto *trustees for* bonâ fide *expenses*

A trustee of a public trust has a first charge on the trust properties for the purpose of reimbursing himself advances properly made for the trust and article 120 and not article 132 of the Limitation Act (XI of 1877) is the one applicable to a suit for recovery of monies so spent; and his right to sue for such monies does not accrue before the date on which he is judicially declared to be no longer a lawful trustee (though it may well be that it does not accrue till he is dispossessed of the trust estate in pursuance of the judicial declaration).

Peary Mohun Mukerjee v. Narendra Nath Mukerjee (1910) I.L.R., 37 Calc., 229 (P.C.), followed.

The expenses of a suit in which a person posing himself to be a trustee unsuccessfully resists another's right to be the trustee cannot be allowed as a proper charge on the trust property.

Obiter:—The time occupied in defending such a suit as the rightful trustee, when no counter-claim is made therein for reimbursement of the expenses made by him but only a claim to remain in possession for such expenses cannot be deducted in his (the trustee's) favour under section 14 of the Limitation Act

Maharajah Jugutendur Bunwarte v. Din Dyal Chatterjee (1864) 1 W.R., 309, followed.

Per SADASIVA AYYAR, J.—Article 61 is applicable only to an ordinary suit for a simple decree for money but not for a suit where the prayer of the plaint is for recovery of the plaint amount out of the income of and on the liability of certain properties. Article 120, and not article 132, is the proper article applicable, and the right of suit does not begin until the trustee is dispossessed.

A trustee has not only got a right to reimburse himself out of the rents and profits of the trust property, but has also a charge thereon, including its *corpus*, which can be enforced only by an order prohibiting any disposition of the trust property, without previous payment of expenses properly incurred by him. He is not entitled to enforce his right by a sale of the trust property.

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* Appeal No. 148 of 1910.

A person, who is a *de facto* trustee, but who *boná fide* thinks himself to be *de jure* trustee, is entitled to reimbursement of all expenses properly incurred by him, just like a *de jure* trustee. ABKAN SAHIB v. SORAN BIVI SAIBA AMMAL.

Even a *de facto* trustee or a trustee *de son tort* is entitled to be reimbursed for all the *necessary* expenses in respect of the trust estate.

Obiter A trustee is entitled to remain in possession until he is reimbursed in respect of all proper charges incurred by him

APPEAL against the decree of K. RAMANATHA AYYAR, the Subordinate Judge of Tinnevelly, in Original Suit No. 8 of 1908.

The facts are fully given in the judgment of MILLER, J

The plaintiffs, whose suit was dismissed as barred by limitation, preferred this appeal.

The Honourable Mr. *L. A. Govindaraghava Ayyar* for the appellants.

The Honourable Mr. *T. V. Seshagiri Ayyar* for respondents Nos. 1 to 3.

MILLER, J.—The question we have to decide is one of limitation and it is not quite simple. The first appellant was in 1893 appointed by the District Judge as trustee or manager of an endowed mosque 'during the minority of the defendants'; an expression which has been in a former suit held to imply the termination of his trusteeship on the date on which the eldest of the defendants attained the age of majority. That date was the 27th of February 1900 The first defendant thereafter sued to recover possession from the appellant and obtained a decree on the 26th of April 1902, and it is conceded that, though the appellant did not actually surrender possession before 1905, we may take the date of the decree as the latest date on which he can be held to have had a right to retain possession. MILLER, J

The appellant's contention is that he has a period of limitation of twelve years under article 132 or at the least a period of six years under article 120 of the second schedule of the Limitation Act within which to bring his suit for the recovery of sums advanced by him to the trust while he was trustee and not recovered by him before he lost possession. The merits of his claim have not so far been investigated and we may assume, without deciding, that some of the advances were made before February 1900, and that among those advances here some which the trustee might properly recover from the trust property. Advances made after February 1900 may possibly

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also be recoverable, if made for proper purposes, and I do not wish to decide more than that the expenses of the suit of 1901 in which the plaintiff unsuccessfully resisted the first defendant's claim to be trustee, cannot be allowed as a proper charge on the trust property.

For the respondents the contention before us is that article 120 is the appropriate article as held by the Privy Council in *Peary Mohun Mukerjee* v. *Narendra Nath Mukerjee*(1), a similar case, and the starting point is the 27th February 1900, the date on which the minority of the first defendant terminated and with it the trusteeship of the first appellant.

The subordinate Judge has suggested the application of other articles not now relied on by either side and has held that, if article 120 be applicable, the contention now advanced on behalf of the respondents must prevail.

I may here observe that the appellants do not now rely on the acknowledgment, Exhibit F, nor on the agreement, Exhibit G. Exhibit F, it is conceded, did not bind all the defendants, and as the fourth defendant was a minor at the date of the trial and the agreement Exhibit G was not sanctioned by the Court, it was open to the parties to recede from it.

The only question therefore is the question of limitation.

The Trust Act does not apply to the case, but the Privy Council have held in the case of a public trust that the trustee has a first charge on the property for the purpose of reimbursing himself advances properly made. It is argued therefore that a suit to enforce payment of the money charged would be governed by article 132, and taking the date of the advance as the date on which the money is due, the charge could be enforced in the present case in respect of all proper advances made within 12 years of the 24th January 1908. But the difficulty in applying article 132 in this way is that there would be no one to be sued when the money became due. There is no beneficiary who could be sued by the trustee in possession, and the trustee could not sue himself; 'due' must therefore mean 'payable by some one else' to the trustee, if article 132 is to be applied, and limitation would start from the time when the trustee ceased to be able to pay himself.

(1) (1909) I.L.R., 37 Calc., 229 (P.C.); s.c., 37 I.A., 27.

But this interpretation of 'due' is open to the objection that the money advanced is recoverable by the trustee as soon as he can get it, and he cannot, properly speaking, recover it before it is 'due.'

I doubt therefore whether article 132 can properly be applied to a case where a man lends money out of his own pocket to himself as trustee of a religious institution on the security of the trust property, and I think it safer to follow their Lordships of the Privy Council in *Peary Mohun Mukerjee* v. *Narendra Nath Mukerjee*(1), and to hold that the appropriate article is article 120.

Applying that article, we have to determine the date on which the right to sue accrued—was it the 27th February 1900 when the first defendant attained majority, or was it, at the earliest, the 26th of April 1902 when the Court, refusing to accede to the first plaintiff's contentions (as defendant in that suit) that he was entitled to be trustee until the youngest child of the founder ceased to be a minor, and that in any event he was entitled to remain in possession till he was paid, decreed the first defendant's claim (as plaintiff in that suit) to eject him at once?

Before discussing this question, I may deal with a contention that in any event the time occupied by the first plaintiff in defending the suit of 1901 must be excluded under section 14 of the Limitation Act. I do not think that section is applicable here. The first plaintiff as defendant in that suit claimed a right to remain in possession till he was reimbursed; he did not ask for a decree against the then plaintiffs for the money alleged to be due to him. That seems clear from the abstract of the defence set out in Exhibit I (the judgment). That being so, his present claim is not founded upon the same cause of action; had he then claimed a decree against the plaintiffs for the money by way of counter claim, there might be something in the contention, as he might, it is possible, have been held to be prosecuting the claim which he is now prosecuting (*vide Maharajah Jugutendar Bunwaree* v. *Din Dyal Chatterjee*(2); but his defence in the suit of 1901 cannot be treated as a counter suit when all he wanted was the dismissal of the plaintiff's suit in ejectment as premature.

(1) (1909) I.L.R., 37 Calc., 229 (P.C.). (2) (1864) 1 W.R., 309.

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Moreover the Court did not dismiss his claim for want of jurisdiction to entertain it: it decided that it was unfounded, holding that he had no right to remain in possession till paid; and it told him that a suit for the money might be successful as a suit for a general account of management. The claim made was a claim to remain in possession and that rightly or wrongly was disallowed as a matter of law, and not for want of jurisdiction to entertain it or other like cause.

The answer to the question raised in article 120 is made to depend, as the case was argued, on the further question whether an ex-trustee remaining in possession can sue his successor in respect of advances made to the trust. There is no beneficiary whom he could sue in the case, and unless he can sue his successor, there can be no right of suit, and therefore limitation cannot start running.

The only suit which appears possible is a suit for a declaration that the property is charged with the amount of the expenses, and the cause of action for such a suit might arise, it is suggested, on the date when the trustee's possession is threatened, in this case, not later than some date in 1901, when the suit No. 22 of 1901 was instituted by the first defendant.

But such a suit would appear to be incompetent, so long as the trustee was in a position to collect the rents and pay himself without a suit and without obstruction or threatened obstruction. His possession was in jeopardy in the suit, but his right to a charge on the property for expenses properly incurred was not denied, and there was no threat to prevent him from collecting the rents and appropriating them so long as he remained in possession—when turned out he would have a cause of action for expenses then unpaid, but not, so far as I can see, before that.

The mere fact that there was in existence a person interested to deny his title to remain trustee would not give him a right to sue for a declaration: that person was not interested to deny his right to repay himself his proper expenses out of the property, so long as he was in possession of it, and apparently did not deny that right but claimed that some unauthorized collection had been made and, I suppose, appropriated by the trustee, though that does not appear in the abstract of the plaint given in Exhibit I.

Consequently, I think, though not without hesitation, that the right to sue did not accrue to the plaintiff before the 26th of April 1902 (it may well be that it did not accrue till 1905), and the suit is not barred and must be remanded for disposal. Costs will abide the event.

SADASIVA AYYAR, J.—The plaintiffs are the appellants. The first plaintiff was the *de jure* and *de facto* trustee of the plaint mosque from April 1893 to the end of February 1900, a period of six years and ten months.

The second plaintiff is the first plaintiff's agent. Then the first defendant attained majority and became *de jure* trustee, but the first plaintiff continued to be *de facto* trustee, refusing to give up possession of the trust properties to the first defendant under a claim that, till the first defendant's two sisters and one brother also attained majority, the first plaintiff was entitled to continue as trustee. The defendants had to bring Original Suit No. 22 of 1901 to eject the first plaintiff. That suit was decreed in the Original Court in the end of April 1902. The first plaintiff still refused to deliver up possession to the defendants, but in execution of the final decree on appeal in that suit, the defendants got possession in February 1905. The plaintiffs have brought this suit for recovery of Rs. 8,000 out of the Rs. 10,000 and odd alleged to have been spent by them till February 1905 for the benefit of the trust. The period covered may be divided thus :—

(*a*) Between April 1893 and February 1900 when the first plaintiff ceased to be lawful trustee, (*b*) between February 1900 and April 1902 when the first plaintiff was declared by a Court of Justice not to be entitled to remain as trustee any longer, and (*c*) between April 1902 and February 1905, when the first plaintiff was ejected from possession of the trust properties. The plaintiff's claim recovery of the amount of Rs. 8,000, costs and interest "out of the income of the said mosque on the liability of the property of the said mosque and out of the income of the said property." The suit was brought in January 1908, more than 14 years after the first plaintiff became trustee, and more than 7 years after the first plaintiff ceased to be lawful trustee, but within 6 years of the first plaintiff's having been declared by a Court of Law to have ceased to be trustee (April 1902) and within 3 years of his dispossession by the defendants of the trust properties (February 1905).

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The learned Subordinate Judge who tried this suit in the Original Court dismissed it as barred by limitation. He considered that article 61, article 85 or article 120 of the Limitation Act would apply and that, applying any of these articles, the suit was barred. I might state at once that article 85 has no application, as there have been 'no mutual open and current accounts' and 'no reciprocal demands' between the plaintiffs and the trust. If article 61 applies, the period of limitation is only 3 years from the time when the first plaintiff spent monies on behalf of the trust. If so, the plaintiffs' claim is barred except in respect of monies spent within 3 years before suit, that is, between the 24th January 19 5 and the 9th February 1905, and we might take it that this is a negligible sum, even if it is not zero. On this question of the applicability of article 61 also, I might at once state that if this suit was an ordinary suit to obtain a simple decree for money, it would be no doubt barred by article 61, but the prayer of the plaint is for recovery of the plaint amount "out of the income of the (plaint) mosque on the liability of the property of the said mosque and out of the income of the said property. To such a suit, article 61 cannot apply; if article 120 had to be applied, the lower Court thought that the starting point for computing the period of limitation could not be later than February 1900, when the first plaintiff's right as trustee came to an end, and, as the suit was brought in 1908, the suit was, on that view also, barred.

The plaintiffs' contentions are—

(a) that article 132 of the Limitation Act providing for a period of 12 years applies to this case, as the plaintiffs claim a charge on the trust properties.

(b) that the first plaintiff is entitled to such a charge because he spent monies as a trustee who, accordingly to law, can claim such a charge.

(c) that even if he was not a trustee *de jure* for a portion of the period during which he spent the monies, as *de facto* trustee he was entitled to a charge on the trust properties just as if he was a *de jure* trustee.

(d) that the plaintiff did not know that he was not entitled to be trustee till the 21st November 1904, when the High Court finally decided against him, and hence he was entitled to a charge for what he spent till that date,

(e) that he was at least entitled to a charge for what he paid till the 26th April 1902, when the Original Court which tried Original Suit No. 22 of 1901, pronounced its decision, because till that date at least, he *bonâ fide* believed that he was ...ee

(f) that at the lowest, he was entitled to a charge for what he spent before the 27th February 1900, when the first defendant obtained majority.

(g) that even if article 120 of the Limitation Act applied, limitation should be calculated from February 1905 when the first plaintiff lost possession, as the first plaintiff could not be expected to sue himself while he was in possession of the trust properties;

(h) that limitation could not in any event be calculated before the 16th April 1902, when Original Suit No. 22 of 1901 was decided

(i) that the acknowledgment (Exhibit F) by the second defendant in 1907 of the plaintiffs' right to reimbursement saves limitation.

(j) that thr razinamah entered into by the defendants during the course of the litigation entitled the plaintiffs to a decree for Rs 8,000 and the lower Court should not have gone into the question of limitation at all.

(k) that the time spent in defending the Suit No. 22 of 1901 and in the conduct of the appeals in that case should be deducted in the plaintiffs' favour under section 14 of the Limitation Act.

The answers of the respondents to these contentions are —

(a-1) Article 132 does not apply to a trustee claiming a charge on properties belonging to a charitable or religious trust. The charge of a trustee is not like an ordinary charge which entitles a man to bring the charged property unconditionally to sale. It is a charge which enables him to take the amount he has spent for the trust out of the rents and profits of the trust property or through raising monies by the creation of a similar charge to his own. Article 120 alone applies to a trustee's suit against the *cestui que* trust to enforce such charge—see *Peary Mohun Mukerjee* v. *Narendra Nath Mukerjee*(1). The first plaintiff's claim for what he spent for the trust before the 24th January 1902 is barred.

(1) (1910) I.L.R., 37 Calc., 229(P.C.).

(a) (i), (j) and (k) above.

That the first appellant as trustee had a charge for what he spent before the 27th February 1900 and could have recovered that money was not denied. (I am just now leaving the question of Limitation on one side.) Whether he could recover what he spent out of his pocket between the 27th February 1900 and April 1902 (when the first plaintiff's right to trusteeship was negatived by the decision of a Court of Law) and whether he could recover what he similarly spent between April 1902 and February 1905 when he was dispossessed, are questions on which I must confess I have felt grave doubts. Was he (the first plaintiff) merely and purely trustee *de son tort* during those periods? Even if he was so, is he still entitled to claim out-of-pocket expenses during the period when he was such trustee? I find that the expression "express trustees" is held to include even trustees *de son tort* who profess (without title) to hold certain properties as trustees, that trustees *de son tort* might even become constructive trustees if they renew leases in their own names (see Lewin on Trusts, Chapter X) and that a trustee *de son tort* cannot plead limitation against the *cestui que trust* as section 10 of the Limitation Act, providing that "a person in whom property has become vested in trust for a specific purpose" cannot plead limitation in a suit by the *cestui que trust*, is applicable to trustees *de son tort* also (see Mitra on Limitation, page 771). I think that if a trustee *de son tort* is subjected to all the liabilities of an express trustee, he should also be given in some cases and subject to certain conditions some of the rights of a lawful *trustee to reimburse himself or to recover properly incurred* out-of-pocket expenses. Of course, the accounts of such a trustee *de son tort* may be liable to be subjected to a more severe scrutiny than those of a lawful trustee, but, on principle, I think that what a trustee, of whatever kind, has really spent for the necessities of the trust should be reimbursed to him, if his claim to the office of trustee was not dishonestly made or if he did not wrongfully continue in possession. I do not say that all trustees *de son tort* are entitled to reimbursement of out-of-pocket expenses incurred on behalf of the trust. If a man violently and dishonestly takes possession of trust properties under a false claim to be trustee, he cannot be allowed to

claim out-of-pocket expenses. If a man, after being told by a Court of Law that he ought to give up possession to the legal trustee, would not give up possession and then chooses to spend further monies out of his own pocket taking the chances of obtaining a decision in appeal in his favour, he must also be held to take the risk of losing the subsequent out-of-pocket expenses. As my learned brother has remarked in his judgment, what the first plaintiff spent in Original Suit No. 22 of 1901 and the appeals therefrom to establish his own alleged title (found to be non-existent by the Courts) cannot be treated as monies spent for the trust and could not be recovered, unless the Court had allowed his costs also to come out of the trust estate. A person, who acts *bonâ fide* as trustee or remains in possession after he had ceased to be trustee by virtue of his lien on the trust properties to recover out-of-pocket expenses incurred while he was trustee, must, however (it seems to me) be allowed to claim recovery of such expenses incurred during the period when he was legal trustee, and also when he *bonâ fide* believed himself to be trustee, or when he *bonâ fide* believed that he had a right to remain in possession of the office till he was so reimbursed. The questions (*a*) whether the first plaintiff *bonâ fide* believed himself to be trustee between February 1900 and April 1902, (*b*) whether monies were due to him from the trust in February 1900 and the first plaintiff believed that he was entitled to continue to hold the office till the amount was reimbursed to him, either or both of these questions might have to be decided by the lower Court for coming to a conclusion on the point whether the first plaintiff is entitled to out-of-pocket expenses (if any) between these dates. After April 1902, the first plaintiff cannot claim out-of-pocket expenses, as he must be held to have taken the risk himself and as such expenses were incurred in assertion of his own false title, which he could not have *bonâ fide* believed in, after that date, as his claim to remain in possession after that date was disallowed by the Court. If he afterwards spent money for necessary purposes *less* than the income he got, he must, of course, account for the surplus, but if he spent more, it was at his own risk. He should, however (I think) be given credit for necessary expenses incurred by him as *de facto* trustee *up to the limit* of the income derived and should not be debited with the

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whole income received without being given any credit at all for even necessary expenses incurred.

In the present case, the first plaintiff's right to reimbursement of out-of-pocket expenses before February 1900 is unquestionable (subject of course to the question of limitation). The question of the first plaintiff's *bonâ fide* belief as to his legal position after February 1900 till April 1902, when the Court decided against his right, may be relevant in deciding whether the plaintiffs are entitled to claim out-of-pocket expenses incurred between those dates. That question will, however, not arise, if the trust was indebted to the plaintiffs in February 1900, when the first plaintiff's title as trustee ceased and if that debt had not been discharged out of the rents and profits before February 1908. The plaintiffs would have (or at least, could *bonâ fide* claim) a right to remain in possession till that money was paid up and so long as they remained in possession, they should maintain the trust as *de facto* trustees lawfully in possession of the trust properties. As however, in April 1902, a Court of Law decided against the first plaintiff's right to remain in possession, the plaintiffs could not, it seems to me, claim out-of-pocket expenses incurred after April 1902.

The last question remaining for disposal, the question involved in contentions (*g*) and (*h*) of the appellants, is also one of great difficulty. I was, at first, inclined to hold that the right to sue for the relief of declaring and enforcing a trustee's charge accrued at once on each occasion when he spent monies out of his own pocket and that, after six years from the date of each such accrual, the right to sue for such money became barred. In *Kandaswamy Pillai* v. *Avayambal* (1), it was held by BENSON and KRISHNASWAMI AYYAR, JJ., that an agent who has got a right of retainer and a right of lien (sections 217 and 222 of the Contract Act) has only three years from each of the dates of his spending monies for his principal for recovery of that money and that the commencement of the running of limitation is not postponed to the termination of the agency. It might, fairly, be argued by analogy of reasoning, that the trustee's right also to recover

(1) (1911) I.L.R., 34 Mad., 167.

from the trust accrued at once on his incurring each out-of-pocket expense. But I find from *Peary Mohan Mukerjee* v. *Narendra Nath Mukerjee*(1), that their Lordships of the Privy Council held that the executors of the deceased trustee, Bijoy, were entitled to a period of six years *from the date of his death*, when he of course ceased to be a trustee (and not from the respective dates of his incurring expenses on behalf of the trust) within which to bring their suit for reimbursement out of the trust property. And the reasons given by my learned brother in the judgment just now pronounced by him (and which I had the advantage of perusing before writing the judgment) have led me to the same conclusion as is expressed in his judgment, namely, that, till the trustee lost possession of the trust properties, no right to bring a suit to enforce his claim against the trust properties accrued to the trustee. As I said above, this also seems to have been the view of their Lordships of the Privy Council in *Peary Mohun Mukerjee* v. *Narendra Nath Mukerjee*(1), though their Lordships do not set out the reasons which led them to the conclusion that the date of the death of the former trustee, Bijoy, was the date of the commencement of the cause of action in that case. There is no doubt this difference between the facts of this case and those in *Peary Mohan Mukerjee* v. *Narendra Nath Mukerjee*(1), namely, that the trustee whose representatives were the plaintiffs in that case was a lawful trustee till his death, whereas the trustee suing in this case ceased to be a lawful trustee in 1900 and was directed in 1902 by a Court of Justice to give up possession of the trust property. But I think that this difference could not affect the principle that, till possession of the trust property out of which the plaintiff could reimburse himself is lost, the peculiar suit to enforce a trustee's peculiar charge could not be brought against the trust.

An agent has only the rights of retainer and lien, whereas a trustee has also a distinct charge even after he loses possession of the trust properties; an agent has only three years to sue, whereas a trustee has six years to enforce his charge; an agent can at any time sue his principal, whereas a religious or charitable trustee or one who claims to be such trustee cannot as

(1) (1910) I.L.R., 37 Calc., 229 (P.C.).

AHMAN SAHIB v. SORAN BIVI SAIBA AMMAL.

SADASIVA AYYAR, J.

plaintiff sue the trust as defendant himself representing the defendant trust, and these distinctions probably prevent the analogy of *Kandasuamy Pillai* v. *Arayambal*(1), being applied as regards the commencement of the period of limitation. I would therefore hold that the plaintiff's cause of action arose only in February 1905.

In the result, I concur in the order of reversal and remand made by my learned brother.

APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Sundara Ayyar.

1913. April 3.

P. K. MOIDIN KUTTI (PLAINTIFF), APPELLANT,

v.

C. POKER AND TWO OTHERS (DEFENDANTS), RESPONDENTS.*

Provincial Small Cause Courts Act (IX of 1887), sch. II, art. 35 (g)—Contract to marry, breach of—Provisions and articles, loss of.

A suit by a father of a Muhammadan girl against the father of a minor boy for breach of contract to marry the boy to the plaintiff's daughter and for compensation for the loss sustained by the waste of articles and provisions in consequence of such breach is governed by article 35, clause (g) of the second schedule to the Provincial Small Cause Courts Act (IX of 1887) and is therefore not cognisable by a Provincial Small Cause Court.

Kali Sunker Dass v. *Koylash Chunder Dass* (1898) I.L.R., 15 Calc., 833, followed.

CASE stated under order 46, rule 7 of the Civil Procedure Code (Act V of 1908), by R. EDGINGTON, the Acting District Judge of South Malabar, in Original Suit No. 112 of 1911, on the file of the District Munsif of Ottapalem.

The facts of the case appear from the judgment below.

K. Ramachandra Ayyar, amicus curiæ.

BENSON AND SUNDARA AYYAR, JJ.

JUDGMENT.—The question for decision is whether a suit by the father of a Muhammadan girl against the father of a minor

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(1) (1911) I.L.R., 34 Mad., 167.

* Referred Case No. 2 of 1912.

boy for breach of a contract agreeing to marry the boy to the plaintiff's daughter falls within article 35, clause (*g*) of the Provincial Small Cause Courts Act "which relates to a suit for breach of contract of betrothal or promise of marriage." We hold, agreeing with the decision of the Calcutta High Court in *Kali Sunker Dass* v. *Koylash Chunder Dass*(1), that the article covers such a case; see also *Nga La* v. *Nga Than*(2). The fact that the article exempts from the jurisdiction of a Small Cause Court a suit for breach of a contract of betrothal which must be against a person other than the husband or wife supports that view.

MOIDIN KUTTI v. POKER.

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We have no doubt that the claim for compensation for the loss sustained by the plaintiff in consequence of the articles and provisions got ready by him for the marriage became wasted must be treated as a claim for compensation for the breach of the contract. Our answer to the reference is that the suit is not cognizable by a Small Cause Court.

APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Sundara Ayyar.

1913. April 23 and 29.

VAIRAVAN CHETTIAR AND ANOTHER (PLAINTIFFS NOS 2 AND 4), APPELLANTS,

v

AVICHA CHETTIAR AND THREE OTHERS (DEFENDANTS NOS 1 TO 3 AND THIRD PLAINTIFF), RESPONDENTS *

Limitation Act (XV of 1877), arts. 36, 115 and 120—Contract to sell another's goods without authority, breach of—Cause of action only in contract and not in tort as on misrepresentation—Indian Contract Act (IX of 1872), sec. 235.

A suit against a person for breach of contract to sell to the plaintiff certain goods of another on the implied representation that he had authority from his principal to sell them, when in fact he had none, is not one arising in tort or one independent of contract but one arising out of and incident to a contract and is governed by article 115 of the Limitation Act (XV of 1877) and not by article 36 or 120.

Section 235 of the Indian Contract Act, discussed.

APPEAL against the decree of V. K. DESIKACHARIAR, the Subordinate Judge of Negapatam, in Original Suit No. 28 of 1907.

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(1) (1888) I. L. R., 15 Calc., 833. (2) (1912) 14 I. C., 837.

* Appeal No. 139 of 1908.

VAIRAVAN v. AVICHA.

The plaintiffs alleged (i) that the third defendant on behalf of his father Chockalinga Chettiyar, who was the guardian of defendants Nos. 1 and 2 agreed by means of Exhibit C on 31st July 1903 with the plaintiffs' predecessor in title (*a*) that the barque 'Vettivel' should be sold, (*b*) that the pass for it should be transferred to the plaintiffs' predecessor-in-title within one month after the vessel returned from its then voyage to Negapatam or Tondi, (*c*) that though the vessel returned to Tondi on 12th January 1904, no sale was effected nor the pass transferred, and (*d*) that the consideration paid for the agreement should be returned. The plaint was filed on 31st July 1907.

The original plaint did not mention any ground of exemption from limitation on the impression that the cause of action arose in August 1904. But in the amended plaint it was stated that the cause of action arose on 13th February 1904, and that the suit was not barred by limitation on account of an acknowledgment of liability contained in a power of attorney (Exhibit A) executed on 28th November 1906, by the mother of first defendant and the mother of the second defendant in favour of the third defendant. The defendants denied that the third defendant had any authority to execute Exhibit C on behalf of his father or that it was ratified or that any liability was acknowledged in Exhibit A. The defendants also stated that the suit was barred by limitation.

Upholding the contentions of the defendants the suit was dismissed against all the defendants

Plaintiffs preferred this appeal.

K. Srmiiasa Ayyangar for the appellants.

S. Srinivasa Ayyangar for respondents Nos. 1 and 2.

K. V. Krishnaswami Ayyar for the third respondent

BENSON AND SUNDARA AYYAR, JJ.

JUDGMENT.—So far as the first and second respondents are concerned this appeal must fail on the finding of the Subordinate Judge, with which we agree, that there is no evidence that the third defendant (third respondent) executed Exhibit C with the authority of his father, Chockalinga or that Exhibit C was subsequently ratified either by Chockalinga or by Srirangam Achi and Sivagami who succeeded Chockalinga in the guardianship of the first and second defendants. The third defendant's testimony is completely against the plaintiffs It may be that is not speaking the truth, but in the absence of any evidence

BENSON AND SUNDARA AYYAR, JJ.

to prove the plaintiff's case their claim against the first and second respondents must fail. Exhibit A does not show that Srirangam Achi and Sivagami intended to ratify Exhibit C. The appeal must therefore be dismissed with costs as against the first and second respondents.

The next question is whether the third defendant is liable to compensate the plaintiffs for the damage caused to them by his executing Exhibit C without the authority of Chockalinga. Several questions of fact and law, the solution of some of which is not free from difficulty have been argued in connection with this point, but we abstain from discussing them as we are of opinion that the claim of the third defendant must fail on the ground of limitation.

The covenant in Exhibit C is that the barque 'Vettivel' should be sold and the pass for it standing in the name of Chockalinga should be transferred to the plaintiffs within one month after the barque returned to Negapatam or Tondi. This took place according to the plaintiffs on the 10th of January 1904. The suit was instituted on the 31st of July 1907 that is more than three and a half years after the boat returned to Tondi. What is the article of the Limitation Act applicable to the case? The third respondent contends that it is article 36 or article 115 while the appellant urges that it is article 120, no other article being applicable. We do not think that article 36 can be held to be applicable. It relates to a suit for compensation for any malfeasance, misfeasance or non-feasance independent of contract and not specially provided for in the schedule. Assuming that the action may be held to be one in tort, it is certainly not for a wrong independent of contract but one connected with a contract and arising from one of the incidents of a contract. A person entering into a contract on behalf of a principal ought not to do so without authority from the principal. His acting on behalf of the alleged principal amounts to a representation that he has authority from the latter to do so. His acting without such authority is a wrong connected with the contract. The case cannot therefore fall within the purview of article 36.

Article 115 provides "for compensation for the breach of any contract express or implied, not in writing registered and not herein specifically provided for." Is the cause of action in this case the breach of an implied contract?

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BENSON AND SUNDARA AYYAR, JJ.

The Indian Contract Act, section 235, enacts as follows:—"A person untruly representing himself to be the authorised agent of another, and thereby inducing a third person to deal with him as such agent, is liable, if his alleged employer does not ratify his acts, to make compensation to the other in respect of any loss or damage which he has incurred by so dealing." In treating of the measure of damages awardable against an agent acting without the authority of the principal, Messrs. Pollock and Mulla observe that in English law "the duty is grounded on an implied warranty by the agent that he has the authority, and the action being in contract lies even if the agent honestly believed he had authority and against executors: which in England an action in tort for deceit does not . . . It is open to question whether in India the compensation recoverable under the section will be assessed on the same principle. The language used seems more appropriate to an action in the nature of deceit than to one founded on warranty." The language of the section no doubt supports the statements of the learned commentators, that the suit appears to be treated as one for damages for misrepresentation and not one on a contract. Section 9 of the Act defines an implied contract as one in which there are an actual proposal and acceptance though made otherwise than in words. Obligations imposed by law similar to contractual obligations are not included in the definition and are placed in the Act in a separate category in Chapter V, but there can be no doubt that according to English law a contract that the agent has authority to act on behalf of the principal would be implied by law whenever he contracts on behalf of a principal. In construing article 115 of the schedule to the Limitation Act it must be remembered that Act IX of 1871 which enacted article 115 was passed before the Indian Contract Act which was enacted in 1872. We think that the expression 'implied contract' was used in the article in the sense in which it is understood in English law. The Contract Act and the Limitation Act are not statutes *in pari materia* and it should not be assumed that article 115 is confined to cases of what would be implied contracts according to the definition in the Contract Act. The result of confining it to such cases would be that where a suit is instituted against the principal and an agent together and relief is claimed against them in the alternative

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... as the act was authorised or not by the principal a ...erent period of limitation would be applicable against each of ...em, though the obligation arises out of the same transaction. We do not think that this could have been intended. We are of opinion on the whole that article 115 must be applied to the ...ase. In *Dukur Pershaud Bustooree* v. *Mussamut Fookumaru ...abu*(1), the Privy Council held that the obligation of a *del credere* agent to pay the vendor of goods their price when it is not ...aid by the purchaser is one on an implied contract. Paragraph 14 of the plaint states that the cause of action arose on the 13th February 1904, that is, one month after the arrival of the boat at ...ondi. On this allegation the suit must be held to be barred. It is urged that as the first and the second defendants' guardians ...ed the power of attorney Exhibit A, with a view to transfer ... pass of the barque on the 28th of November 1906 to the ...aintiffs' names the contract was not really broken on the 13th February 1904. But the execution of Exhibit A was not in ...erformance of the agreement Exhibit C, but in consequence of request by Erambumurthi Pillai to whom Chockalinga had sold the barque to the guardians asking them to transfer it to the plaintiffs on the ground that he had sold the barque to them. There is nothing in the facts of the case to postpone the commencement of limitation beyond one month after the arrival of the barque at Thondi. We must therefore hold that the suit as against the third defendant is barred by limitation. In the result the appeal is dismissed with costs against him also.

(1) (1871) 16 W.R., 35 (P.C.).

APPELLATE CIVIL.

Before Mr. Justice Miller and Mr. Justice Sadasiva Ayyar.

1913. March 28 and April 10.

NARASAPPAYYA (PLAINTIFF), APPELLANT,

v.

S. GANAPATHI RAO AND ANOTHER (DEFENDANTS), RESPONDENTS.*

Easement—User of easement for less than the prescriptive period—No right to sue for infringement.

Incorporeal rights such as easements are not capable in an exact sense of being possessed; and unless an easement had ripened into a prescriptive one, mere enjoyment of the easement for any length of time short of the full period of prescription gives no right for the enjoyer to maintain an action against any person infringing such a user.

Protection given in law to mere possession of corporeal things cannot be extended to such cases.

Acchanna v. *Venkamma* (1895) 5 M.L.J., 24 and *Kondapa Rajam Naidu* v. *Devarakonda Suryanarayana* (1911) I.L.R., 34 Mad., 173 distinguished.

English authorities reviewed.

SECOND APPEAL against the decree of V. VENUGOPAL CHETTI, the District Judge of South Canara, in Appeal No. 221 of 1910, preferred against the decree of B. KRISHNA RAO, the District Munsif of Mangalore, in Original Suit No. 335 of 1908.

The facts are fully given in the judgment of MILLER, J.

B. Sitarama Rao for the appellant.

K. Yagnyanarayana Adiga for the respondents.

MILLER, J.

MILLER, J.—The plaintiff prays for an injunction to prevent the defendants from cutting a channel from a tank from which he waters some of his fields, so as to deprive him of the water. He alleged, *inter alia*, that the defendants were threatening to construct a dam to prevent the water from flowing to his fields, but this they denied.

The District Munsif, as I understand him, held that the plaintiff has a right to a supply of water from the pond in question, to the exclusion of the defendants and on that ground issued the injunction prayed for. The District Judge holds that the plaintiff has no right to the water of the pond, though he had

* Second Appeal No. 1061 of 1912.

been in the habit of taking it through a channel for sometime not exactly determined but less than twenty years. He dismissed the suit.

In Second Appeal it is contended that on the finding of the District Judge we ought to hold that the plaintiff, though he has not by prescription acquired a right to take the tank water through his channel, is nevertheless entitled, having been for sometime taking it in that way to prevent the defendants, who have also no right, to take the water, from taking it so as to deprive him of his supply and in support of this contention reliance is placed on *Kondapa Rajam Naidu* v. *Devarakonda Suryanarayana*(1). It is perhaps unfortunate that in that case the learned Judges have referred to the right for which protection was there claimed as "in the nature of an incorporeal right in process of acquisition." It seemed to me during the argument before us that reliance was sometimes placed on this observation as suggesting the existence in the eye of the law, of what I may call a partially acquired easement, as though the period required for the acquisition of an easement were a period of gestation, during which the easement gradually acquires form and life by a process of growth within the womb of prescription, and during which it is capable of suffering an injury.

It is perhaps hardly necessary to say that this is not the law. That is made clear by FARWELL, J., in *Greenhalgh* v. *Brindley*(2). You have your easement or you have nothing. You have nothing more for 19 years' enjoyment than for 19 months except possibly a greater prospect of success. What is growing and gradually ripening is not your easement, but your chance of success, and that is not a thing which the law protects. But I do not think that the learned Judges had in their minds anything in the nature of an inchoate or embryonic easement. Their decision was based on the view that in many cases incorporeal rights are as much capable of possession as rights to corporeal hereditaments. This means that you may have an enjoyment of a thing incorporeal without title, an enjoyment which may properly be called possession, and which will be protected in the same way that possession without title of corporeal things is protected. The question in each case will therefore be

(1) (1911) I L R, 34 Mad., 173. (2) (1901) 2 Ch., 324.

NARASAPPAYYA v. GANAPATHI RAO. — MILLER, J.

not whether the plaintiff has been enjoying the benefit which he seeks to retain, but whether he has possession of it.

In the opinion of Sir Frederick Pollock, no mean authority on question of possession, easements "are not capable in an exact sense of being possessed. The enjoyment which may in time ripen into an easement is not possession and gives no possessory right before the due time is fulfilled. The only possession that can come in question is the possession of the dominant tenement itself"—Pollock on Torts, 8th Edition, page 375; and in Holmes' Common Law it is pointed out that "where an easement has been actually created, whether by deed or prescription, although it is undoubtedly true that any possessor of the dominant estate would be protected in its enjoyment, it has not been so protected in the past on the ground that the easement was in itself an object of possession but by the survival of precedents" founded, as he elsewhere explains on ideas which permitted the acceptance of a theory that an easement is something belonging, attached, adhering, appurtenant, to the dominant estate itself and not to the owner thereof personally and the learned author expresses the opinion that a person using a way for some years without an easement would not be protected in its use against third persons (Holmes' Common Law, pages 240, 241). The same illustration is repeated elsewhere in the same work 'a way, until becomes a right of way, is just as little susceptible of being held by a possessory title as a contract" (page 354) and again "The Common Law does not recognize possession of a way; there must exist a right against the servient owner before there is a right against anybody else. At the same time it is clear that a way is no more capable of possession because some body else has a right to it than if no one had" (page 382).

In the Roman Law the enjoyment of a servitude (or of certain servitudes) was considered to be a quasi-possession, *i.e.*, I take it, not a true possession, but something like it.

I do not wish to suggest that on its facts *Kondapa Rajam Naidu* v. *Devarakonda Suryanarayana*(1) was wrongly decided, but I am not sure that any question of possession of an incorporeal thing really arose there, and I must confess that

(1) (1911) I.L.R., 34 Mad., 173.

I find it easier to accept generally Sir Frederick Pollock's view than the statement of the learned Judges in that case. I find difficulty in conceiving of any true possession of things incorporeal, though no doubt the enjoyment of some easements resembles in some ways the occupation and use of a corporeal thing, and it may be that there are cases in which the resemblance is so close as to warrant the extension to this quasi-possession of the protection which is given to true possession.

It is noticeable that Sir Frederick Pollock does not refer to *Jeffries* v. *Williams*(1) in the passage which I have extracted above, and that, I venture to think, is because he did not regard that case as bearing on the question; the actual decision turned on a question of pleading, and, though there are observations in the judgment which suggest that the protection of a possessory right was in the minds of the learned Judges, still as is pointed out in *Dhuman Khan* v. *Muhammad Khan*(2) the decision is based on the fact that the defendant was on the declaration to be taken to be a wrong-doer as he had negligently injured the plaintiff's house and was not alleged to be the owner of the adjacent close or to have the owner's rights of mining and digging therein.

But, if the case is to be taken as a decision on a question of possessory right, it does not follow that other easements are similarly capable of possession. When I by building on my own land obtain the support for my house of my neighbour's land it may perhaps be said without great inaccuracy that I have obtained something very like possession of the support. But can this be said of the plaintiff's claim in the present case?

In *Stockport Water Works Company* v. *Potter*(3) BRAMWALL, B., observed that the mere taking of water (from a river) by the plaintiffs did not give them a right of action; and referred to *Whaley* v. *Laing*(4) as deciding this point. In *Whaley* v. *Laing*(4), the plaintiff took water from a canal by license of the owner of the canal, into a cistern of his own and thence to the engines which worked his mines. The defendants polluted the water of the canal and the foul water entered the plaintiff's cistern. BRAMWELL, B., delivered the judgment of the Court of Exchequer holding that the plaintiff had a right of action but declining to

(1) (1855) Exch R., 792.
(2) (1897) I.L.R., 19 All., 153.
(3) (1861) 3 H. & C., 300 at pp. 318 and 476.
(4) (1857) 2 H. & N., 476.

NARASAPPAYYA v. GANAPATHI RAO.

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decide whether he had any possessory right in the water; the ground of their decision was that the defendant without right caused foul water to flow on to the plaintiff's premises. The case was like *Jeffries* v. *Williams*(1), based on questions as to the sufficiency of the plaintiff's declaration and the defendant's pleas and in the Exchequer Chamber the judgment was reversed by a majority of the judges *Laing* v. *Whaley*(2). WILLES, J., accepted the judgment of BRAMWELL, B., in the Court below and CROWDER, J., held that the permission of the land-owner gave the plaintiff a rightful enjoyment of the water and the defendant had wrongfully polluted the stream. But CROMPTON, J., thought the plaintiff was bound to aver a right to the water and construed the declaration as averring such a right, but held on the facts that no right existed and refusing to construe the declaration as the Court below had done as one complaining of foul water thrown on the plaintiffs premises, was of opinion that the judgment ought to be reversed. ERLE, J., agreed with him. WILLIAMS, J., held the declaration bad for want of any allegation that the plaintiffs were rightfully in enjoyment of the benefit of the water of the canal and WIGHTMAN, J., stated the facts to be that neither the plaintiffs nor the defendants had any right to do that which they did and held that, on the facts as upon the pleadings, the judgment ought to be reversed. On the pleadings he found nothing in the declaration to show that the defendant by fouling the water had injured any right of the plaintiffs or could as against them be considered a wrong-doer, and that no right of action was shown. MARTIN, B., in the lower Court and CROMPTON, J., in the Exchequer Chamber put the case of the poisoning of a pond by a man without right and consequent injury to the cattle of a man watering them at that pond by permission of the owner. And CROMPTON, J., thought that in that case an action against the poisoner of the water might be founded in some circumstances not on any right in the water but on the wilful injury to the plaintiffs' property. These cases are nearer the present case than the case of *Jeffries* v. *Williams*(1) and suggest that the enjoyment of the water of a river by taking it without right is not a possessory right which the Law of England will

(1) (1850) 5 Ex. R., 792. (2) (1858) 3 H. & N., 675.

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protect. Possession seems to involve an appropriation to the exclusion of others and with the intention of maintaining such exclusion and it seems impossible to apply such a conception to the mere taking of water from a stream through a cut in the bank. There may be, no doubt, possession of the actual cut or channel, through which the water is taken, and possession of the water once it is appropriated, and that possession might be protected and this seems from the record of the case reported in *Kondapa Rajam Naidu* v. *Devarakonda Suryanarayana*(1) to have been the question there raised; the actual channel used exclusively by the plaintiff was obstructed by the defendant. *Acchanna* v. *Venkamma*(2) presents to my mind considerable difficulty, if it is to be regarded as a case in which the Court protected a possessory right. I find it difficut to conceive of the possession of the access of light to a house. But it may be that the learned Judges considered that the action would lie on account of injury to the plaintiff's property, as is suggested in *Dhuman Khan* v. *Muhammad Khan*(3) and by the observation of CROMPTON, J., in *Whaley* and *Laing*(4) and that the defendant would have to justify the *primâ facie* nuisance by showing some right in himself. Possibly this is what they mean when they say that against a wrong doer it was not necessary to show a prescriptive right. But even in this case we have the idea of exclusion which is essential to possession; the plaintiff's house alone was served by the light which was obstructed by the defendant's wall, and in this case therefore there may be some justification for protecting what may be regarded as a sort of possessory right.

In the present case, the plaintiff has no possession that I can see; he has not enclosed the pond; he has only cut a hole in one bank and that cannot give him possession of all the water in the pond; if I do not get possession of an unenclosed common by turning out my horse in one end of it to graze, I do not get possession of an unenclosed pond and its contents by making a cut in one end of it. The plaintiff has possession of the water when he gets it into his channel, but in no true sense has he possession of it before that. It is open to any one to go

(1) (1911) I.L.R., 34 Mad., 173 (2) (1893) 5 M.L.J., 24.
(3) (1897) I L.R., 19 All., 153. (4) (1857) 2 H. & N., 476.

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protect. Possession seems to involve an appropriation to the exclusion of others and with the intention of maintaining such exclusion and it seems impossible to apply such a conception to the mere taking of water from a stream through a cut in the bank. There may be, no doubt, possession of the actual cut or channel, through which the water is taken, and possession of the water once it is appropriated, and that possession might be protected and this seems from the record of the case reported in *Kondapa Rajam Naidu* v. *Devarakonda Suryanarayana*(1) to have been the question there raised; the actual channel used exclusively by the plaintiff was obstructed by the defendant. *Acchanna* v. *Venkamma*(2) presents to my mind considerable difficulty, if it is to be regarded as a case in which the Court protected a possessory right. I find it difficut to conceive of the possession of the access of light to a house. But it may be that the learned Judges considered that the action would lie on account of injury to the plaintiff's property, as is suggested in *Dhuman Khan* v. *Muhammad Khan*(3) and by the observation of CROMPTON, J., in *Whaley* and *Laing*(4) and that the defendant would have to justify the *primâ facie* nuisance by showing some right in himself. Possibly this is what they mean when they say that against a wrong doer it was not necessary to show a prescriptive right. But even in this case we have the idea of exclusion which is essential to possession; the plaintiff's house alone was served by the light which was obstructed by the defendant's wall, and in this case therefore there may be some justification for protecting what may be regarded as a sort of possessory right

In the present case, the plaintiff has no possession that I can see; he has not enclosed the pond; he has only cut a hole in one bank and that cannot give him possession of all the water in the pond; if I do not get possession of an unenclosed common by turning out my horse in one end of it to graze, I do not get possession of an unenclosed pond and its contents by making a cut in one end of it. The plaintiff has possession of the water when he gets it into his channel, but in no true sense has he possession of it before that. It is open to any one to go

(1) (1911) I.L.R., 34 Mad., 173.
(2) (1895) 5 M.L.J., 24
(3) (1897) I L.R., 19 All., 153.
(4) (1857) 2 H. & N., 476.

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to the pond and draw water therefrom, and the defendant is not a wrong doer as against the plaintiff; dishonesty apart, the case is parallel to one in which one man being in the habit of stealing manure for his field from a farm yard, finds one day that *another thief has been beforehand with him and taken* the manure which he intended to steal. There could be no right of action in such a case.

The appeal must be dismissed with costs.

SADASIVA AYYAR, J.

SADASIVA AYYAR, J.—The plaintiff is the appellant. The facts found might shortly be stated thus. There is a small natural pond on Government land from which the plaintiff has been taking water to irrigate his lands which are evidently on a lower level than the tank bed. It is not clear from the evidence for how many years past he has been so using that water, but the District Judge finds that he has not been doing it for any length of time, and that he has acquired no right as against the Government to use the water of the pond for suggi cultivation. The plaintiff purchased the land only eleven or twelve years before the suit. The defendants shortly before the suit dug a trench in another corner of the tank and tried to take the water of the tank to their own lands situated in the direction of the other corner They also had no right as against the Government to do so. The plaintiff sued for an injunction against the taking of the pond-water into the defendants' fields. The District Judge dismissed the plaintiff's suit because the plaintiff possesses no legal right to take water from the plaint's pond and the defendant by trying to take the water of the pond could not therefore infringe any legal right of the plaintiff. The contention of the learned vakil for the plaintiff, Mr. Sitarama Rao, is that, because the plainitff had been using the tank water for some years, though he had no right to do so, he was in possession of an incorporeal right to take such water and that the defendants as trespassers have no right to take such water and to interfere with the enjoyment by the plaintiff of such incorporeal right. Reliance has been placed on *Achanna* v. *Venkamma*(1) and *Kondapa Rajam Naidu* v. *Devarakonda Suryanarayana*(2). Whether an incorporeal right of easement which is merely in process of acquisition

(1) (1895) 5 M.L.J., 24. (2) (1911) I.L.R., 34 Mad., 173.

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can be held to be capable of legal possession at all till the process of acquisition is complete is a very doubtful question. Pollock in his book on Torts at page 375 says as follows:—"Easements and other incorporeal rights in property, rather a fringe to property than property itself" as they have been ingeniously called, are not capable in an exact sense of being possessed. The enjoyment which may in time ripen into an easement is not possession, and gives no possessory right before the due time is fulfilled: "a man who has used a way ten years without title cannot sue even a stranger for stopping it." In *Bonner* v. *Great Western Railway Co.*(1), BAGGALLAY, L.J., says, differing from BACON, V.C., in the Court below "I am unable to take the same view of the case as was taken by the Vice-Chancellor . . . . In the present case the person complaining has no rights at all. It is admitted that the windows through which the plaintiff has derived light and air for a certain number of years past, have not been enjoyed for a sufficient length of time to give him a right to that light. It appears that for sixteen years he has had the joyment of these windows, and the view taken by the Vice-Chancellor was apparently this, that he had an accruing right to the enjoyment of this light which, supposing there was no interruption on the part of the Railway Company, he might enjoy until the whole twenty years had expired, and that the defendants ought to be restrained from interfering with the acquisition of the easement by the plaintiff. But it seems to me to be contrary to every principle on which the Court acts in cases of this kind that a person who has no right should obtain an injunction to restrain a Railway Company or *anybody else* from doing that which will interfere with his acquiring a right, by reason of his being unmolested for a certain length of time." LINDLEY, L.J., said in the same case "the plaintiff comes here asking an injunction to restrain the defendants from interfering with certain lights which he admits he has no title to. That appears to me to be the simple answer to the case quite apart from anything else." FRY, L.J., concurred on the same ground, namely, "that the plaintiff had not enjoyed the lights which were interfered with by the defendants hoarding for twenty years and that he therefore had no *primâ facie* title whatever to the access

(1) (1883) 24 Ch. D., 1.

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of light to that building." As regards the case in *Jeffries* v. *Williams*(1), as far as I could understand it, it was decided on the highly technical ground that the defendant's plea of "not guilty" did not properly raise the question of the plaintiff's title to lateral support from the adjacent sub-soil to his buildings and hence the defendant's plea must fail on that question. Anyhow I should be prepared, on principle, if necessary to differ from the dicta in *Acchanna* v. *Venkamma*(2), *Kondapa Rajam Naidu* v. *Devarukonda Suryanarayana*(3), to the effect that incorporeal *rights* in process of acquisition can be the subject of such legal possession as should be protected against the acts of another trespasser.

Assuming, however, that incorporeal rights in process of acquisition can be the subject of legal possession, what is the nature of the incorporeal right capable of such possession even while in process of acquisition? I am clear that the incorporeal right should be a right which, by its very nature, is presumably one enjoyed to the exclusion of others, or there must be clear evidence that one who is acquiring the incorporeal right by the enjoyment of it has been in enjoyment with the distinct animus or intention of excluding other persons from like enjoyment with himself. In *Acchanna* v. *Venkamma*(2) the plaintiff was enjoying access to light across a poramboke land to his windows. The right he was so enjoying was clearly enjoyed exclusively and the defendant, a trespasser, was interfering with plaintiff's said exclusive enjoyment by building a wall upon that poramboke land. In *Kondapa Rajam Naidu* v. *Devarakonda Suryanarayana* (3) also, I found on a perusal of the records that the plaintiff in that case had collected Government water flowing from certain hills into a channel and had been taking *the whole* of that water through that channel which was under his control for about eighteen years *into a tank belonging to him*. The defendant in that case put up a dam *in that channel which had been so under the plaintiff's exclusive control* and diverted the water through a new channel which the defendant dug branching from the channel under the plaintiff's control. The circumstances of that case, therefore, clearly indicated that the plaintiff had a clear intention to exclude

(1) (1850) 5 Ex. R., 792. (2) (1895) 5 M.L.J., 21.
(3) (1911) I.L.R., 34 Mad., 173.

others from using the water flowing through the channel which supplied the plaintiff's tank. In the present case, the facts proved do not establish any such intention on the plaintiff's part. He had nothing to do with the collection of the water which fell into the Government pond, and the mere fact that the Government Revenue officers have not prevented the plaintiff from drawing the water (naturally stored in that pond) to irrigate the plaintiff's lands for a few years before suit cannot raise any presumption that the plaintiff intended to exclude every other ryot from taking the water to their lands like the plaintiff or even that the plaintiff when drawing the water began an enjoyment which he intended after sixty years (see article 149 of the Limitation Act) to mature into a right against the Government to take such water against the wishes of the Government.

As I said above, even if a person could be said to be in legal possession of an incorporeal right *which he is merely in process of acquiring*, and even if it be held in consequence that he could sue others for infringement of that so-called possession, such a possession must at least be "exclusive" in the sense in which it is used by Lightwood in his book on Possession. He says at page 14 "Not only must the alleged possessor exercise the acts of ownership over the land, but other persons must be excluded. In English Law, however, the rule only requires that there should be no other person exercising acts of ownership or claiming possession adversely to the possessor. Two persons may jointly exercise acts of ownership, and they may thus gain a possession which vests in them an estate as joint tenants (*Ward* v. *Ward* (1); *cf.* Litt., S. 311) but in such a case there is really one possession, and the possessors enjoy together the rights which flow from it. It is different where there are two persons on land, each claiming possession independently of the other, and then neither can acquire actual possession without excluding the other" (*cf.* Holmes' Common Law, 285, referring to *McGabey* v. *Moore; Barnstable* v. *Thacker;* Bigelow's Leading Cases on Torts, 353).

"The question whether foreign interference is to be deemed to be in fact excluded is somewhat more difficult in the case of

(1) (1871) L.R., 6 Ch., 789.

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land than of goods. In the case of goods, as a rule, both the original act of appropriation and the existing custody are such as obviously to exclude others, but with land it is different. The possessor may be absent from the land, and other persons may be upon it. The practical rule appears to be that the area of the alleged possession must be marked out, and that there must be an habitual observance of its limits by the world at large (*cf.* Pollock and Wright on Possession, 13). Ordinarily, as just stated, the area of possession is marked out by means of fences or other actual barriers which are themselves likely to keep away intruders. Inclosure is the strongest possible evidence of adverse possession [*Seddon* v. *Smith*(1)]. "If," said BRAMWELL, L.J., in *Coverdale* v. *Charlton*(2), "there were an inclosed field, and a man had turned his cattle into it, and had locked the gate, he might well claim to have a *de facto* possession of the whole field; but if there were an uninclosed common of a mile in length, and he turned one horse on one end of the common he could not be said to have a *de facto* possession of the whole length of the common." If, as regards possession of a land itself, the difficulty of establishing exclusive possession is a serious one in many cases, the difficulty is much greater in the case of several incorporeal rights (like the right to irrigate the plaintiff's land from the water of a tank belonging to another) and the difficulty is still further increased in the case of an incorporeal right which is still in process of acquisition.

In the present case, the plaintiff having taken for some years water stored in a Government pond cannot be held to constitute exclusive possession in the plaintiff of right to take such water or a possession even intended to exclude others from doing a similar act, no more than the fact of a ryot having watered his cattle in the water of a Government pond for some years would, by itself, show a right or intention to exclude another ryot from watering his cattle also, when the latter subsequently finds it convenient to do so, though he had not done so before. In the result I would dismiss the second appeal with costs.

(1) (1877) 36 L.J., 168. (2) (1878) 4 Q.B.D. 104 at p. 118.

APPELLATE CIVIL.

Before Mr. Justice Sankaran Nair and Mr. Justice Tyabji.

MUTHIAH CHETTI AND THREE OTHERS (PLAINTIFFS), APPELLANTS, 1913. April 10.

v.

SUPPAN SERVAI (DEFENDANT), RESPONDENT.*

Limitation—Registration Act (XVI of 1908), sec. 77—Thirty days after passing of decree, under—Computation of, for the purpose of that section—Civil Procedure Code (Act V of 1908), O. 20, r. 7

For the purposes of section 77 of the Registration Act (XVI of 1908) the period of thirty days, within which a document has to be presented for registration after the passing of a decree of Court directing its registration, is to be reckoned not from the date the decree bears but from the time it was actually drawn up and signed by the Judge

Per curiam—It is desirable that in decrees of this nature the Judge should put the date on which they are signed by him under Order 20, rule 7, Civil Procedure Code (Act V of 1908)

SECOND APPEAL against the decree of J. G. BURN, the Acting District Judge of Madura, in Appeal No. 317 of 1911, preferred against the decree of K. V. DESIKACHARIYAR, the Principal District Munsif of Madura, in Original Suit No. 471 of 1910.

The following facts are taken from the District Judge's judgment :—

"In Original Suit No. 608 of 1909 the present defendant sued the plaintiff to have a sale-deed executed in his favour by the latter registered (section 77 of Act XVI of 1908). Judgment was delivered in the defendant's favour on 3rd February 1910. He did not, however, present the instrument for registration until 15th April, 1910, when it was accepted and registered." The present suit was for a declaration that the registration was invalid, for setting aside the sale-deed and for possession of the lands referred to in the plaint. "The contention in that present suit is that this registration was illegal, the presentation having been made more than thirty days from the date of decree. Application for a copy of decree was made on 8th February 1910. The decree was, however, not actually drawn up and signed until the 17th March 1910, although it had to bear date the 3rd

* Second Appeal No. 811 of 1912.

MUTHIAH CHETTI v. SUPPAN SERVAI.

February, 1910. Thus the thirty days' period had expired before the decree was ready. It is urged on behalf of the appellant that the decree must operate from the date it bears." The District Judge agreeing with the District Munsif held that the registration was valid though the document was presented after thirty days after the decree was passed and dismissed the suit on the ground that the thirty days must be counted from the date the decree was prepared and signed by the Judge.

The plaintiff whose suit was dismissed preferred this Second Appeal.

C. V. Anantakrishna Ayyar for the appellants.

R. Kuppuswami Ayyar for the respondent.

TYABJI, J.

TYABJI, J.—The only question that has been argued before us in this appeal is whether the registration of the document referred to in the plaint is invalid, because of its not having been duly presented for registration " within thirty days after the passing " of such a decree as is mentioned in section 77 of the Registration Act. If that provision means that the document must be presented within thirty days of the judgment being pronounced, then the presentation of the document is invalid and, on the authority of *Raya Raghoba Kamat* v. *Annapurana Bai*(1), the alleged registration is also invalid and of no effect. But the lower courts hold that in this connection the words " passing a decree " must be taken to mean something different from pronouncing judgment. The learned District Munsif refers in his judgment to the Civil Procedure Code, Order XX, rule 7, which provides that the decree shall bear the date on which the judgment is pronounced, but on a consideration of section 33 of the Code together with the fact that the decree could be prepared only after the time fixed by the Rules of Practice for filing the memorandum of costs expired, and with the fact that section 77 of the Registration Act refers to the passing of the decree and not to the date that the decree bears nor to the date when the judgment is pronounced, he came to the conclusion that passing the decree is something different from pronouncing judgment and something that must of necessity follow the judgment in point of time. He also referred to the Limitation Act, article 182, under which time runs from the date of the decree, and not from the passing

(1) (1873) 10 B.H.C.R., 98.

of the decree. He therefore held that the registration was valid, and dismissed the plaintiff's suit, which was for a declaration that the registration was invalid, for setting aside the sale-deed and for possession of the lands referred to in the plaint.

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TYABJI, J.

The learned District Judge was of the same opinion, and added as a further reason that "until the decree has taken form so as to be capable of communication to the official of the Registration Department who is to give effect to it, time could not be held to run against the decree-holder, provided he himself has not been guilty of want of diligence." *In connection with this* argument we were referred to *Abdul Ali* v. *Mirga Khan*(1), where it is stated that an order does not become an order unless and until steps are taken by the officer passing it to bring it to the consciousness and knowledge of the party against whom it is passed. Without *implying that the ruling in that case governs the facts now* before us, it may be said that in circumstances such as those with which we are dealing, in one sense the party against whom the order is passed, is the Registrar.

As against the train of reasoning above referred to, it was argued before us that the decree bears its date under Order XX, rule 7, and it being a matter of record, it is not permissible to the Court to disregard the terms of the decree, and to say that it was passed on some date other than that which it bears.

We are of opinion that there is much force in the answer to this argument that the Legislature could not be assumed to have intended that the decree should be conclusive as to the fact being different from what it actually is; for the section and the rule, to which reference has been made above, show that the decree must, as a matter of necessity, come into being at a time subsequent to the pronouncement of the judgment; and it seems difficult to assume that the intention of the Legislature is that the decree should be understood to have been drawn up at the very moment when the judgment was pronounced. The decree is made to bear the date of the judgment primarily in order to show that its effect dates back to the time when the judgment is pronounced. Hence *if for any purpose, it becomes* necessary to determine the date, not on which the judgment was pronounced, but on which its effect was expressed in formal

(1) (1904) I.L.R., 28 Bom., 8.

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TYABJI, J.

terms, for that purpose, it seems to us permissible to look for its date beyond the terms of the decree: and we cannot say that the District Judge was wrong in his view that for the purposes of section 77 of the Registration Act the period of thirty days has to be reckoned not from the time when the judgment is pronounced but from the time when the pronouncement so made is expressed in a form which can be brought to the cognizance of the Registrar; and that consequently the decree must for the purposes of section 77 be taken to be passed at the time when *it* has been *actually* drawn up and *signed by the Judge.*

It was further argued on behalf of the appellants that, unless the decision of the Lower Courts are reversed, we should be throwing upon the Registrar the burden of deciding when a particular decree has been drawn up and signed by the Judge in order that he may be able to determine whether the document directed by such decree to be presented within thirty days after the decree has been passed, is presented for registration within time; and that we ought not to throw any such burden on the Registrar: but that we should proceed on the basis that the Legislature must have intended that the Registrar should merely follow the date which the decree bears. We do not accede to this argument, as we do not think that there would be any difficulty in the way of the Judge putting after his signature the date when he signs the decree under Order XX, rule 7. It is desirable that in decrees of this nature he should so put the date on which his signature is made. However that be, we are not prepared to hold that the inconvenience or difficulty arising from the necessity for the Registrar to be satisfied as to the date when the Judge signs the decree is greater than the anomaly that would follow, if parties were required to present the document for registration without having any means of satisfying the Registrar that the decree had been passed directing its registration.

We are therefore of opinion that no grounds have been shown to us for disturbing the decisions at which both the Lower Courts arrived in their carefully considered judgments. We are not unaffected by the nature of the claim set up by the plaintiffs, by the fact that the interests of no innocent third party are involved; and by the fact that we think it is possible that in future such a practice may be observed in similar cases as to preclude the

difficulty with which we are now dealing from arising. As there has been a certain amount of doubt on the question, we think that this matter might be provided for by the rules of the Court. MUTHIAH CHETTI v. SUPPAN SERVAI.

With reference to the costs, we note that the judgment ordering registration of the document was pronounced on the 3rd of February 1910. No copy was applied for till the 8th. The decree was prepared and signed on the 17th of March 1910 (for some reason the respondent does not seem to have obtained a copy of it till the 23rd March), and yet he did not present it for registration till the 15th of April, i.e., not until after the lapse of 29 days after a copy of the decree had been prepared for him. We think that this is a circumstance which we should bear in mind in making our order as to costs, and though we do not disturb the orders as to costs made by the Lower Courts, we think that the present appeal should be dismissed without costs. TYABJI, J.

SANKARAN NAIR, J.—I agree. SANKARAN NAIR, J.

APPELLATE CIVIL—FULL BENCH.

Before Sir Charles Arnold White, Kt., the Chief Justice, Mr. Justice Miller and Mr. Justice Sankaran Nair.

THE RECEIVER OF THE NIDADAVOLE AND MEDUR ESTATES (PLAINTIFF), APPELLANT, 1913. April 15.

v.

K. SURAPARAZU AND THREE OTHERS (DEFENDANTS), RESPONDENTS.*

Madras Estates Land Act (I of 1908), sec 192—Presentation of plaint to Head Clerk not authorised to receive—Limitation Act (IX of 1908), sec 4—Court not closed, if the officer on tour only, and not on leave—Rule 14 of Civil Rules of Practice.

Plaints under the Madras Estates Land Act (I of 1908) cannot be said to be validly presented if presented to the Head Clerk of the Collector, unless the Collector has appointed him to receive them

A Court cannot be said to be closed within the meaning of section 4 of the Limitation Act (IX of 1908) merely because the presiding officer is not in headquarters but is in camp on tour.

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* Second Appeal No. 1538 of 1911.

THE RECEIVER OF THE NIDADAVOLE AND MEDUR ESTATES v. SURAPARAZU.

Rule 14 of the Civil Rules of Practice does not apply to proceedings before a Revenue Court.

Appeal against the decree of F. A. COLERIDGE, the Acting District Judge of Kistna, in Appeal No. 457 of 1910 preferred against the decree of R. F. B. L. GUPPY, the Acting Head Assistant Collector of Narasapur in Summary Suit No. 4 of 1909.

The facts of the case are stated in the Order of Reference.

P. Nagabhushanam for the appellant.

V. Ramadoss for the respondent.

The following ORDER OF REFERENCE TO A FULL BENCH WAS made by SANKARAN NAIR and TYABJI, JJ. :—

SANKARAN NAIR AND TYABJI, JJ.

Under section 192 of the Estates Land Act, the provisions of the Civil Procedure Code are made applicable to suits and appeals filed under the Act. Section 26, Civil Procedure Code, enacts that all suits shall be instituted by the presentation of a plaint, and under Order 4, rule 1, the plaint is to be presented to the Court or such officer as it appoints in this behalf. In the case before us, the plaintiff took his plaint to the office of the Head Assistant Collector to whom it had to be presented. That officer was absent from head-quarters and in camp, and the plaintiff accordingly requested the chief ministerial officer of the Court to receive his plaint, but that officer refused to do so, as he was not authorized to receive such plaints; it was presented to the Head Assistant Collector on his return from camp. The suit is barred, if it is held to have been presented only after the return of the Head Assistant Collector. It is not barred, if presentation to the Head Clerk was a valid presentation of the plaint according to law. The question is one of general importance, and we think it desirable that there should be a final decision. We accordingly refer to the Full Bench the question whether, on the facts stated above, the plaintiff's suit is barred by limitation.

P. Nagabhushanam for the appellant.

V. Ramadoss for the respondent.

This case coming on for hearing, the Court expressed the following

WHITE, C.J., AND MILLER AND SANKARAN NAIR, JJ.

OPINION.—We think the words "all suits, appeals and other proceedings under this Act," in section 192 of the Madras Estates Land Act, 1908, may be construed as including the institution of a suit by the presentation of a plaint. The result is that the

provisions of the Code of Civil Procedure apply to the presentation of a plaint in a suit under the Estates Land Act Under section 121 of the Code of Civil Procedure, the rules in the first schedule have effect as if enacted in the body of the Act. Order IV, rule 1, provides that every suit shall be instituted by presenting a plaint to the Court or such officer as it appoints in this behalf. It is therefore open to the Collector to appoint an officer to whom plaints may be presented, but this, we understand, has not been done.

It is clear that rule 14 of the Civil Rules of Practice does not apply to proceedings before a Revenue Court, and we cannot accept the contention that, when the plaintiff sought to present his plaint in this case, the Court was closed with the meaning of section 4 of the Limitation Act.

We must accordingly answer the question in the affirmative.

APPELLATE CIVIL.

Before Sir Charles Arnold White, Kt., Chief Justice, Mr. Justice Miller and Mr. Justice Oldfield.

MUTHUKRISHNIER AND THREE OTHERS (PLAINTIFFS), APPELLANTS,

v.

VEERARAGHAVA IYER AND ANOTHER (DEFENDANTS), RESPONDENTS.*

1912. August 6 and 30 and 1913 April 18 and 22.

Transfer of Property Act (IV of 1882), ss. 130 and 134—Mortgage in writing of a promissory note—Assignees' right and liability to sue on the promissory note.

By virtue of sections 130 and 134 of the Transfer of Property Act (IV of 1882), a mortgage in writing of a promissory note, executed in favour of the mortgagor by a third party for a debt, creates an assignment of the promissory note in favour of the mortgagee even without an endorsement, and as the right of the promisee to sue on the note becomes vested in the mortgagee, the mortgagee alone is entitled to sue on the note and in taking accounts of the mortgage, the mortgagee is liable to be debited with the amount of the note if he without any justification allows the recovery of the debt barred by limitation.

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* Letters Patent Appeal No 147 of 1912.

MUTHU-KRISHNIER v. VEERA-RAGHAVA IYER.

Mulraj Khataw v. *Viswanath Prabhuram* (1913), I.L R., 37 Bom., 198 (P C.) followed.

Shyam Kumari v. *Rameswar Singh* (1905) I.L.R., 32 Calc, 27 P.C, followed.

APPEAL under article 15 of the Letters Patent Act against the decision of SUNDARA AYYAR and SADASIVA AYYAR, JJ., in *Muthukrishnien* v. *Veeraraghava Iyer*(1) preferre dagainst the decree of the District Judge of Madura in Appeals Nos. 409 and 391 of 1910 presented against the decree of the Principal District Munsif of Madura in Original Suit No. 715 of 1909.

The plaintiffs in this case sued to recover the amount due to them on a mortgage bond (Exhibit A) executed in favour of their father by the first defendant by which a house, a promissory note and two simple mortgage bonds executed in favour of the first defendant by the third parties were hypothecated. There was no assignment of the promissory note by way of endorsement. The portions of the defence material for the purpose of this report were that the plaintiff being the assignee of the promissory note by virtue of the mortgage was not only entitled, but was also bound to sue on the note before it became time-barred and that he not having sued the third party before the promissory note became time-barred was liable to be debited while taking accounts, with the amount of the promissory note.

The Lower Courts upheld the pleas of the defendant and debited the plaintiff with the amount of the promissory note. In *Muthukrishnien* v. *Veeraraghava Iyer*(1) filed by the plaintiff SUNDARA AYYAR, J., *held*, (*a*) that this mortgage did not create any assignment of the mortgage in favour of the mortgagee, (*b*) that even if it created any assignment he was not bound to sue on the note and that he, the plaintiff, ought not to be debited with the amount of the promissory note.

SADASIVA AYYAR, J., differing from SUNDARA AYYAR, J.,on all these points, confirmed the decree of the Lower Court. Thereupon the above Letters Patent Appeal was filed by the plaintiffs.

[The judgments of SUNDARA AYYAR and SADASIVA AYYAR, JJ., are reported in *Muthukrishnien* v. *Veeraraghava Iyer*(1) and are not herein reported in view of the later decision of the Privy Council in *Mulraj Khataw* v. *Viswanath Prabhuram*(2) and in

(1) (1913) 23 M.L.J., 430. (2) (1913) I.L.R., 37 Bom., 198 (P.C.).

view of the concurrent opinion of the three Judges in this Letters Patent appeal based on the above Privy Council decision and the Privy Council decision *Shyam Kumari* v. *Rameswar Singh*(1).

MUTHU-KRISHNIER v. VEERA-RAGHAVA IYER.

C. V. Ananthakrishna Ayyar for the appellants.

K. N. Aiya for the first respondent.

WHITE, C.J.

WHITE, C.J.—Under Exhibit A the defendants mortgaged to the plaintiffs a house and a promissory note which had been executed to the defendants, by a third party as security for money owing by the defendants to the plaintiffs. The promissory note was not endorsed to the plaintiffs. It became time-barred, and the question is whether on the taking of accounts the plaintiffs should be debited with the amount due on the note. It was not suggested that the plaintiff could sue on the note. It was contended that the note was evidence of a pre-existing debt due by the third party to the defendants, that that debt was by the mortgage assigned to the plaintiffs, and that the plaintiffs being the parties who were entitled to sue for the assigned debt were under an obligation to the defendants, to do so before the right to recover the debt became barred by limitation. The promissory note refers to a pre-existing debt due by the third party to the defendants, but I have had some doubt whether on the documents alone, coupled with the fact that the maker of the note attested the mortgage to the plaintiffs and that is all we have to go on—there is evidence of a pre-existing debt. No attempt appears to have been made to show that there was no debt (in the Court of First Instance the defendants sought to show that the amount due on the note had been paid) and I think we are warranted in holding that there was a debt. The mortgage thereof was, in my opinion, a *transfer of an actionable claim* within the meaning of section 130 of the Transfer of Property Act, which vested in the transferee the rights and remedies of the transferor, subject to the equities which remained in the transferor by reason of the fact that the transfer was by way of security. This is in accordance with the decision of the Privy Council, in the recent case of *Mulraj Khataw* v. *Viswanath Prabhuram*(2), which does not appear to have been reported when this appeal was argued before SUNDARA AYYAR, J., and SADASIVA AYYAR, J. In

(1) (1905) I.L.R., 32 Calc., 27 (P.C.). (2) (1913) I.L.R., 37 Bom., 198 (P.C.).

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WHITE, C.J.

the Privy Council case the contest was between a party who held an assignment in writing of a policy and parties holding a deposit of the policy by way of security which was earlier in date than the assignment in writing. Their Lordships held in favour of the parties holding the written instrument. In the judgment they observe with reference to the assignment in writing "It may well be that although absolute in form it was intended to be only by way of security so as to be subject to a right of redemption, but this does not affect the rights of the parties under the circumstances of the present case." And again "He (the party claiming under the instrument) has an absolute right to the proceeds of the policy."

The rights of the transferor being vested in the transferee by the express words of the section, the transferee is the only party entitled to sue, and this being so, he is, I think, accountable to the transferor for having allowed the remedy to become time-barred.

I do not think any useful purpose would be served by a discussion of the English authorities. The cases turn on the language of section 25 (6) of the English Judicature Act, 1873. In the Privy Council decision to which I have referred, their Lordships observe "The error (of the Court in India) arose from the learned Judges not having appreciated that the positive language of the section precluded the application in India of the principles of English law on which they based their decision."

I only propose to refer to one authority, the decision of the Privy Council in *Shyam Kumari v. Rameswar Singh*(1). There, the mortgagors assigned to their mortgagee a debt due to them from a third person, and in taking the account of what was due to the mortgagee, the Courts in India debited him with the amount of the debt, though he had not received it. It was held, that it lay upon the mortgagee to use reasonable diligence to recover it from the debtor, and it appearing that no serious attempt had been made to do so it was held that it had been rightly debited in the account.

I think this appeal fails and should be dismissed with costs.

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(1) (1905) I.L.R., 32 Calc., 27 (P.C.).

MILLER, J.—I am of the same opinion. After the recent decision of the Privy Council in *Mulraj Khataw* v. *Viswanath Prabhuram*(1), it seems impossible to contend that a hypothecation of a debt is not a transfer of an actionable claim within the meaning of section 130 of the Transfer of Property Act. Their Lordships held that by that section a writing is required to effect a charge on an actionable claim. It follows that the remedies of the mortgagor are transferred to the mortgagee of the debt and he is entitled to recover the sum due from the debtor and if so entitled then he is rightly made liable if he without justification allows the debt to become irrecoverable *Shyam Kumari* v. *Rameswar Singh*(2).

In the present case an attempt was made in the Court of First Instance to show that by agreement the first defendant was to recover the amount of the debt, but the District Munsif held that the provisions of Exhibit A were clear, and there was no need to consider the oral evidence : and it seems that point was not pressed either in the District Court or here at the hearing of the Second Appeal, and we were not asked by the appellant to re-open the question on the evidence and must therefore proceed on the footing that there was no contract altering the position of the parties We must deal with the case on the provisions of section 130 apart from any contract. The plaintiffs endeavoured, but failed, to prove that the debt mortgaged had been paid to the first defendant and did not, so far as I can see, ever allege that the promissory note which was handed over to the plaintiffs did not represent a debt which could be assigned. I find no difficulty therefore in accepting the view taken by all the Courts which have dealt with the matter so far, that what was mortgaged was a debt evidenced by a promissory note.

That being so, it lay upon the plaintiffs to show that they were not in fault in allowing the recovery of the debt to be barred by limitation, and they made no attempt to show that. Then it was contended that the first defendant was equally entitled to recover the debt and therefore the plaintiffs cannot be made liable: the default was as much that of the one as of the other.

But the remedy open to the first defendant as creditor had passed by the section 130 of the Transfer of Property Act to the

(1) (1913) I.L.R., 37 Bom., 198 (P.C.) (2) (1905) I.L.R., 32 Calc., 27 at p. 35.

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plaintiffs: what was retained by the first defendant was his right to redeem the mortgage. This contention is therefore of no avail, and moreover was not, so far as I can see, raised at any previous stage of the case.

MILLER, J.

I concur in dismissing the appeal with costs.

OLDFIELD, J.

OLDFIELD, J.—I concur in the decisions of my learned colleagues for the reasons given by them and have nothing to add.

APPELLATE CRIMINAL.

Before Mr. Justice Ayling.

1913. July 15.

Re V. BATI REDDI AND FIFTEEN OTHERS (ACCUSED), PETITIONERS.*

Criminal Procedure Code (Act V of 1898), *ss.* 255 *and* 342—*Indian Evidence Act (I of* 1872), *sec.* 30—*Confession of co-accused, admissible under—Separate trials not necessary where confession made during trial.*

When before a magistrate in a statement under section 347, Criminal Procedure Code, certain accused confessed the crime and implicated their co-accused and further under section 255 (1), pleaded guilty to the charges:

Held, that it was not necessary to try the co-accused separately to enable the confessions to be used against them under section 30, Indian Evidence Act.

Queen-Empress v *Lakshmayya Pandaram* (1899) I.L.R., 22 Mad., 491, dissented from.

Queen-Empress v. *Pirbhu* (1895) I.L.R., 17 All, 524 and *Queen-Empress* v. *Pahuji* (1895) I.L.R, 19 Bom., 195, distinguished.

PETITION under sections 435 and 439 of the Code of Criminal Procedure (Act V of 1898), praying the High Court to revise the judgment of A. DURAISWAMI AYYAR, the Deputy Magistrate of Jammalamadugu, in Criminal Appeal No. 1 of 1913, presented against the conviction and sentence of S. SUBRAHMANYA AYYAR, the Stationary Sub-Magistrate of Jammalamadugu, in Calendar Case No. 182 of 1912.

In this case the accused, 17 in number, were charged with offences under sections 147 and 312, Indian Penal Code, and section 22 of the Cattle Trespass Act (I of 1871) by the Stationary Second-class Magistrate of Jammalamadugu. The fourteenth and the seventeenth accused in a statement made

* Criminal Revision Case No. 297 of 1913 (Criminal Revision Petition No 642 of 1913).

under section 342, Criminal Procedure Code, implicated the remaining accused and on the pleas of the accused being taken under section 255, Criminal Procedure Code, these accused (Nos. 14 and 17) pleaded guilty to the charge whereas the remaining accused pleaded not guilty, and examined defence witnesses. The Magistrate convicted all the accused in one judgment in which he stated that the confessions of the fourteenth and the seventeenth accused showed that all the accused took part in the commission of the crime and were corroborated by the prosecution evidence.

In appeal it was argued that as the confessions of the accused Nos. 14 and 17 were made during the trial a separate trial should have been held of the remaining accused and that the confessions were therefore not relevant under section 30, Indian Evidence Act

The appellate Magistrate held that the confessions of the fourteenth and the seventeenth accused could not have influenced the trial Magistrate; but gave no other finding on the point of law raised. He confirmed the convictions of the accused.

The accused petitioned to the High Court.

P. Venkataramana Rao for the petitioner.

ATLING, J.

ORDER.—The chief point taken by the petitioners' vakil is the fact that the Magistrate has taken into consideration against the remaining accused, under section 30, Indian Evidence Act, the confessional statements of accused Nos. 14 and 17, who, when questioned under section 342, Criminal Procedure Code, at the close of the prosecution case, made statements implicating themselves and their co-accused, and pleaded guilty on a charge being framed under section 255. The vakil contends relying on the dictum of BODDAM, J., in *Queen-Empress* v. *Lakshmayya Pandaram*(1) that these were not the statements of persons "jointly tried" with the petitioners, and hence were inadmissible under section 30, Indian Evidence Act.

The learned Judge has based his conclusion on two other cases *Queen-Empress* v. *Pirbhu*(2) and *Queen-Empress* v. *Pahuji*(3). With all respect, I do not consider that these decisions have any application to a case tried before a Magistrate under chapter XXI of the Criminal Procedure Code. Both

(1) (1899) I.L.R., 22 Mad., 491. (2) (1895) I.L.R., 17 All., 524.
(3) (1895) I.L.R., 19 Bom., 195.

Re BATI REDDI.

AYLING, J.

relate to trials before a Sessions Court, where the accused's plea of guilty is recorded under section 271 at the outset of the trial. No doubt a prisoner who then pleads guilty and is convicted on his plea cannot be held to be tried jointly with others (co-accused) against whom the case proceeds under section 272. But the present case is quite different. All the accused were jointly tried before the Magistrate, and their pleas were not recorded until after the close of the prosecution evidence, and after the recording of their statements now in question, I can see no reason why statements made under these circumstances should not be taken into consideration under section 30, Indian Evidence Act.

No other ground is shown for interference and the petition is dismissed.

APPELLATE CRIMINAL.

Before Mr. Justice Ayling.

1913. August 1.

Re SUBRAMANIA AYYAR (ACCUSED), PETITIONER.*

Magistrates, bench of—Magistrate, convicting who has not heard all the evidence—Criminal Procedure Code (Act V of 1898), sec. 530.

Where the trial of the accused was commenced before a Bench of four Magistrates who heard part of the evidence and continued before the same four Magistrates and another who had joined as the fifth, and all the five Magistrates deliver judgment convicting the accused

Held, that the conviction was vitiated and that there must be a re-trial.

PETITION under sections 435 and 439 of the Code of Criminal Procedure (Act V of 1898), praying the High Court to revise the judgment of A. PUSHPANATHA PILLAI, the First-class Sub-Divisional Magistrate of Mayavaram, in Criminal Appeal No. 3 of 1913 (Special Tribunal No. 620 of 1912 on the file of V. GOVINDASWAMI, the Stationary Second-class Magistrate of Mayavaram).

The facts of this case are stated in the following order:—

T. S. Rajagopala Ayyar for the petitioner.

J. O. Adam for the Public Prosecutor on behalf of the Government.

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* Criminal Revision Case No. 155 of 1913 (Criminal Revision Petition No. 123 of 1913).

ORDER.—In this case the petitioner was convicted by a Bench of five Magistrates, one of whom had not heard all the evidence. This vitiates the conviction—*vide* section 530 of the Criminal Procedure Code, and *Hardwar Sing* or *Lall* v. *Khega Ojha*(1) [followed in *Queen-Empress* v. *Basappa*(2)] and *Damri Thakur* v. *Bhowani Sahoo*(3). The conviction and sentence are set aside, and a retrial is ordered.

APPELLATE CRIMINAL.

Before Mr. Justice Ayling.

Re K. VENKAPPA AND FOUR OTHERS (ACCUSED), PETITIONERS *

1913. August 15 and 18.

Indian Penal Code (Act XLV of 1860), sec. 283—Obstruction, causing of—Whether necessary to prove any particular individual obstructed.

Where the evidence showed that an obstruction placed on a road must necessarily prevent vehicles from passing at all and foot-passengers from passing without inconvenience,

Held, that it is a necessary inference that persons were obstructed and that it is not necessary to expressly prove that any specific individual was actually obstructed

The Queen v. *Khader Moidin* (1882) I L R, 4 Mad., 235, not followed.

Queen-Empress v. *Virappa Chetti* (1897) I L R, 20 Mad, 433, commented on.

PETITION under sections 435 and 439 of the Code of Criminal Procedure (Act V of 1898), praying the High Court to revise the judgment of V. PARABRAHMA SASTRI, the Head-quarters Deputy Magistrate, Kurnool Division, in Calendar Case No. 1 of 1913.

In this case, the accused were convicted of having caused obstruction to the public road by leaving a " prabha " on the road and thus of having committed an offence under section 283, Indian Penal Code.

The evidence as to the "prabha" being an obstruction was that of the Sub-Inspector of Police who stated, " the accused leaving

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(1) (1893) I.L.R., 20 Calc, 870. (2) (1895) I.L.R, 18 Mad., 394. (3) (1896) I.L.R, 23 Calc., 195.

* Criminal Revision Case No 149 of 1913 (Criminal Revision Petition No. 129 of 1913).

Re VENKAPPA.

the "prabah" to itself on the road causes obstruction to the public. . . . The width of that road is about three yards and that of the 'prabah' about two yards . . . The "prabha" has been on the road from 5 P.M. yesterday up to now today (7 P.M.). Nobody can now pass on that road. . . . I apprehend danger in the dark nights. I cannot pass over that road now without inconveniencing myself.

K. B. Ranganadha Ayyar for the petitioners having argued on the facts, maintained that there was no proof that any specific person has actually been obstructed and that on the authority of *The Queen* v. *Khader Moidin*(1), no conviction could be had. He also quoted *Queen-Empress* v. *Virappa Chetti*(2).

J. C. Adam for the Public Prosecutor having replied on the facts contended that *The Queen* v. *Khader Moidin*(1), should not be applied in this case as it was proved that a foot passenger could not pass without inconvenience and the obstruction was placed in the principal street of the village and opposite the Chavadi. In *The Queen* v. *Khader Moidin*(1), it was not definitely proved that the fishing nets in question were an obstruction at all. *Queen-Empress* v. *Virappa Chetti*(2), did not definitely lay down that proof of obstruction to a particular individual was necessary. In the present case also, the Court, if it had any doubt might apply section 290, Indian Penal Code as was done in that case.

AYLING, J.

ORDER.—The petitioners have been convicted of an offence under section 283, Indian Penal Code, by leaving a "prabha" lying in a public road for 24 hours so as to cause obstruction.

The first point argued is that the abandonment of the "prabha" was due to the action of the Sub-Magistrate (prosecution witness No. 2), who stopped the procession of the accused and others accompanying it: and that therefore the accused committed no offence. It is certain that the Sub-Magistrate apprehending a breach of the peace stopped the progress of the procession. According to his own account (which there seems no reason to distrust) he simply told the accused to go and bring their elders. According to the defence version, he threatened to fire on the processionists if they persisted in going on. In neither case can it be said that the Magistrate's action justified

(1) (1882) I.L.R., 4 Mad., 235 (2) (1897) I.L.R., 20 Mad., 433.

or excused those carrying the "prabha" in leaving it in the middle of the street in such a way as to cause obstruction even for a short time, to say nothing of 24 hours. This plea cannot be accepted.

Re VENKAPPA.

AYLING, J.

It is next represented that the accused were prejudiced by the hurried nature of the trial. I find no ground for holding that this was the case.

Lastly it is argued on the authority of *The Queen* v. *Khader Moidin*(1), that in the absence of evidence of obstruction to any particular individual a conviction under section 283, Indian Penal Code, cannot stand. The evidence on record shows that the road at the place in question is three yards wide, while the "prabha" was two yards wide. Consequently as long as the "prabha" remained on the road no vehicle could pass, and even a foot passenger could not pass without inconvenience. This amounts to saying that the "prabha" could not fail to cause obstruction to any person who had occasion to pass along the road which is admittedly a public one: and though obstruction to any individual is not expressly proved, it is a matter of necessary inference. I very much doubt whether the ruling in the case above quoted was ever intended to apply to a case of this kind: and, if it were, with due deference to the learned Judges responsible for it, it seems to me to go too far (*cf.* Mayne's Criminal Law of India, 3rd Edition, paragraph 403). The only other Madras case quoted to me is *Queen-Empress* v. *Virappa Chetti*(2). That was an appeal against acquittal. The court, while expressing some doubt as to the applicability of section 283, Indian Penal Code, pointed out that the case undoubtedly fell under section 290, Indian Penal Code, and ordered a retrial.

In the present case also, there is clear evidence to support a conviction under section 290, Indian Penal Code, which renders the offender liable to exactly the same punishment as section 283.

Under these circumstances there seems to be no ground for interference, and the petition is dismissed.

(1) (1882) I.L.R., 4 Mad., 235. (2) (1897) I.L.R., 20 Mad., 433.

APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Sundara Ayyar.

1913. April 17.

K. SEETAMMA (FIRST DEFENDANT), APPELLANT,

v.

P. VENKATARAMANAYYA AND FIVE OTHERS (PLAINTIFFS), RESPONDENTS.*

Transfer of Property Act (IV of 1882), sec. 6, cl. (e)—Transfer of right to past mesne profits, illegality of.

A transfer of a claim for past mesne profits is invalid under clause (e) of section 6 of the Transfer of Property Act (IV of 1882).

Varahaswami v. *Ramachandra Raju* (1913) 24 M.L.J., 298, followed.

King v. *Victoria Insurance Company* (1896) A.C., 250, distinguished.

APPEAL against the decree of T. SADASIVA AYYAR, the District Judge of Ganjam at Berhampur, in Original Suit No. 1 of 1907.

The first defendant against whom and other defendants a decree for ejectments was given in favour of the plaintiffs preferred this appeal. The first plaintiff who in December 1906 bought the right of one of the heirs after the succession opened in 1896 brought this suit in 1907 for possession and mesne profits of the years 1904, 1905 and 1906 and as his claim for mesne profits before the date of his purchase was disallowed he filed the memorandum of objections.

H. Sitaramaswami for the appellant.

P. Narayanamurti for the respondents.

BENSON AND SUNDARA AYYAR, JJ.

JUDGMENT.—We entirely agree with the findings of the learned District Judge and the reasons he has given for them. The appellant's case as to the date of Ankamma's death is entirely unsupported by any credible evidence. We dismiss the appeal with costs.

The question argued in the memorandum of objections is whether a claim for past mesne profits could be validly transferred having regard to clause (e) of section 6 of the Transfer of Property Act. We are of opinion, that the Lower Court is

* Appeal No. 211 of 1911.

SEETAMMA v. VENKATA-RAMANAYYA. — BENSON AND SUNDARA AYYAR, JJ.

right in holding that it cannot be. *Shyam Chand Koondoo* v. *The Land Mortgage Bank of India*(1), and *Pragi Lal* v. *Fateh Chand*(2), support this view. The recent decision of this Court in *Varahaswami* v. *Ramachandra Raju*(3), after the amendment of clause (*e*) of section 6 of the Transfer of Property Act is to the same effect. See also *Abu Mahomed* v. *S. C. Chunder*(4). The respondents refer to *King* v. *Victoria Insurance Company*(5). But the case is not in point as the right of an insurer under a contract of insurance to be subrogated to the rights and remedies of the assured cannot be regarded as arising merely from the transfer of a right of action. We are not prepared to agree that the view laid down in Warren's "Choses in Action," page 161, that a right to recover damages for an assault is assignable correctly expresses the law applicable in this country assuming that it does the law applicable in England. The plaintiffs are entitled to interest on the profits of each year at 6 per cent. per annum. With this slight modification we dismiss the memorandum of objections with costs.

(1) (1883) I.L.R., 9 Calc., 695. (2) (1883) I.L.R., 5 All., 207.
(3) (1913) 24 M.L.J., 298. (4) (1909) I.L.R., 36 Calc., 345.
(5) (1896) A.C., 250.

APPELLATE CIVIL.

Before Mr. Justice Sundara Ayyar and Mr. Justice Sadasiva Ayyar.

1912. September 30 and October 11

RATHNA MUDALI (PLAINTIFF), APPELLANT,

v.

PERUMAL REDDY AND TWO OTHERS (DEFENDANTS Nos 2 TO 4), RESPONDENTS *

Transfer of Property Act (IV of 1882), ss. 60 and 91—Redemption, suit for, by the owner of a portion of the equity of redemption—Mortgagee in possession—Vendee from other co-owners of the equity of redemption—Payment by vendee of his share of mortgage-amount to the mortgagee—Possession, surrender of, by mortgagee to vendee of aliquot portion of lands—Objection by mortgagee and vendee to redemption of the whole mortgage and surrender of the whole mortgaged property—Redemption of plaintiff's share only on payment of his share of debt—Possession of lands, right to, by fair partition in a suit for redemption—Equities on partition—Transfer of Property Act (IV of 1882), sec. 91, construction of.

Where the plaintiff (an owner of a half-share in the equity of redemption) sued the mortgagee and the owner of the other half of the equity of redemption, who had redeemed one-half of the mortgage, for redemption of the whole mortgage and for the recovery of possession of the whole of the mortgaged property, the High Court on Second Appeal passed a decree for redemption of the plaintiff's half share on payment of half the mortgage-amount and for partition and delivery of possession of half the mortgaged lands in respect of such share.

The owner of a portion of the equity of redemption is not entitled as a matter of right to redeem the whole of the mortgage and recover possession of the whole of the mortgaged property, on payment of the whole of the mortgage-amount against the will of the mortgagee in possession and of the vendee of another portion of the equity of redemption who was put in possession of some of the lands by the mortgagee on payment of an aliquot portion of the mortgage-amount.

The question whether the Court will allow redemption of the whole of the mortgage at the instance of a person entitled to a part only of the equity of redemption must depend on the circumstances of each case and the rights acquired by the mortgagee or by third persons subsequent to the mortgage.

Kuray Mal v. Puran Mal (1879) I.L.R., 2 All., 565, *Munshi v. Daulat* (1907) I.L.R., 29 All., 262 and *Nawab Azimut Ali Khan v. Jowahir Singh* (1870) 13 M.I.A., 404, followed.

Huthasanan Nambudri v. Parameswaran Nambudri (1899) I.L.R., 23 Mad., 209, dissented from.

Section 91 of the Transfer of Property Act explained.

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* Second Appeal No. 1219 of 1911.

RATHNA MUDALI v. PERUMAL REDDY.

SECOND APPEAL against the decree of E. L. THORNTON, the District Judge of Chingleput, in Appeal No. 147 of 1910, presented against the decree of T. A. RAMAKRISHNA AYYAR, the District Munsif of Chingleput in Original Suit No. 513 of 1908.

The facts of this case appear from the judgment of SUNDARA AYYAR, J.

T. Venkatasubba Ayyar and *Narayana Sastriyar* for the appellant.

S. Srinivasa Ayyangar for respondents Nos. 1 and 2.

SUNDARA AYYAR, J.

SUNDARA AYYAR, J.—The facts of this case so far as they are necessary for the decision of this second appeal are briefly as follows. One Vedachala Mudali executed an usufructuary mortgage to one Thangavelu on the 7th April 1900, Exhibit II. This mortgage was subsequently transferred to the second and third defendants in the suit. The first defendant is the heir of Thangavelu. Vedachala had three sons. He and each of the sons was therefore entitled to a fourth (¼) share in the property. On the 2nd May 1900 two of the sons Singaravelu and Tiruvengada sold their half share of the property to the fourth defendant. The mortgagees, the second and third defendants, received half of their debt from the fourth defendant, and gave up possession of a portion of the properties to him. The plaintiff obtained a transfer of the equity of redemption from Vedachala and his remaining son, and he has instituted this suit for redemption of the mortgage. He claims to be entitled to be put in possession of the whole property mortgaged by Vedachala on payment of the whole amount and is not content with a decree for possession of half the property on payment of half the mortgage amount. The fourth defendant resists the plaintiff's attempt to recover the whole of the property and contends that as he had become the owner of half of the equity of redemption and the plaintiff is entitled only to the remaining half, he should not be allowed to recover possession of more than half of the properties and he claims to be entitled to retain possession of the property in his possession as representing the share of his transferors. The District Munsif gave the plaintiff a decree for the whole property. On appeal the District Judge modified the Munsif's decree holding that the plaintiff was not entitled to recover the whole of the property and held that on payment by the plaintiff of half the mortgage-

RATHNA MUDALI v. PERUMAL REDDY.

SUNDARA AYYAR, J.

amount, the plaintiff and fourth defendant should be held to be jointly entitled to the possession of the mortgaged lands. The second appeal to this Court is preferred by the plaintiff and he contends that he is, as a matter of right, entitled to recover the whole of the property mortgaged under Exhibit II. The question for decision is whether the plaintiff is entitled as a matter of right, to redeem the whole of the mortgage and to recover possession of the whole of the property in the circumstances of the case. It will be noticed that the mortgagees have split up the mortgage so far as they could by receiving a portion of the mortgage amount from the fourth defendant the assignee of half of the equity of redemption and the fourth defendant has now become the owner of a share both in the equity of redemption and the mortgage. Section 91 of the Transfer of Property Act lays down that any person having an interest in the right to redeem the property, may redeem or institute a suit for redemption of the mortgaged property, but I do not think that it lays down that a person who is entitled to a share only of the equity of redemption has, under all circumstances, the right to insist on redeeming the whole of the mortgage and recovering possession of the whole of the mortgaged property. Section 60 enacts that a person entitled to a share only of the mortgaged property is not entitled to redeem his share only on payment of a proportionate part of the amount remaining due on the mortgage, and lays down an exception where a mortgagee has acquired in whole or in part a share of the mortgagor. The mortgagee under this section has ordinarily a right to insist on treating the mortgage as indivisible and on the redemption of the whole mortgage. But he cannot do so where he has split up the equity of redemption by becoming the owner of a part of it himself. I do not think that there is any principle of justice which requires that a person who is entitled only to a part of the equity of redemption should necessarily be held to have a right to redeem the whole of the mortgage. If there are several persons in whom the equity of redemption is vested, there is no reason why one of them and the mortgagee acting together should not be held to be entitled to deal with his interest in the equity of redemption and the mortgagee's rights as against him provided the rights of the other owners in the equity of redemption are not thereby injuriously affected. Of course,

nothing done either by a mortgagor or a mortgagee behind the back of the other can affect the right of that other so as to injure him in any way. Where the mortgagee has dealt with one of those entitled to the equity of redemption, it has been held that a person entitled to the remainder may claim to redeem his share only of the equity of redemption. See *Marana Ammanna* v. *Pendyala Peru Botulu*(1) and *Subramanyan* v. *Mandayan*(2).

It has also been held that a mortgagee may claim to recover the share of the debt due from a person entitled to a portion of the equity of redemption when he has already entered into an arrangement with the owner of the remainder provided the right of the defendant is not prejudiced by the arrangement entered into between the mortgagee and the defendants' co-owners of the equity of redemption—see *Hari Kissen Bhagat* v. *Veliat Hossein*(3), *Mahadaji Hari Limaye* v. *Ganpatshet Dhondshet*(4), *Brij Kishore* v. *Madho Singh*(5) and *Venkatachella Chetty* v. *Srinivasa Varada Chariar*(6). In *Lakshuman Giriraya Naik* v. *Madhav Krishna Shenvi*(7), it was held that the mortgagee was entitled to have an account taken between him and the owner of a part of the equity of redemption where he had already settled his rights as against the owner of the remainder of the equity. The objection to a mortgagee splitting up a mortgage is entitled to weight only where the owner of a part of the equity of redemption is prejudicially affected by the splitting. In *Huthasanan Nambudri* v. *Parameswaran Nambudri*(8), it was no doubt held by this Court that a person entitled to a part only of the equity of redemption had a right to redeem the whole notwithstanding the mortgagee's objection that he should not be permitted to redeem more than his share of the equity. In that case the persons who were entitled to the remainder of the equity were parties to the suit and also seem to have resisted the plaintiff's attempt to redeem the whole. It does not appear whether they claimed to continue the mortgage in so far as their shares were concerned. The decision proceeded on the principle that a mortgage contract was

(1) (1881) I.L.R., 3 Mad., 230
(2) (1886) I.L.R., 9 Mad., 453
(3) (1903) I.L.R., 30 Calc., 755
(4) (1891) I.L.R., 15 Bom., 257.
(5) (1906) I.L.R., 28 All., 279.
(6) (1905) I.L.R., 28 Mad., 555.
(7) (1891) I.L.R., 15 Bom., 186.
(8) (1899) I.L.R., 22 Mad., 209.

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indivisible and that it was the right equally of the mortgagor and mortgagee to keep it indivisible. The judgment was based on some decisions of the English Courts *Pearce* v. *Morris*(1), and *Hall* v. *Heward*(2), but in those English cases the plaintiff's co-owners of the equity of redemption were not parties and it does not appear that they objected to the redemption of the whole of the mortgage by the plaintiff. I cannot see any principle on which it should be held that even if some of the co-owners of the equity of redemption should desire to continue the mortgage of their shares one of the co-owners should be held to be entitled to redeem the whole of the mortgage. I do not think that *Huthasanan Nambudri* v. *Parameswaran Nambudri*(3), intended to go the length of laying down such a general rule and certainly the English cases which were followed there did not propound any such rule. The question whether the Court will allow redemption of the whole of the mortgage at the instance of a person entitled to a part only of the equity of redemption must depend on the circumstances of each case, and the rights acquired by the mortgagee or by third persons subsequent to the mortgage. In this case there is no reason why the plaintiff should first be allowed to redeem the whole of the mortgage and the fourth defendant who has the rights both of a mortgagee and a mortgagor be left to bring a fresh suit for recovering his share of the equity of redemption from the plaintiff. In two cases in this Court—*Mamu* v. *Kuttu*(4), and *Thillai Chetti* v. *Ramanatha Ayyan*(5)—it was held that when the plaintiff was entitled only to a part of the equity of redemption and the defendant entitled to another part the plaintiff could not sue to redeem at all without first getting a partition of the equity of redemption. With all respect it seems to me that those cases have gone too far in holding that the plaintiff's suit should be altogether dismissed. It may be noted that in those cases it was the mortgagee himself who had acquired a share of the equity of redemption and there was, in my opinion, the less reason for holding that a partition should be first effected between the parties to the suit before a suit for redemption could be maintained. In Bombay, on the other hand, it was held that

(1) (1869) 5 Ch. App., 227. (2) (1886) 32 Ch., 430.
(3) (1899) I.L.R., 22 Mad., 209 (4) (1883) I.L.R., 6 Mad., 61.
(5) (1897) I.L.R., 20 Mad., 295.

notwithstanding that the mortgagee had become owner of a part of the equity of redemption, the mortgagor was entitled to insist on redeeming the whole mortgage. See *Mora Joshi* v. *Ramchandra Dinkar Joshi*(1) and *Narayan* v. *Ganpat*(2). In my opinion, both the Madras cases and the Bombay cases mentioned above are contrary to the principle of the proviso to section 60 of the Transfer of Property Act. I can see no reason why on the facts found there should not be a decree for partition in this case so as to allow plaintiff to recover half the properties included in the mortgage. The second and third defendants did not claim to be entitled to any part of the properties now. The fourth defendant according to their admission is entitled to all that the plaintiff cannot claim. I ought to notice a contention that Vedachala was himself entitled to the whole of the property and that the fourth defendant acquired no rights by the conveyance he obtained from two of the sons of Vedachala. I am unable to see that this contention was put forward in either of the Courts below. It has not been raised even in the memorandum of second appeal. It was held in Original Suit No. 261 of 1901 which was instituted by the original mortgagee (Thangavelu against Vedachala and his sons and the fourth defendant) that the latter was entitled to the shares of the two sons that were conveyed to him subject to the mortgage in Thangavelu's favour. The plaintiff in this suit did not, as I have already observed, contend in the lower Courts that Vedachala was solely entitled to the property. No doubt the plaintiff's object in insisting on recovering possession of the whole property is to make an attempt to set up a claim to the whole in case the fourth defendant be driven to another suit for recovering the shares of his transferors. I do not think that this course should be followed. The learned Vakil for the appellant consents to a decree for partition if we hold that he ought not to be allowed to redeem the whole mortgage. I have already held that the plaintiff was in no way prejudicially affected by the mortgagee's splitting up the mortgage and receiving half the amount due to them from the fourth defendant and I am therefore of opinion that the decree of the lower Appellate Court should be modified by the plaintiff being allowed to redeem only

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(1) (1891) I.L.R., 15 Bom., 24. (2) (1897) I.L.R., 21 Bom., 619.

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half the properties on payment of half the mortgage amount, *i.e.*, Rs. 187-5-0. The plaintiff will be put in possession of half the properties included in the mortgage deed after a fair partition between him and the fourth defendant. The fourth defendant must be put in possession of the remainder. It would be desirable to allow the lands in fourth defendant's possession to him in partition in so far as that can be done without injustice to the plaintiff. In the circumstances, we think the parties should bear their own costs throughout.

SADASIVA AYYAR, J.

SADASIVA AYYAR, J.—I do not think it necessary to set out the facts which have been mentioned in some detail in the judgment just now pronounced by my learned brother. I shall content myself with making some observations on the principal question of law involved in this case. It is unnecessary for the purpose of deciding on that question of law to consider the cases where the objection of the mortgagee to partial redemption by the owner of a fraction of the equity of redemption was allowed as a valid objection, or the cases where a similar objection of the mortgagee who had himself split up the mortgage was disallowed. Such cases have very little relevancy to the question in dispute before us.

In the Privy Council case [*Nawab Azimut Ali Khan* v. *Jowahir Singh*(1)] their Lordships say that co-mortgagors who were entitled only to a portion of the mortgaged property could not redeem against the will of the mortgagee any portion of the mortgaged property except the one village in which those co-owners (the plaintiffs), were interested. That suit was brought by the purchasers of the equity of redemption in one of the four mortgaged villages for redemption of all the four villages. And their Lordships say that the mortgagee "if desirous of retaining possession" of the other three villages "as mortgagee was entitled to do so" against the plaintiffs "whose rights in that case were limited to the redemption and recovery of their village of Hussainpur upon payment of so much sum deposited in Court as represents the portion of the mortgage debt chargeable on that village." I think that this opinion of the Privy Council is binding on us and I therefore do not propose to deal in detail with the Indian and English cases decided before and

(1) (1870) 13 M I A, 404 at p. 416

after the Privy Council decision, and I shall make reference only to a few of the latest cases. In *Munshi* v. *Daulat*(1), it was held following *Kuray Mal* v. *Puran Mal*(2), that where all the proprietors of an estate joined in mortgaging it and the mortgagee subsequently purchased the share of one of the mortgagors and where another mortgagor sued to redeem his own share and also the share of yet another mortgagor, the plaintiff could only redeem his own share. In *Mir Eusuff Ali Haji* v. *Panchanan Chatterjee*(3), the following observations occur; "Now, what was the true position of the mortgagors when they transferred a portion of the property to Harasatulla, who obtained a release from the mortgagee by payment of a sum of money? It is firmly settled doctrine that, as between the original parties, the release of a part of the premises does not affect the lien of the mortgagee upon the residue, which is bound for the whole debt. No doubt as against others who have liens upon the remainder of the mortgaged premises, a mortgagee, with notice of such lien, has no right to release any portion of the mortgaged premises to the injury of the owners of such liens. . . . To put the matter in another way, as between the mortgagor and mortgagee, the latter is not entitled to release a portion of the hypothecated property and diminish his own security to that extent . . . While therefore we adhere to the view taken in *Imam Ali* v. *Baij Nath Ram Sahu*(4) and *Hakim Lal* v. *Ram Lal*(5), namely, that the mortgagee who has a security upon two or more properties which, he knows, belong to different persons, cannot release his lien upon one so as to increase the burden upon the others without the privity and consent of the persons affected [*Kettlewell* v. *Watson*(6)], we are of opinion that this doctrine has no application to the present case where the release took place at a time when the appellants had not purchased any interest in the mortgaged premises, and the mortgagors alone were the persons affected by the release. We must not, however, be assumed to adopt the rule laid down by the learned Judges of the Allahabad High Court that such a release may be granted even to the prejudice of

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(1) (1907) I.L.R., 29 All., 262. (2) (1879) I.L.R., 2 All., 565.
(3) (1910) 15 C.W.N., 800 at pp. 805 and 808.
(4) (1906) I.L.R., 33 Calc., 613. (5) (1907) 6 C.L.J., 46.
(6) (1882) 21 Ch. D., 686 at p. 714.

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persons who had previously acquired an interest in the mortgaged properties. That view is clearly opposed to the principles of equity, justice and good conscience, and though recognised in *Sheo Prasad* v. *Behari Lal*(1), *Ghafur Hasan Khan* v. *Muhammad Kifayat-ul-lah Khan*(2), *Sheo Tahal Ojha* v. *Sheodan Rai*(3) and *Pirbhu Narain Singh* v. *Amir Singh*(4), was not adopted in *Ram Ranjan Chakravarti* v. *Indra Narain Dass*(5) and *Krishna Ayyar* v. *Muthukumaraswamiya Pillai*(6) if it lays down a similar principle cannot, to that extent, be supported. The contrary view which accords with the rule adopted by this Court was followed in *Ponnusami Mudaliar* v. *Srinivasa Naickan*(7)." It is again unnecessary for me for the purpose of deciding this case to express a final opinion on the question whether the mortgagee himself as plaintiff can sue for sale of a portion alone of the mortgaged property after releasing the other portions at his pleasure. As at present advised, and notwithstanding the great respect I have for the opinions to the contrary including that of ASUTOSH MUKERJEE, J., I do not see any objection on principle to the mortgagee doing so. A mortgagee can sue for a personal decree alone against his mortgagor giving up all claims to bring any portion of the mortgaged properties to sale if he so desires. Why should he not therefore be allowed to sue for the sale of a portion of the mortgaged property for the whole or the portion remaining due and unpaid of his mortgage money, leaving the owners of the equity of redemption in the mortgaged properties to settle their claims as between themselves either in the same suit if convenient or in another suit? He would of course be barred afterwards from attaching other portions of the mortgaged properties and bringing them to sale in execution of the money decree he obtained. He might also perhaps be barred from again suing for a mortgage decree for sale of the other portions left out in his first suit for sale. But these considerations have nothing to do with his rights to release any portion or to sue for the sale of a portion only of the mortgaged property though such release or abstention would not affect the rights and

(1) (1903) I.L.R., 25 All., 79.
(2) (1906) I.L.R., 28 All., 19.
(3) (1906) I.L.R., 28 All., 174.
(4) (1908) I.L.R., 29 All., 869.
(5) (1906) I.L.R., 33 Calc., 890.
(6) (1906) I.L.R., 29 Mad., 217.
(7) (1903) I.L.R., 31 Mad., 333.

liabilities as between themselves of the owners of the different portions of the equity of redemption in the mortgaged properties. If he has himself purchased any portion he must of course make proportionate abatement of the mortgage amount when bringing a suit for sale. In the present case the plaintiff claims only an undivided half share in the mortgaged property. Therefore, it seems to me that *against the will of the mortgagee and of the fourth defendant* who has obtained half the mortgagee's interest by paying half the mortgage money to the mortgagee and half share in the equity of redemption by purchase of same from two out of four owners of the equity of redemption, the plaintiff cannot claim to redeem more than plaintiff's half share of the mortgaged properties. As I said before I hold this view following *Kuray Mal* v. *Puran Mal*(1), *Munshi* v. *Daulat*(2) and *Nawab Azimut Ali Khan* v. *Jowahir Singh*(3).

There are no doubt some comparatively old cases and some English cases in which it was said that a mortgagee could not compel even the owner of only a portion of the equity of redemption to redeem only that portion. But in most of those cases it does not appear that the owners of the other portions of the equity of redemption were parties to the suit or objected to the plaintiff's redeeming the whole. Any such case like *Huthasanan Nambudri* v. *Parameswaran Nambudri*(4) which decided that even in that state of circumstances the plaintiff is entitled to redeem the whole against the will of the mortgagee and against the wishes of the other owners of the equity of redemption, I respectfully dissent from. I am also against making any distinction between cases where, the mortgage is split up (*a*) by the mortgagee releasing certain of the properties (or a certain share of the properties comprised in the mortgage), (*b*) by himself purchasing a portion of the mortgaged property, and (*c*) by the joint owners of the equity of redemption effecting a partition of their properties either by metes and bounds or by agreeing to hold the property in common in definite shares instead of jointly. I hold generally that against the mortgagee's consent the owner of a definite share of the equity of redemption should not be entitled to redeem more than his share

(1) (1879) I.L.R., 2 All., 565. (2) (1907) I.L.R., 29 All., 262.
(3) (1870) 13 M.I.A., 404. (4) (1899) I.L.R., 22 Mad., 209.

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unless the owners of the other shares consent, or do not object to plaintiff's redeeming their shares also. The very general words of section 91 of the Transfer of Property Act "any person having any interest in or charge on a property can institute a suit for the redemption of the mortgaged property," cannot be construed to mean that a plaintiff who owned only a fractional share can redeem other shares than his own when the owners of those other shares object to his redeeming their fractions, or contend that their shares have already been redeemed by them. In the above view the decree of the Lower Appellate Court, allowing plaintiff to redeem the plaintiff's half share alone on payment of half the mortgage amount (which half of the mortgage amount alone remains due to the mortgagee) and allowing the plaintiff in execution to be put in possession of the half share by permitting him to take possession of the whole land as common owner with the fourth defendant seems to me to be correct; strictly speaking this Second Appeal should be dismissed as plaintiff and fourth defendant did not express their consent in the lower Court to have a partition effected between them. [See *Thillai Chetti* v. *Ramanatha Ayyan*(1)]. But as before us the plaintiff and the fourth defendant have so consented to an order allowing partition on redemption, I concur in the decree proposed by my learned brother.

(1) (1897) I L R, 20 Mad, 295.

APPELLATE CIVIL.

Before Mr. Justice Miller and Mr. Justice Sadasiva Ayyar.

RAJA RAJESWARA DORAI *alias* MUTHU RAMALINGA DORAI, LATE A MINOR, THROUGH HIS NEXT FRIEND M VELUSWAMI THEVAR, DECLARED A MAJOR (PLAINTIFF), APPELLANT,

1913. February 10, 11 and 12 and March 3.

v.

A. L A. R. R. M. ARUNACHELLAN CHETTIAR, RESPONDENT.*

Limitation Act (XV of 1877), art 91—Undue influence—Lease, suit to set aside, on the ground of,—Applicability of the article—Suit for possession—Whether setting aside lease by decree of Court necessary—Repudiation of lease by the plaintiff, if sufficient—Suit for setting aside lease if barred, suit for possession also barred—Indian Trusts Act (II of 1882), ss. 86, 89, 90, 91 and 96—Transfer of Property Act (IV of 1882), sec. 126—Indian Contract Act (IX of 1872), ss 64 and 66—Custom of inalienability in a zamindari, onus of proof as to—Evidence, nature of.

Where the plaintiff sued in 1904 to recover possession of certain lands which had been leased by his deceased father under two registered lease deeds, dated 5th November 1889 and 2nd June 1893, respectively, to the deceased father of the defendants, on the ground that the leases were obtained by undue influence exercised by the father of the defendants on the plaintiff's father, and the father of the defendants had died in 1899 —

Held, that the suit was barred by limitation under article 91 of the Limitation Act (XV of 1877).

A transfer which is voidable and which can be effected only by a registered instrument can be avoided only by a formal re-transfer or by a decree of Court.

Janki Kunuar v. *Ajit Singh* (1888) I.L R, 15 Calc., 58 (P.C.), explained and applied.

Section 86 of the Indian Trusts Act, even if it were applicable to the case, is not available to the plaintiff because there was no allegation in the plaint that a notice of rescission was given to the defendants or their father before the suit, and the suit itself can operate as a notice to the defendants only when a copy of the plaint was served on them after the suit was duly instituted The defendants therefore were not trustees at the date of the suit, and the right to immediate possession had not then vested in the plaintiff by virtue of the said section.

Sections 86 and 89 of the Indian Trusts Act are not applicable because section 96 of the said Act will operate to prevent their application as it enacts that no obligations under Chapter IX of the Trusts Act (which contains sections 86 and 89) can be created in evasion of the provisions of any law.

* Appeal No. 25 of 1909

RAJA RAJESWARA DORAI v. ARUNACHELLAN CHETTIAR.

Per SADASIVA AYYAR, J.—A unilateral expression of a rescission of a contract by one of the parties to the contract does not relieve him from his obligation to have the contract rescinded by Court under the substantive law of the land and within the time allowed by the statutory law, if he wants, as plaintiff, the assistance of the Court in obtaining certain reliefs on the basis that the contract has ceased to exist.

The wide phrases 'hold the property' (section 86, Trusts Act), or 'hold the advantage' (section 89, Trusts Act) for the benefit of the transferor do not create at once an enforceable as distinguished from an establishable trust in favour of the transferor.

Property in the hands of a mere constructive trustee does not become the property of the beneficiary under the constructive trust so as to enable him to treat it as such without a judicial declaration of trust

A defendant, though his right to bring a suit for rescission of a contract or lease may be barred, might be permitted to defend his possession of properties by showing that the contract or lease so voidable at his instance has been repudiated by him.

Lakshmi Doss v. *Roop Laul* (1907) I.L.R., 30 Mad., 169, referred to.

The onus of proving inalienability in the case of a zamindari lies on the person who alleges it.

Sundaram v *Sithammal* (1893) I L R., 16 Mad., 311, dissented from.

A perpetual lease, reserving no rent to the Zamindar except a sum which was payable wholly to the Government towards the revenue due on the leased lands, is really an absolute conveyance of the properties.

The case law on the subjects reviewed.

APPEAL against the decree of S. RAMASWAMI AYYANGAR, the Subordinate Judge of Madura (East), in Original Suit No. 30 of 1904.

The plaintiff, who is the present Zamindar of Ramnad, sued to have it declared that the term and permanent leases, dated the 5th November 1889 and 2nd June 1893, respectively, granted by his father, the late Raja of Ramnad, who died on the 27th December 1903, in favour of the defendants' father A. L. A. R. Ramaswami Chettiar who died in 1899, of the mahanum or subdivision of Eravaseri which was part and parcel of the impartible zamindari of Ramnad were not binding on him and to recover from the defendants possession of the lands comprised in the leases. The plaintiff's case was that the leases were obtained by the lessee, the said A. L. A. R. Ramaswami Chettiar by undue influence exercised by him over the plaintiff's father who had attained majority just before the time of the grant of the leases in question and was given to expensive habits. It was alleged in the plaint that the said lessee Ramaswami Chettiar was lending the late Raja large sums of money while his estate was under the Court of Wards and encouraged and helped

him to lead a wasteful and extravagant life and acquired immense influence over him and made himself indispensable to him. It was also alleged in the plaint that the lessee took a most prominent part in the administration of the estate, controlled the action of the officials of the zamindari and became the chief and confidential adviser of the late Raja in all his financial, legal, domestic and private concerns. It was also alleged in the plaint that the late Raja was made entirely dependent on the defendants' father for information regarding the zamindari, and for the administration thereof, that the late Raja had no independent advice in his actions and having just come of age was not possessed of judgment or discretion, and his will had been completely dominated by the defendants' father and by persons who were under his control and influence. The defendants' father and after him the defendants were alleged to have been exercising undue influence and power over the late Raja up to the latter's death. Having acquired complete mastery over the late Raja, and within only two days after his attaining majority, the defendants' father obtained from the late Raja a lease of the Eravaseri mahanum or subdivision for a term of fifty years at an annual rental of Rs. 4,035-2-0 with a false recital in the instrument of lease to the effect that a nazzur or premium of Rs. 10,000 was paid while no such sum was ever paid. The late Raja was alleged to have been ignorant of the real annual income of the property leased, which amounted to an annual rental of over Rs. 25,000. Subsequently in 1893 while the previous lease was subsisting the late Raja granted a permanent lease of the same property for a rent of Rs. 4,335-2-0 per annum (*i.e.*) for only an increased rental of Rs. 300 over and above the previous lease. That subsequently by a document dated 20th April 1894, the defendants' father arranged with the late Raja to pay direct to the Government the proportionate poshkash due on the properties comprised in the lease instead of paying the lease amount to the Zamindar. The aforesaid leases were impeached further on the ground that they were in contravention of the provisions of section 11 of the Rent Recovery Act (VIII of 1865) and were therefore not binding on the plaintiff. It was also contended that the zamindari of Ramnad was impartible and inalienable according to custom and usage and that the leases in question were not binding on the

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plaintiff as the successor of the late Raja. The plaintiff, it was claimed, was entitled to have it established that the said leases and agreement were not binding on the plaintiff and to recover the plaint properties with mesne profits.

The plaintiff instituted this suit on the 30th April 1904 and prayed that the Court may be pleased to pass a decree (1) holding that the leases aforesaid and dated the 5th November 1889 and the 2nd June 1893 were not binding on the plaintiff, (2) ordering the defendants to put the plaintiff in possession of the plaint properties, and (3) directing the defendants to pay to plaintiff mesne profits from 5th November 1889 to the date of plaint and (4) for other appropriate reliefs.

The defendants denied all the allegations in the plaint relating to the exercise of undue influence by their father over the late Raja at any time or in obtaining the leases referred to from the late Raja and raised among several other pleas, the plea of limitation as a bar to the suit. The defendants contended that, the plaintiff not having sued for the cancellation and setting aside of the leases of 1889 and 1893, the suit for a declaration of their invalidity and possession was not sustainable in law; and that the plaintiff was barred by limitation from suing for such cancellation and setting aside of the said documents, or for recovery of possession of the suit properties. The Subordinate Judge dismissed the suit holding among other grounds that the suit was barred by limitation. The plaintiff preferred an appeal to the High Court.

K. Srinivasa Ayyangar and *A. Krishnaswami Ayyar* for the appellants

The Honourable Mr. *F. H. M. Corbet*, the Advocate-General, for the respondents.

S. Srinivasa Ayyangar for first, third and fourth respondents.

S. Varadachariyar for the first respondent.

S. Soundararaju Ayyangar for the third and fourth respondents.

MILLER, J.

MILLER, J.—This appeal arises from a suit in which the Raja of Ramnad (the present sole plaintiff) prays the Court to hold that two leases executed by his father, one on the 5th of November 1889 and the other on the 2nd of June 1893, are not binding upon him and to direct the defendant to deliver to him possession of the property affected by them.

The principal ground on which the suit is based is that the lessee obtained the leases by the exercise of undue influence. That is denied by the defendants, who also raise many other pleas and among them, a plea that the suit is barred by article 91 of the second schedule of the Limitation Act.

The original lessee died in 1899, and the plaintiffs' father was then alive. The suit was instituted in 1904, and it is not contended before us, though it was contended in the Court below, that the undue influence continued after the death of the lessee to be exercised by his sons.

For the appellant it is argued that article 91 is inapplicable to the case, first, because it cannot, in any case, be applied to a suit founded on an allegation of undue influence, and secondly, because the suit is not a suit to cancel or set aside an instrument. As to the first contention, the first column of article 91 does in terms apply to the suit, because in no other article is provision made for setting aside a deed executed under undue influence, but it is argued that the language of the third column, the column in which the starting point of limitation is set out, is inapplicable to a case of undue influence and consequently the article must be held inapplicable. It is doubtless true that cases can be imagined in which the undue influence may continue for three years after the victim has become fully aware of all the facts entitling him to avoid the consequences of its exercise and may so prevent his taking action, but that possibility does not seem to me to indicate that the starting point is wholly inapplicable; it shows only that there may be cases in which its application would be a hardship. In very many, if not in most, cases of undue influence, the influence is utilised to distort or misrepresent material facts, and, though it must be confessed that there may be cases in which it will be difficult satisfactorily to apply article 91, it cannot be said that on its language it is altogether inapplicable, and there is authority for its application which I am unable to disregard. In *Janki Kunwar* v. *Ajit Singh*(1), the Privy Council applied it to what, on their Lordships' statement of facts, was, it seems to me, clearly a case of undue influence; it was applied also by SUBRAHMANYA AYYAR, J., in *Roop Laul* v. *Lashmi Doss*(2), to a case of undue influence, and

(1) (1898) I.L.R., 15 Calc., 58 (P.C.). (2) (1906) I.L.R., 29 Mad., 1.

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though his view on the question of limitation was not accepted by the Full Bench, the applicability of article 91 to the case as a case of undue influence was not questioned. It was held that it did not operate to prevent a defendant in possession from pleading the undue influence to protect his possession. *Hasan Ali* v. *Nazo*(1), to which the article was applied, seems also to have been a case of undue influence.

An observation of SUBRAHMANYA AYYAR, J., in *Roop Laul* v. *Lakshmi Doss*(2), suggests that the starting point might be held to be postponed till cessation of the undue influence; that is a question which he had not to decide, and which it is unnecessary for us to decide, for, even if that be so, this suit of 1904 was instituted more than three years after the cessation of the undue influence, which we may assume for the present purpose to have continued down to the death of Ramaswami Chettiar in 1899.

I think article 91 must, on its language and on authority, be held to be applicable to a suit to set aside an instrument on grounds of undue influence.

The second contention on behalf of the appellant is that the plaintiff, having elected to terminate the leases on the ground of undue influence, is now entitled to ask the Court for possession without any further setting aside of the instruments. The lease is terminated, the interest transferred to the lessee is revested in the lessor, and nothing remains but to give effect to his right to immediate possession. In *Janki Kunwar* v. *Ajit Singh*(3), the Privy Council, dealing with this question, observed that it was necessary to bring a suit to set aside the sale on payment of Rs. 1,25,000 before possession could be recovered; but it is argued that that observation assumes the necessity and is not to be taken as laying down a rule of law that an instrument of transfer which is voidable by the transferor for undue influence can be avoided only by a decree of the Court; or, if it was intended to lay down such a rule, that rule cannot be applied to a transfer made after the enactment of the Trusts Act and the Transfer of Property Act.

I do not feel justified in deciding that that is unnecessary which the Privy Council has declared to be necessary, unless it is quite clear that these enactments, which, it may be, did not

(1) (1889) I.L.R., 11 All., 456. (2) (1906) I.L.R., 29 Mad., 1.
(3) (1898) I.L.R., 15 Calc., 58 (P.C.).

apply to the sale dealt with in *Janki Kunwar* v. *Ajit Singh*(1), have altered the law upon this subject.

Mr. K. Srinivasa Ayyangar did not rest his case on any distinction between an 'ancillary' and a 'substantial' relief prayed for in the suit. I do not think he could do so in the face of the decision to which I have just referred. Then their Lordships lay it down that the immoveable property (in that case) could not be recovered until the deed of sale had been set aside, and so far as this point is concerned, that case cannot be distinguished from the one before us. I think it therefore unnecessary to discuss the cases in India in which attempts have been made to distinguish *Janki Kunwar* v. *Ajit Singh*(1) and which in some cases proceed, as Mr. K. Srinivasa Ayyangar was prepared to admit, on differences which are without much substance.

It was necessary, then, in the present case to set aside the leases before possession could be recovered by the Raja, and we have to consider the question whether he has already effectively set them aside, or whether the Court has to do so for him by its decree. In the latter event, the suit is barred by limitation.

Reliance was placed by Mr. K. Srinivasa Ayyangar on sections 64 and 66 of the Indian Contract Act and section 126 of the Transfer of Property Act and section 86 of the Trusts Act as showing that, whatever may be the case elsewhere, the law of India does not require the intervention of the Court to make effective an avoidance by the transferor, against the will of the transferee, of a transfer voidable at his option.

It is, I think, clear that neither the Indian Contract Act nor the Transfer of Property Act is inconsistent with a rule requiring a decree to set aside a transfer. Sections 64 and 66 of the Contract Act were in force before the transfer dealt with in *Janki Kunwar* v. *Ajit Singh*(1) and, besides, do not provide for the method of rescission of a contract, and section 126 of the Transfer of Property Act does not lay down the method to be adopted to effect the revocation of a gift; these provisions may well co-exist with a rule of law that a transfer which can be effected only by a registered instrument can be avoided only by a formal re-transfer, or by the Court's decree, which may be a sufficient substitute for an instrument of re-transfer. And such a rule

(1) (1898) I.L.R., 15 Calc., 58 (P.C.).

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would, I conceive, be entirely in accordance with the policy of the law as indicated by the fourth proviso to section 92 of the Evidence Act; that proviso forbids proof of an oral agreement to rescind a contract, grant or disposition of property in cases in which the law requires the contract, grant or disposition to be effected by an instrument in writing. This rule has been said to be a rule of positive law rather than of evidence; the law will not enforce the agreement and so will not allow it to be proved; but whatever be the foundation on which the rule is based, it has the effect of preventing the rescission, by oral agreement, of a transfer which cannot be effected by oral agreement, but not of other transfers. The inference is that the law desires the same publicity and the same safeguards in the case of a re-transfer as were required to support the original transfer, for, if a writing was unnecessary for the transfer, then it is unnecessary for the re-transfer, and consequently the rule cannot be put merely on the ground that documentary evidence is better than oral evidence. And the fact that the transferor has been wronged and is therefore in a position to compel the re-transfer seems to me to make no difference from this point of view; it is a concession to him if the decree of a Court under the Specific Relief Act is allowed to suffice to revest the transferee's interest in him, instead of the registered instrument required by the Transfer of Property Act. The English cases [*Clough* v. *London and North Western Railway Company*(1), *Oakes* v. *Turquand*(2) and *Reese River Silver Mining Company* v. *Smith* (3)], cited by Mr. K. Srinivasa Ayyangar, do not touch this particular question, and the analogy of the forfeiture of a lease, suggested by him, is not exact, for the title in that case is revested by virtue of a provision in the contract itself.

So far then as the provisions of the Transfer of Property Act and the Contract Act are concerned, I am unable to see any reason why I should hold that the observation of the Privy Council in *Janki Kunwar* v. *Ajit Singh* (4) does not bind me or that the law is not in accordance with it. Mr. K. Srinivasa Ayyangar argued that, if that is so, *Lakshmi Doss* v. *Roop Laul*(5), and the cases which have allowed defendants in possession

(1) (1871) L R., 7 Ex Ch, 26. (3) (1869) L.R., 4 H L., 64.
(2) (1867) L R, 2 H L., 325. (4) (1898) I L R., 15 Calc, 58 (P.C).
(5) (1907) I.L.R., 30 Mad., 169.

to plead undue influence after the time prescribed by article 91, must be held to have been wrongly decided. That is not a question which we have to decide in this case, but, unless we are to hold that in each case a plea of undue influence is a counter-suit for setting aside the instrument, the conclusion we are asked to draw does not necessarily follow. The defendant is required to get the Court to set aside the instrument, but, if he can do so without a suit of his own, it is possible that he need not do it within the period provided by article 91.

Section 86 of the Trusts Act raises a somewhat different question; by that enactment, a transferee in possession under a voidable transfer, must, on receipt of notice of rescission, hold the property for the benefit of the transferor, subject to repayment of the consideration actually paid.

The contention is that no further avoidance is necessary; the transferor, as a constructive *cestui que trust*, has the right to compel the transferee, as constructive trustee, to surrender the property.

It is not at all clear to me that the plaintiff in this case can base any claim on this section. I do not find in the plaint any allegation that a notice of rescission was given to the defendants or their father before the suit, and the plaint itself is therefore the only notice available to the plaintiff wherewith to satisfy the requirements of the section. But the plaint is primarily a prayer to the Court to adjudicate upon a statement of claim, and can only operate as a notice to the defendants under section 86 of the Trusts Act when a copy is served on them in due course and that, in this country, is after the suit is duly instituted; (*vide* Order V, rules 1 and 2, Civil Procedure Code). The defendants, therefore, were not trustees under section 86 at the date of the suit, and the right to immediate possession had not then vested in the plaintiff by virtue of that section.

But if I assume the section to be applicable at all or if section 89 can be held applicable, then section 96 will, I think, operate to prevent their application here. For, as I have held, I am bound by the Privy Council decision to hold that there is a rule of law requiring that, if a sale is to be rescinded, it must be by judicial rescission or a written instrument, and that rule will apply to the present case. Now, in order to obtain a judicial rescission, the plaintiff must invoke the aid of the Court within

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the time allowed by article 91 of the second schedule of the Limitation Act. This he has not done, and to allow him now to rely on section 86 of the Trusts Act would be to place on the defendants an obligation of which they have been in effect relieved by article 91—an obligation in evasion of that provision of the law. Again, section 96 shows that Chapter IX of the Trusts Act was not intended to alter any provision of the law, but merely to make provision, so far as that could be done consistently with the laws already in force, for certain cases in which Courts of Equity in England fastened a constructive or resulting trust upon holders of property and for which in India, before the Trusts Act, there was no statutory provision. It follows that Chapter IX does not repeal the rule of law laid down by the Privy Council.

For these reasons I think article 91 must be applied to the present case.

The question whether there is a custom in the Ramnad zamindari by which the alienations made by one Zamindar are void as against his successor, was raised and presented to us for our consideration, but the evidence clearly negatives it, as my learned brother shows in his judgment, which I have read.

The Appeal must be dismissed with costs.

SADASIVA AYYAR, J.

SADASIVA AYYAR, J.—While I fully concur in the judgment just now pronounced by my learned brother, I consider that it is due to the strenuous and able arguments advanced by the appellant's learned vakil that I should state in my own language my views on the question of limitation arising in this case. Though sixty-eight grounds are mentioned in the appeal memorandum as valid grounds for attacking the Lower Court's judgment, it is unnecessary for the decision of this appeal to consider more than a few, as the other grounds relate to certain questions of fact and law, such as whether the defendants' father really exercised undue influence over the late Raja and so on, which might all be assumed as decided in the plaintiff's favour, without actually deciding them. The sixtieth ground was abandoned, the appellant's learned vakil conceding that the Privy Council decision in *Ramasami* v. *Bhaskarasami*(1) was against the contention raised in that ground (the contention being based on section 11 of the Rent Recovery Act). Grounds 56 to 59 raised the contention

(1) (1879) I.L.R., 2 Mad., 67.

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that, by the custom of the estate, the leases in question (one being a lease for 50 years and the other being a perpetual lease) were invalid beyond the late Raja's lifetime, the late Raja having died in December 1903, about four months before the suit was brought. But the plaintiff in his plaint (paragraphs 4 and 5) admits the power of his father (the late Raja) to settle the zamin by a trust-deed on the plaintiff so as to be valid beyond the Raja's life; *Vijiasami Tevar* v *Sasivarma Tevar*(1) shows that in the Sivaganga Zamindari (carved out of Ramnad), no such custom, as contended for, against inalienability exists, and the decisions in *Sartaj Kuari* v. *Deoraj Kuari*(2) *Sivasubramania Naicker* v. *Krishnammal*(3) and *Sri Raja Rao Venkata Surya Mahipathi Rama Krishna Rao Bahadur* v. *The Court of Wards*(4) clearly establish that the onus of proving a custom of inalienability in the case of these impartible zamindaries lies heavily on the person who alleges it. (After the coming into force of the Madras Impartible Estates Act, the question of the right to alienate, of course, stands on an entirely different footing.) Far from there being any evidence of such custom in this case, the evidence is almost wholly against the existence of any such custom. (See Exhibits CIII, CXL series, CXLI-A, CXLI-E, etc.) That before the decision in *Sartaj Kuari* v. *Deoraj Kuari*(2), it was erroneously thought by the Court, by the Revenue Officers and by the litigant public as a matter of law that impartible estates were inalienable, cannot constitute evidence of the custom of inalienability, which ought to be proved by cogent evidence as in the Ammayanayakanur case, *Sivasubramania Naicker* v. *Krishnammal*(3). In fact, the contention raised by the grounds Nos. 56 to 59, though not abandoned by the appellant's learned vakil, was only very slightly pressed before us and it must be decided against the appellant.

I have thus sufficiently cleared the ground for the consideration of the point of limitation, which was strenuously argued before us. The proper decision of that point depends on the answers to be given to the following questions:—

(1) Is the plaintiff bound to have the leases in dispute set aside by a judicial pronouncement before obtaining the relief of

(1) (1905) I.L.R., 28 Mad., 560. (2) (1888) I.L.R., 10 All., 272 (P.C.).
(3) (1895) I.L.R., 18 Mad., 287. (4) (1899) I.L.R., 22 Mad., 383 (P.C.).

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possession and mesne profits claimed in this suit? (It is admitted, if I understood the respondents' vakil aright, that the relief of setting aside the leases might be given in the same suit in which the relief as to possession is claimed, and as ancillary to the relief awarding possession.) Or is no such judicial pronouncement necessary, and whether the mere bringing of the suit by the plaintiff, alleging in the plaint that he or his father has repudiated the lease, or a mere oral declaration by the plaintiff or his father that he has repudiated the lease, is sufficient to put an end to the lease and to give a right to the plaintiff to obtain the relief as to possession and mesne profits? Whether even a repudiation is unnecessary, on the ground that the provisions of the Trusts Act entitled the plaintiff to treat the defendants as trustees of the plaint property for the plaintiff and to recover possession of the same from the defendants?

(2) If a mere repudiation *in pais* (before or at the time of the plaint) would suffice, can it be made at any time (however long) after the date of the lease, or ought it to be made within the time fixed by law for the bringing of a suit to set aside the leases, or, at least, within the time fixed by law for possession of the property?

(3) Is article 91 of the Limitation Act inapplicable to a suit which seeks such a declaration of the invalidity of the lease, on the ground that the plaint in the suit prays also for possession of immoveable property?

I am unable to accept the contention that, because chapter IX of the Indian Trusts Act attempted to enunciate, in the form of sections, the principles which the Courts of Equity in England have established for their own guidance in order to fix wrongdoers with obligations to be fulfilled in favour of wronged persons, substantive rights and obligations were at once created by those sections without the person who invokes those principles in his favour being obliged to obtain the establishment of those rights by first invoking the aid of the Court in the manner indicated and provided for by law. The appellant's vakil relies on sections 86 and 89 of the Trusts Act which are as follow:—

"Where property is transferred in pursuance of a contract which is liable to rescission or induced by fraud or mistake, the transferee must, on receiving notice to that effect, hold the property for the benefit of the transferor, subject to repayment by the latter of the consideration actually paid.

"Where by exercise of undue influence, any advantage is gained in derogation of the interests of another, the person gaining such advantage without consideration, or with notice that such influence has been exercised, must hold the advantage for the benefit of the person whose interests have been so prejudiced."

The wide phrases "hold the property" (section 86) or "hold the advantage" (section 89) "for the benefit" of the transferor, cannot be held to create at once an enforceable as distinguished from an establishable trust in favour of the transferor. The chapter itself in which these sections occur, is headed thus "Of certain obligations *in the nature of Trusts.*" If a trust obligation has to be created and if the law requires that the creation of the trust itself (not an inchoate obligation in the nature of a trust) should be the act of the Court regularly invoked for that purpose, the person who wants to benefit by the provisions of the Trust Act ought to so invoke the aid of the Court for the effective creation of the trust within the time limited by law. I entirely agree with my learned brother that that is the effect of the last clause in section 96 of the Trusts Act. That the contention on the appellant's side would lead to startling and anamolous results which could not have been intended by the Legislature, might be shown easily by a reference to section 91 of the Trusts Act. That section is as follows:—

"Where a person acquires property with notice that another person has entered into an existing contract affecting that property, of which specific performance could be enforced, the former must hold the property for the benefit of the latter to the extent necessary to give effect to the contract."

Can it be argued on this section that, because *A*, the purchaser under a registered deed of sale with notice of a previous contract of sale in favour of *B*, "must hold the property for the benefit" of *B* (the prior promisee from the vendor), *A* became a complete trustee for *B* on the date of *A*'s sale-deed itself, and hence *B* need not bring a suit for specific performance within three years of the date fixed for the performance (article 113 of the Limitation Act), but might bring a suit within 12 years, nay, after any length of time, for possession of the lands against *A* (the subsequent purchaser) as if *A* had been created an express trustee for *B* by the effect of section 91 of the Trusts Act from the date of *A*'s sale-deed? If such construction of section 91 of

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the Trusts Act is correct, section 12 of the Specific Relief Act, which gives a discretion to the Court to give specific relief (in the above case, the relief would be the compelling of *B* to execute a registered conveyance to *A*), the provisions of the Transfer of Property Act requiring a registered conveyance to transfer property (see *Immudipattam Thirugnana Kondama Naick* v. *Peiya Dorasami*(1) the provisions of the Evidence Act, section 92, excluding oral proof of the setting aside of a registered document and requiring proof of such to be in writing, the provisions of section 26 of the Specific Relief Act, requiring the court to decree specific performance only subject to a variation in certain circumstances, might all be evaded and set at naught, as the Trusts Act, section 91, merely uses the general expression that, if specific performance could be enforced (with or without variation and with or without conditions), *A* must hold the property for the benefit of *B*. There might be cases coming under a few sections of chapter IX, where a judicial declaration of trust might be unnecessary even when the beneficiary comes in as plaintiff, but the present is not such a case. Property in the hands of a mere constructive trustee does not become the property of the beneficiary under the constructive trust so as to enable him to treat it as such without a judicial declaration of the trust. As said in Lewin on Trusts, chapter X, para. 18, "Until some judgment or decree has been obtained, the money" (in the possession of the person who obtained a pecuniary advantage by unfair use of a fiduciary relation) "cannot be said to be the money of the principal." As said by LINDLEY, L.J. in *Lister & Co.* v. *Stubbs*(2) of such an argument, "the unsoundness of it consists in confounding ownership with obligation."

As I said before, a perusal of the whole of chapter IX of the Trusts Act has left the clear impression on my mind that it was intended only to lay down the principles which ought to govern the Courts in India in ascertaining the rights and obligations of parties in certain cases, and not to relieve a party from any obligation to take the necessary steps (required by the substantive or adjective law to be taken by him) before a trust could be validly established and created in his favour. Similar observations apply to the argument based on sections 64, 65 and 66 of

(1) (1901) I.L.R., 24 Mad., 377 at p. 386. (2) (1890) 45 Ch. D. 1.

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the Contract Act. A unilateral expression of a rescission of a contract by one of the parties to the contract cannot be held to relieve him from his obligation to have the contract rescinded by Court under the substantive law of the land and within the time allowed by statutory law, if he wants, as plaintiff, the assistance of the Court in obtaining certain reliefs on the basis that the contract has ceased to exist. *Reese River Silver Mining Co.* v. *Smith*(1), quoted by the appellant's learned vakil, does not (it seems to me) do away with the necessity of rescission by the Court in the case of a plaintiff. There are, no doubt, certain passages in Lord HATHERLEY's judgment tending in the appellant's favour, but the other learned Law Lords gave their verdict for the plaintiff only on the short ground that, as he had filed his bill in Chancery for rescission of his contract as a shareholder with the company before the company was ordered to be wound up, the rescission by Court related back to the date of the filing of the bill.

The argument of the appellant's learned vakil, if I understood him aright, was that the law of the land does not require a judicial rescission of a contract or the judicial rescission of a registered lease deed or conveyance in order to enable the party to a contract or the executant of a conveyance to sue for reliefs flowing from the rescission of the contract or setting aside of the conveyance, as the case may be, provided that he himself repudiates the contract or the conveyance, his own repudiation, if found to be for good cause, having equal effect with a decree of Court rescinding the contract or setting aside the conveyance. In considering this question, we have to bear in mind that Courts of Equity in England were not bound by any law of limitation so far as the distinctive reliefs granted by such Courts were concerned. Equity, no doubt, tried to follow the law as much as possible and refused to grant equitable reliefs where the plaintiff was guilty of laches. Laches took the place of limitation but the ground covered by the two was not the same in many cases. For instance, the law of limitation never took note of the fact that a plaintiff was unable to bring his suit within the period prescribed owing to poverty, but the doctrine of laches allowed poverty to be a good excuse. Expressions, therefore,

(1) (1869) L.R., 4 H.L., 64.

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quoted from several of the cases decided by Courts of Equity in England in which the effect of the repudiation by a party was not clearly distinguished from a judicial rescission, have not much force, because, where there is no question of limitation governing the power of the Court to grant a judicial rescission, repudiation for good cause by the party and judicial rescission for the same good cause by the Court when the matter comes before it can be practically put and talked of as if standing on the same footing. Again, even where the law of limitation affects the power of the Court to grant or declare a judicial rescission in *favour of a plaintiff*, the power of the Court to find *in favour of a defendant* that a proper rescission has taken place by the repudiation of the defendant for good cause and the power of the Court on such a ground to non-suit the plaintiff, seems to be much larger, as has been held in the Full Bench case of *Lakshmi Doss* v. *Roop Laul*(1). The defendant, though his right to bring a suit for rescission of a contract or a lease may be barred, might be permitted to defend his possession of properties by showing that the contract or lease so voidable at his instance has been repudiated by him. Section 28 of the Limitation Act is as follows:—"At the determination of the period hereby limited to any person for instituting a suit for possession of any property, his right to such property shall be extinguished." This shows that it is only where a person is under a necessity to institute a suit for possession of the property to which he lays a claim (and where the time for instituting such suit has lapsed), that his title to the property is extinguished. But if he is himself in possession and it is only his right to sue as plaintiff to set aside or declare invalid the deed or title set up by another man that is barred, he could defend his possession by pleading, as defendant, the voidability of the deed or title set up by the plaintiff who seeks possession. I am not sure that even the defendant, unless he has perfected his title by adverse possession, should not be deprived of his possession if there is a registered deed (corresponding to a deed under seal in English Law), which, *prima facie*, has transferred title to the plaintiff, though it was voidable at the instance of the defendant, if the defendant had not brought the suit within the prescribed period to have that

(1) (1907) I.L.R., 30 Mad., 169 at p. 178 (F.B.).

deed set aside. But *Lakshmi Doss* v. *Roop Laul*(1) has decided otherwise, though the learned Judges did admit the difficult nature of the question, and I do not wish to unsettle the law as fixed by that decision. A defendant who has properly repudiated a contract or a deed, might well be allowed to sit tight over his possession and defend his right to such possession by setting up, by way of plea, such proper repudiation by him, though he might be barred if he seeks positive relief as plaintiff on the basis of such repudiation. (Even a defendant could not however retain possession, if he had only a right to obtain a title-deed from his vendor and had lost that right by limitation—see the judgment of the Full Bench in *Kurri Veerareddi* v. *Kurri Bapireddi*(2). If, as the appellant's learned vakil, Mr. K. Srinivasa Ayyangar, contends, the vendor became a trustee for the purchaser as soon as the contract for sale was made, and also gave possession to the beneficiary purchaser of the property held in trust, he could not recover possession from the purchaser who had neglected to obtain the registered conveyance.) But so far as a *plaintiff* seeking relief is concerned, the decision in *Lakshmi Doss* v. *Roop Laul*(1) does not help him; on the other hand, there are observations in that case to the effect that a plaintiff seeking relief cannot evade the statute of limitations like a defendant. The question is, therefore, now narrowed to this point. Is a litigant coming forward *as plaintiff* for a relief which he cannot get if a document executed by himself or his predecessor in title is in force on the date of suit, is such a litigant entitled to the relief of possession after the expiry of the time fixed by law for the setting aside of that document and simply on his allegation and proof that he has himself repudiated the document on proper grounds, assuming that the document is voidable at his instance? If he brings a suit for possession within the time limited by law for setting aside that document, that suit, of course, might be taken as brought for both the reliefs of possession and rescission, and there will be then no difficulty. The difficulty will arise only where the time fixed by law for a suit to set aside the document has elapsed, but the limitation for possession of the immoveable property dealt with under the document has not elapsed, and also in cases where the suit was brought

(1) (1907) I.L.R., 30 Mad., 169 at p. 178 (F.B.).
(2) (1906) I.L.R., 29 Mad., 336 (F.B.).

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after the expiry of the period fixed by law for the recovery of the property, if calculated from the date when the plaintiff became entitled to repudiate the contract, but within such period, if calculated from the date when he actually repudiated the contract or deed. However, it must be admitted that there is no Indian statute expressly laying down that a person who comes in as plaintiff claiming relief against the effect of a deed voidable at his instance, should have it judicially rescinded before or at the time of his getting that relief. But if judicial decisions have laid down the common-law of the land as requiring such judicial rescission, and if there are implications to be found in the statute law supporting the judicial decisions as to the rules of the common-law, we are bound to follow such decisions. The common-law being founded on common sense, many of its principles will be found laid down in English cases also. And if the principles so laid down by English decisions have been adopted by the Privy Council and by the Indian High Courts, they form part of the law, binding upon Indian Courts. Hence, though I do not wish usually to refer to the English law, as numerous English decisions were referred to in the course of the arguments in this case, I shall very briefly refer to what I consider to be the result of those decisions. Isolated passages in several of those judgments can, no doubt, by ingenious interpretation, be made to support the appellant's view. I do not mean, however, to enter, upon an elaborate refutation of the arguments advanced by the appellant's learned vakil based on such passages. I shall merely refer to what Lord Halsbury in his Laws of England, volume 20, section 1745, says on this point:—

"Where the representee has been induced by misrepresentation, whether fraudulent or innocent, to enter into a contract or transaction with the representor, which, unless and until rescinded, would be binding on the parties, such contract or transaction is voidable at the option of the representee. This means that the representee, on discovery of the truth, has a right to elect whether he will affirm or disaffirm the contract or transaction, and, if he adopts the latter course, is entitled to give notice to the representor of repudiation, and demand from him a complete restoration of the *status quo*. In the event of his demand not being complied with, he may, subject to certain conditions and affirmative defences, *maintain an action or analogous proceedings*

for the purpose of having the contract or transaction declared void and rescinded by the court, in which event it is deemed to have been void ab initio."

This shows that where the repudiation is by one party alone, he cannot, as plaintiff, get any relief except as consequent on getting a declaration and a rescission by the Court. Of course, if the repudiation is accepted by the other side in the mode allowed by law, then the contract or transaction might be properly rescinded by the act of both parties without the intervention of a Court. (See sections 62 and 63 of the Contract Act on this point.) Or if the original contract or deed itself, by clauses of forfeiture or similar clauses, puts an end to the contract or transaction, then also it is really determined by both parties, and the aid of the Court is not required But in other cases, even though the contract or transaction is voidable at the instance of one party, its rescission is effectuated, not by the mere repudiation of one party, but by the decree or declaration of the Court. The form and extent of the relief are thus indicated in section 1755 of Halsbury's Laws of England, volume 20. "The ordinary form in which the aid of the court is invoked is an action, or counterclaim for rescission, in which, on discharging the necessary burden of allegation and proof, unless countervailed by any affirmative plea successfully raised by the representor, the representee is entitled to relief of a nature to effectuate the objects already indicated—that is to say, to an order rescinding or setting aside the contract, with or without a prefatory declaration, and in certain special cases, to an order for the delivery up of the instrument in which the contract is contained or recorded to be cancelled, or for rescission of the conveyance by which it was completed; and to such further orders for repayment of money with interest, reconveyance and retransfer, indemnity, not being in the nature of damages, injunction, accounts and inquiries, rectification of an entry in a statutory register which otherwise would or might import liability, and generally, and otherwise, all such directions as, in the circumstances of the particular case, may be required for the purpose of complete *restitutio ad integrum*; which means that, on his part, the representee must also make all such corresponding repayments, retransfers, and reconveyances as are necessary to restore the *status quo* on both sides. Where the representee has simply paid money to the representor under the

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contract, and has received neither money nor money's worth in exchange, and so has nothing to restore, the proceeding assumes the form of an action for money had and received, which succeeds, or fails, *on precisely the same principles as if the action were for rescission*; and, similarly, where the representee has parted with property or an instrument, without receiving any money or other benefit, the action may be in trover, or for the mere delivery up of the instrument to be cancelled, in which case, again, the same principles apply." In Bigelow on Fraud at pages 75 to 79, the whole matter is put very lucidly: "There are three classes of cases in which rescission may be effected, each having a mode of its own. These classes, *nameless in the books*, may be severally termed 'rescission *in pais*,' 'judicial rescission,' and 'rescission by plea (or answer)'." Then the learned author says that rescission *in pais* is very rarely effective, that rescission by plea or answer as in *Lakshmi Doss* v. *Roop Laul*(1), may be fully effectual in certain cases, and, lastly, that judicial rescission may fall under two sub-heads, one where it is a mere substitute for a rescission *in pais*, and the other, where acts of repudiation *in pais* are insufficient to rescind the contract or transaction or to restore the *status quo*. Then the learned author says on page 78. "It (that is, judicial rescission) is the remedy for fraud in transfers of real estate, according to the general common-law doctrine, for specialities, according to some authorities, and for fraud in contracts generally where tender and demand are insufficient or inappropriate for the end sought, or where there is nothing to tender because nothing has been received, and yet where a defence alleging the fraud might not afford sufficient relief." This again, is clear authority for the proposition that a mere unilateral repudiation *in pais* by the plaintiff cannot constitute an effectual rescission of a contract or deed and such effectual rescission entitling the plaintiff to obtain further reliefs must be made by a decree of Court declaring that the contract or transaction is void and setting it aside.

Now let us see whether the Indian Legislature has indicated, at least by implication, that contracts and deeds *primâ facie* binding on the plaintiff, as entered into by himself or as executed

(1) (1907) I.L.R., 30 Mad., 169 (F.B.)

by himself or his predecessor, ought to be judicially set aside as a necessary preliminary to the granting to the plaintiff of reliefs consequent upon the wiping out of the contract or deed. The Indian Contract Act, section 2, clause (1), defines a voidable contract thus:—An agreement which is enforceable by law at the option of one or more of the parties thereto, but not at the option of the other or others, is a voidable contract. Section 10 says:—"All agreements are contracts if they are made by the free consent of parties competent to contract, for a lawful consideration and with a lawful object, and are not hereby expressly declared to be void." Section 14 says: "Consent is said to be free when it is not caused by coercion, undue influence, fraud, mis-representation or mistake." Reading sections 10 and 14 together, therefore, an agreement to which consent is caused by coercion, etc., is not a contract. However, sections 19 and 19-A loosely call an agreement caused by coercion, etc., as a *contract* voidable at the option of the party whose consent was so caused. Then section 19-A is a most important section; it is as follows:—

"When consent to an agreement is caused by undue influence, the agreement is a contract voidable at the option of the party whose consent was so caused. Any such contract may be set aside either absolutely, or, if the party who was entitled to avoid it has received any benefit thereunder, upon such terms and conditions as to the Court may seem just.

Illustration.

(*a*) *A*'s son has forged *B*'s name to a promissory note. *B*, under threat of prosecuting *A*'s son, obtains a bond from *A* for the amount of the forged note. *If* B *sues on this bond, the Court may set the bond aside.*

(*b*) *A*, a money lender, advances Rs. 100 to *B*, an agriculturist, and, by undue influence, induces *B* to execute a bond for Rs. 200 with interest at 6 per cent. per month. *The Court may set the bond aside, ordering B to repay the Rs. 100 with such interest as may seem just.*"

I think this section clearly indicates that, as regards a contract voidable by the plaintiff or the defendant on the ground of undue influence, *the legislature, though it calls it a voidable contract, clearly intended that, in order that the avoiding by the party might be effectual to set aside the contract,* the bond, even when the defendant raises a plea in answer to the plaintiff's action

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on the bond, as in the first illustration, and, of course, when the obligor is the plaintiff (which seems to be the meaning of the second illustration), ought to be set aside by the Court in favour of the defendant or the plaintiff as the case may be. Chapter IV, section 35, of the Specific Relief Act provides for the Court rescinding a contract voidable or terminable by the plaintiff, and also, where a contract of sale or lease has been made and the purchaser or lessee makes default in payment of the purchase money or the premium money after a decree for specific performance had been passed. Again, the Limitation Act prescribes a limitation of one year in articles 11 and 11-A for suits to set aside certain judicial orders, in article 12 (a) the same period to set aside sales in execution of a decree of a Civil Court or of a Revenue Officer or held for recovery of arrears of Government revenue and so on, and in articles 13, 14 and 15 for setting aside other similar orders of public authorities. Article 44 of the Act prescribes a period of three years for a suit by a ward (to set aside alienations by his guardian) calculated from the date when the minor attains majority. Article 91 provides a three years' limitation period for a suit to cancel or set aside an instrument not otherwise provided for. Article 95 gives again three years for setting aside a decree obtained by fraud or for other relief on the ground of fraud. Article 113 provides three years for specific performance of a contract. Article 114 provides three years for a suit for rescission of a contract. Let us take the case mentioned in article 95. Supposing there is a decree obtained by *A* through fraud, declaring against *B* that *A* is entitled to retain as against *B* the suit land as absolute owner, though really *A* was only a permissive tenant of *B* in respect of the land, having obtained possession of the land as such permissive tenant one year before the decree was passed. *B* knows of the fraud two years after the decree is passed. He keeps quiet for four years and then sues for possession of the land, he being then barred from bringing a suit to set aside the declaratory decree obtained through fraud by *A*. It seems to me clear that that fraudulently obtained decree which has not been set aside must stand in his way. Similarly, it seems to me that the other articles, including the article relevant to this case, viz., article 91, will stand in the way of a plaintiff suing for the relief claimed by him against the tenor of the decisions or instruments, as the case may be, to

which he has been a party and which are binding on him till set aside by the Court. In a very recent article in page 55 of the Madras Law Journal (February), Mr. Shephard says that section 36 of the Specific Relief Act indicates that "rescission imports a judicial decision" and that "rescission by a person entitled to rescind means that he having resolved not to persist in demanding performance, is *in a position to sue for rescission* or to defend an action brought on the contract." If he allows the time (prescribed by the Indian Law of Limitation) to sue for rescission to pass, his rescission *in pais* cannot entitle him to sue for any other relief on the basis that the contract has been set aside though, as a defendant, he may be allowed to defend his possession in a suit brought by the other party, provided his title to the property in dispute has not passed to the other party by the effect of a registered deed under the provisions of a statute giving such effect to such a deed. Even in the latter case, if he has acquired a title by prescriptive possession, he can, of course, successfully put forward that plea.

(I may add that, in this case, the second lease sought to be set aside, though it is called a perpetual lease, is really a conveyance, as though there is a sum nominally reserved as rent, that sum is wholly to be paid to the Government towards the revenue due upon the leased land, and the late Raja followed up that lease, which is dated 1893, by another instrument of 1894, Exhibit E, by the effect of which the defendants' father was even relieved of his obligation to pay the peshkash through or on behalf of the late Raja and was allowed thereafter to pay it to Government direct. The Government, in accordance with the wishes of the Raja, sub-divided the leased lands as a separate estate and registered it in the defendants' father's name Whatever the parties may choose to call this transaction, effected by the deeds of 1893 and 1894 (Exhibits C2 and E), I am unable to entertain any doubt that they constitute an absolute conveyance of the properties mentioned in them in favour of Ramaswami Chetti. The late Raja could not claim even a pepper-corn rent from the defendants' father after the document of 1894 and he retained absolutely no interest in those properties)

Having considered the common law and the implications of the statute law, I shall refer to a few of the decisions passed in

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Indian cases. Naturally the leading decision of the Privy Council, in *Janki Kunwar* v. *Ajit Singh*(1), has to be first considered. That case arose out of a suit brought by the plaintiff on the 18th February 1884 to obtain the cancellation of a deed of sale, dated the 29th July 1872 (on the ground that it had been obtained from the plaintiff and her late husband by fraud and undue influence), and to have the property conveyed by the sale restored to the plaintiff's possession with mesne profits and costs upon certain conditions to be imposed on the plaintiff. Though the suit was brought within 12 years of the plaintiff's having lost possession of the conveyed property, the Privy Council held that the suit fell under article 91 and was barred. Criticising the judgment of the lower Court, their Lordships say as follows :—"Then the Judicial Commissioner deals with the case in a different way. He says that the suit is essentially a suit for the possession of immoveable property, and as such falls within the 12 years' limitation. Now he is clearly wrong there. It was not a suit for the possession of immoveable property in the sense to which this limitation of 12 years is applicable. The immoveable property could not have been recovered until the deed of sale had been set aside, and it was necessary to bring a suit to set aside the deed upon payment of what had been advanced, namely, the Rs. 1,25,000. Therefore there has been on the part of the lower Courts a misapprehension of the law of limitation in this case. Their Lordships are clearly of opinion that the suit falls within Art. 91 of the Act XV of 1877, and is therefore barred." The appellant's learned vakil sought to distinguish this case by arguing that the Privy Council dealt with the case of a document voidable for fraud and not for undue influence. The facts of the case, however, clearly show that it was a case of undue influence. The word "fraud" is, no doubt, used in some places, but that word when used by Courts is not confined to its meaning as defined in section 17 of the Contract Act. Courts have always refused to define fraud exhaustively, as it is as hydra-headed as the devices of human ingenuity. Every unfair means used to obtain unconscionable advantage over another is spoken of as "fraud." In *Sundaram* v. *Sithammal*(2) the suit was brought in 1889 for possession of land conveyed

(1) (1888) I.L.R., 15 Calc., 58 at p. 65 (P.C.). (2) (1893) I.L.R., 16 Mad., 311.

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away in 1883 by one of the plaintiffs. The conveyance was found to have been obtained by undue influence. The two learned Judges who formed the Bench upheld the plaintiffs' claim on the ground that article 91 did not apply but article 144. With the greatest respect I must dissent from the ruling in this case, as, in my opinion, it is clearly opposed to the decision of their Lordships of the Privy Council in *Janki Kunwar* v. *Ajit Singh*(1). One of the learned Judges distinguished *Janki Kunwar* v. *Ajit Singh*(1) on the ground that the plaintiffs in this latter case asked for a decree for their property being restored upon their paying to the defendants so much of the consideration money as might be found to be justly due under the sale-deed which was impugned and the plaintiffs did not ask for a decree for unconditional possession. I am (with the greatest respect) unable to appreciate the distinction. The other learned Judge sought to distinguish *Janki Kunwar* v. *Ajit Singh*(1) on the ground that the plaintiffs in that case came into Court expressly asking that the deed should be set aside as obtained by fraud and undue influence, whereas in *Sundaram* v. *Sithammal*(2) the plaintiffs did not pray for any such relief. I am equally unable to see how the ingenuity of a party in the wording of the reliefs claimable by him can affect the question of limitation. Their Lordships of the Privy Council in *Malkarjun* v. *Narhari*(3), dealt with some arguments employed by the Bombay High Court in *Bhagavant Govind* v. *Kondivalad Mahadu*(4) similar to the arguments employed in *Sundaram* v. *Sithammal*(2), and remarked that they found it "impossible to grasp the reasoning behind such observations." *Malkarjun* v. *Narhari*(3) arose out of a suit for redemption of the plaint property brought without setting aside a judicial sale under which the mortgaged properties had been sold away irregularly in satisfaction of a money decree against the plaintiffs' predecessor-in-title, the mortgagee having purchased the equity of redemption in such Court-sale. I shall here quote some of the observations of their Lordships in this case. "A sale valid until set aside can be legally and *literally* set aside; and anybody who desires relief inconsistent with it *may and should* pray to set it aside." "If a

(1) (1888) I.L.R., 15 Calc., 58 (P.C.). (2) (1890) I.L.R., 16 Mad., 311.
(3) (1901) I.L.R., 25 Bom., 337 at pp. 350 and 352 (P.C.).
(4) (1890) I.L.R., 14 Bom., 279.

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sale is a reality at all, it is a reality *defeasible only in the way pointed out by law.* . . . In the adoption case just cited from *Jagadamba Chowdhrani* v. *Dakina Mohun*(1), this Board remarked that there was no principle on which simple declarations of invalidity should be barred by the lapse of twelve years after the adoption, while the very same issue, if only mixed up with a suit for the possession of the same property, is left open for twelve years after the death of the widow. Their Lordships make the same remark now. What is the justification for refusing to construe article 12 (*a*) according to its obvious meaning whenever a suitor goes on to pray for that relief which is the object, perhaps the only object, of setting aside the sale? Their Lordships hold *that both the letter and the spirit of the Limitation Act* require that this suit, when looked on as a suit to set aside the sale, should fall within the prohibition of the article."

I think the principle underlying these remarks of their Lordships apply as aptly to a suit for possession of immoveable property, when that relief is inconsistent with a registered lease-deed executed by the plaintiff's predecessor-in-title and I hold that the plaintiff, who desires a relief inconsistent with the said document, may and should pray to set it aside, and that the letter and spirit of article 91 of the Limitation Act require that such a suit should fall within the prohibition of the article. In *Ranga Reddi* v. *Narayana Reddi*(2) a suit for possession of properties conveyed away by the minor's guardian, brought more than three years after the minor attained majority but within 12 years of the sale, was held to be barred by limitation, the learned Judges applying article 44 and holding that article 144 did not apply to that case. It seems to me that, if even a ward is obliged to have an alienation by his guardian set aside by a judicial declaration before he could recover the property, it is an *a fortiori* case where the alienation was made by an adult plaintiff himself or his predecessor-in-title. An alienation by a guardian beyond his powers is really void, whereas an alienation by an adult is only voidable. The principle of the decision in *Ranga Reddi* v. *Narayana Reddi*(2) is accepted as correct in *Madugula Latchiah* v. *Pally Mukkalinga*(3), *Sivaradivelu* v. *Ponnammal*(4) and *Chunder*

(1) (1886) 13 I.A., 84 (2) (1905) I.L.R., 28 Mad., 423.
(3) (1907) I.L.R., 30 Mad., 393. (4) (1912) 23 M.L.J., 404

Nath Bose v. *Ram Nidhi Pal*(1). I am therefore clear that article 91 of the Limitation Act must be applied to this case.

Then there was the further argument of the appellant's learned vakil that article 91 should not be applied to cases of undue influence, as the period from which time runs is stated to be the time when the facts entitling the plaintiff to have the instrument cancelled or set aside become known to him; and as in most cases the facts are not at once known to the person against whom the undue influence is exercised, the legislature could not have intended that article to apply to cases of undue influence. I need only say that the Privy Council did apply that article to the case of undue influence in *Janki Kuwar* v. *Ajit Singh*(2) and even Sir S. SUBRAHMANYA AYYAR in *Roop Laul* v. *Lakshmi Doss*(3) applied that article, though he thought that the time from which the period begins to run might be the cessation of undue influence and not the time when the facts become known to the plaintiff. I am, however, unable to hold that the cessation of undue influence can fix the time from which the period begins to run when the legislature has clearly fixed another period. Formerly, in English Law, the period when a man was in prison was excluded from computation against him. All those rules are now obsolete and we have to look to the plain words of the statute, which is based principally on considerations of public policy, and we cannot allow considerations as to hardship in the case of particular plaintiffs to override the plain provision of the Act. The Limitation Act provides exceptions on the ground of the plaintiff's disability or inability to sue in sections 7, 8 and 13 (the last section relating to the *defendants'* absence from British India and not to the plaintiff's and the first two relating to the plaintiff's being a minor, an insane man or an idiot). As Mitra says: "The exceptions recognised by the legislature are founded on its own idea of expediency, that is, on what it considers expedient upon the balance of convenience and inconvenience. The judge and the lawyer arguing analogically from the reason of the law cannot engraft a new exception upon the rule" I am, therefore, clear that new exceptions based on the fact of the plaintiff's having been in

(1) (1902) 6 C.W.N., 863 (2) (1888) I.L.R., 15 Calc., 58 (P.C.).
(3) (1906) I.L.R., 29 Mad., 1.

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prison or the plaintiff's having been out of British India or his having been under undue influence (or even wrongful restraint at the defendant's instance) for a long time cannot be grafted upon the Limitation Act. In the present case, even if Sir S. SUBRAHMANYA AYYAR's cautious *obiter dictum* as to the cessation of undue influence giving the starting point of limitation be followed, the suit is clearly barred.

I do not think it necessary to refer in detail to the contention of the appellants' learned vakil that the repudiation *in pais* might be made by him any number of years after the date of the transaction (as the Limitation Act does not deal with repudiation *in pais*) and to his further contention that he has a period of 12 years to sue from such repudiation for possession of the lands. In fact his contention came to this, that he could indefinitely postpone the commencement of the limitation period at his pleasure. Even in the exceptional case of a Hindu reversioner, their Lordships of the Privy Council, while holding that he could repudiate the alienation without having it set aside by a suit, did not state that he could take his own time for the repudiation and have 12 years again from the date of repudiation. See *Bijoy Gopal Mukerji* v. *Krishna Mahishi Debi*(1). Their Lordships only held that the repudiation might be within the 12 years granted for bringing the suit for possession, the commencement of limitation for the latter relief having nothing to do with the date of repudiation.

In the result, I agree that the appeal must be dismissed with costs.

(1) (1907) I L R, 34 Calc., 329 (P C).

APPELLATE CIVIL.

Before Sir Charles Arnold White, Kt., the Chief Justice, Mr. Justice Sankaran Nair and Mr. Justice Tyabji.

1913. March 7.

THE SECRETARY TO THE COMMISSIONER OF SALT, ABKĀRI AND SEPARATE REVENUE (PETITIONER),

v.

THE SOUTH INDIAN BANK, LIMITED, TINNEVELLY (COUNTER-PETITIONER).*

Stamp Act (II of 1899), sec. 57, reference under—Article 5, schedule I—Agreement or memorandum of agreement, meaning of—Proposal or offer in writing—Parol acceptance—Whether proposal or offer in writing requires to be stamped—Advance of loan or written declaration by a party as to his property—Entry in register of the declaration—Whether stamp necessary.

Where it appeared on the evidence as to the course of business of a bank, that the bank advanced loans on promissory notes payable on demand or otherwise, but before advancing money it required the borrower to make a declaration in the confidential register in the form thereto annexed as to the property in his possession and to sign the same,

Held, that the entry of the declaration in the register was not an "agreement" or a "memorandum of an agreement" which is required to be stamped under article 5 of the schedule I of the Indian Stamp Act (II of 1899).

Assuming that on the signing of the declaration there was "a proposal" or an "offer," a written proposal or a written offer does not become subject to stamp duty by reason of a subsequent acceptance which is not in writing.

Carlill v. *The Carbolic Smoke Ball Company* (1892) 2 Q.B., 484, *Chaplin* v. *Clarke* (1851) 4 Ex. Rep., 403 and *Clay* v. *Crofts* (1851) 20 L J, C.L., 361, followed.

Quære: Whether the entry in the register amounted to a proposal or offer in writing.

CASES stated under section 57 of the Indian Stamp Act (II of 1899), by H. H. F M. TYLER, the Acting Secretary to the Commissioner of Salt, Abkāri and Separate Revenue.

This is a reference by the Board of Revenue under section 57 of the Indian Stamp Act (II of 1899) to the High Court for a decision on the question of stamp duty on certain entries in the confidential register maintained by the South Indian Bank, Limited, Tinnevelly. The circumstances under which the entries

* Referred Case No. 16 of 1911.

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were recorded in the Bank's register were stated as follows:—"The Bank grants loans generally on promissory notes payable on demand or otherwise. Before advancing money, it requires the borrower to make a declaration in the confidential register in the form thereto annexed and to sign it. Each declaration consists of two parts. The first part gives the description and the value of the borrower's property with the existing liability thereon while the second part contains an unconditional undertaking not to further encumber his property until he repays the loan which he proposes to obtain from the Bank." The Collector of Tinnevelly, before whom the documents in question (namely, the confidential register above referred to) were produced in the course of an income-tax enquiry, impounded the documents as they were considered to be in the nature of agreements liable to stamp duty under article 5, schedule I of the Indian Stamp Act (II of 1899) The Board of Revenue were also of the same opinion, but as the point was not free from doubt it sought for an authoritative ruling from the High Court under section 57 of the Indian Stamp Act (II of 1899).

C. F. Napier, the Government Pleader, for the petitioner.

M. D Devadoss, counsel, for the counter-petitioner.

WHITE, C.J

WHITE, C.J —The only evidence to which our attention has been invited as to the course of business of the Bank is the statement contained in the letter of the Secretary to the Board of Revenue. In that letter, the course of business is thus described: "The bank grants loans on promissory notes payable on demand or otherwise. Before advancing money, it requires the borrower to make a declaration in the confidential register in the form thereto annexed and to sign it." A translation of the form to which the Secretary refers is annexed to the letter. Reading the entries in the register by the light of the statement by the Secretary as to the course of business, I am unable to say that the entries in the register show that the signing of the declaration, the execution of the note, and the advance of money by the bank were one and the same transaction. I express no opinion as to whether, if it appeared on the face of the entries that the signing of the declaration, the execution of the note and the advance of the money were one and the same transaction, the entries would require to be stamped as an agreement or a memorandum of an agreement.

For the purposes of the question we have to consider, I am quite prepared to accept the proposition that, if the document in question is evidence of an agreement, I do not say 'of an agreement and the terms thereof', but if the document is evidence of an agreement—evidence that the minds of the parties when the document was signed were *ad idem* with regard to the particular matter—in that case the document would require to be stamped. Now can we infer from the statement as to the course of the business and the entries in the register that, when the declaration was signed, the minds of the parties were *ad idem* with regard to the matter in question? It has to be observed that, according to the course of business as stated by the Secretary, before the money is advanced the borrower is required to make a declaration. The Government Pleader has suggested that that implies that, if the declaration has been made, the Bank will, as a matter of course, make the advance. I do not think that that implication necessarily arises.

Now can it be said that there is evidence of an agreement which imposes an obligation of any kind on the Bank? I think not. I do not think it can be said, reading these entries, that, on the making of the declaration by the borrower, the Bank were under any obligation, forthwith or within a reasonable time thereafter, to advance money. What is it on which the suggestion is based that we can read in these entries an agreement imposing an obligation on the Bank? The Government Pleader concedes that the only words in the register are the words "Hundi No. 179." We have looked into the original register, and we find that it is arranged in a tabular form. The first column is headed "Hundi No. ". The second column is headed "Date." The first entry in the first column is "179," that is, there is a reference to a hundi of which the number is 179. Then as regards the date in the original register, the year and month are not given, but the day of the month which is stated appears to be the date on which the declaration was signed. Whether that is intended to be the date of the hundi or whether it is intended to be the date of the making of the declaration, is not clear in the original register. Now, we are invited, on the strength of this reference to a *hundi* (amount unspecified), to refer an agreement by the Bank to make an advance on the signing of the declaration and to infer the fact that an advance

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was made. I do not think that, on such evidence, we should be warranted in *making that inference*,—at any rate, for the purpose of deciding whether, under a fiscal enactment, this particular document is one which required to be stamped. Then can it be said that there is an agreement which imposes any obligation on the borrower? It had been suggested that it is an undertaking by the borrower that, in consideration of the Bank advancing money, he undertakes not to encumber the property mentioned in the register. I cannot read the entry in the register as amounting to an agreement such as that. It seems to me so far as I can see from what appears within the four corners of the document—, I do not know whether we are entitled *to go outside it—it seems* to me that what the entry really represents is a statement by the would-be-borrower of the property of which he is in possession in order that the Bank might be informed as to whether he is a man of substance and an undertaking by the would-be-borrower that, if the Bank advanced him money on his promissory note, he would not encumber the property mentioned in the declaration *until the Bank debt was discharged: and that the entries were* made, not for the purpose of recording an existing agreement between the parties or any memorandum of an existing agreement, but for the purpose of enabling the Bank to decide whether in the course of their business, they would make the advance which was contemplated at the time the declaration was signed. No doubt, the execution of a promissory note was in the contemplation of the parties at the time. No doubt, *the coming into* existence of a Bank debt, was in the contemplation of the parties at the time. But for the reasons I have stated, I do not think that this document can be treated either as an agreement or as a memorandum of an agreement. The Government Pleader, suggested that, 'until the Bank debt is discharged' should be read as indicating that the debt had already been incurred by the advance of money on the *promissory note at the time* the declaration was signed. That seems to me to be inconsistent with the statement of the course of business by the Secretary that, before advancing money, the Bank requires the borrower to make a declaration in the form prescribed.

For the purposes of the further argument that the Government Pleader addressed to us I will assume that on the signing *of the declaration there was a "proposal" or an "offer."* The

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Government Pleader has referred to several authorities with regard to the question as to what is sufficient by way of note or memorandum for the purpose of satisfying the 4th section of the English Statute of Frauds. There can be, I think, no doubt that there is a considerable divergence between the line of authorities with reference to section 4 of the Statute of Frauds and the other authorities to which our attention has been called, the authorities under the stamp law. It seems to me that, if there be any conflict between the principles held applicable in these two lines of authorities, we ought to follow the decisions, in connection with the matter which is now before us, that is, the stamp law. If we turn to the authorities under the stamp Acts, I think it may be said to have been established that a written proposal or a written offer does not become subject to stamp duty by reason of subsequent acceptance which is not in writing. In *Carlill* v. *Carbolic Smoke Ball Company*(1), HAWKINS, J., lays down the law thus: "No document requires an agreement stamp unless it amounts to an agreement, or a memorandum of an agreement. The mere fact that a document may assist in proving a contract does not render it chargeable with stamp duty; it is only so chargeable when the document amounts to an agreement of itself or to a memorandum of an agreement already made. A mere proposal or offer until accepted amounts to nothing. If accepted in writing, the offer and acceptance together amount to an agreement; but, if accepted by parol, such acceptance does not convert the offer into an agreement nor into a memorandum of an agreement, unless, indeed, after the acceptance, something is said or done by the parties to indicate that in the future it is to be so considered;" and the learned Judge cites several English decisions. Among the authorities which he cites is *Chaplin* v. *Clarke*(2). In that case, the action was brought by an allottee of shares in a joint-stock company to recover the amount of deposits paid by him. The question arose as to whether a certain document required a stamp. MAULE, J., in the course of the argument, observed, "If the contract was made by the letter of allotment, coupled with the payment of the deposit, then it was not an agreement within the Stamp Act. An offer in

(1) (1892) 2 Q B, 484 at p 490. (2) (1849) 4 Ex. Rep, 403 at p. 407.

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writing accepted by parol does not require a stamp." Then we have another decision of the Exchequer Chamber in *Clay v. Crofts*(1). That was the case of an action by a school-master who published a prospectus, one of the terms being that pupils should not be removed without three months' notice, subject to the payment of one term's fee if they were taken away without notice; a pupil was taken away without notice and the school-master sued for the fee. There it was held that the prospectus was a proposal, and not an agreement, and that no stamp was necessary. PARKE, B., in the course of the argument, said: "A memorandum does not require a stamp where, being a mere proposal in the first instance, it afterwards becomes binding by subsequent matter." Later on, he says, "This was only a proposal at the time the prospectus was produced to the defendant. It becomes an engagement only when it is qualified by an offer to reduce the terms. The defendant then makes a contract by his conduct. The defendant, by adopting the proposal, and sending his sons to school, makes it a contract. There was only a proposal in the first instance and the case is not within the Stamp Act." The Government Pleader has invited us to say that the passage in the judgment of HAWKINS, J., to which I have referred does not represent the law. Speaking for myself, I am not prepared to say this. The conclusion at which I have arrived is that the document in question in the present case does not require to be stamped as an agreement or as a memorandum of an agreement.

SANKARAN NAIR, J. TYABJI, J.

SANKARAN NAIR, J.—I agree.

TYABJI, J.—A declaration in the form appended to the letter of reference, dated the 21st September 1911, cannot, it is admitted, of itself constitute any agreement. In order that an agreement may arise between the parties, such a declaration must be followed by some action on the part of the Bank, indicating an acceptance by it of the terms contained in the declaration. It was argued before us that, when subsequently to the declaration, a loan is made by the Bank, then there is a complete agreement, the terms of which are represented by the declaration, and that the declaration then becomes an "agreement or memorandum of an agreement" within the terms of article

(1) (1851) 20 L.J., Ex., 361

5 of the Stamp Act; and must therefore be stamped as such. According to this contention, therefore, the agreement or memorandum of agreement consists, partly of the declaration and partly of its parol acceptance: the declaration is not, in itself, the whole contract: the declaration when read together with its acceptance by the Bank (such acceptance being implied by the Bank making the loan) forms the contract. The decisions cited by the learned Chief Justice, viz., *Clay* v. *Crofts*(1), *Chaplin* v. *Clarke*(2), *Hadsplet* v. *Yarnold*(3) and *Carlill* v. *Carbolic Smoke Ball Company*(4) show that the Courts in England have held that, under such circumstances, no stamp is necessary in England. The English Stamp Acts, under which the decisions were given, are 55 Geo. III, c. 184 and 54 and 55 Vict., c. 39. The terms of those Acts are not materially different from the terms of the Indian Stamp Act, 1899. I, therefore, agree that the reference should be answered in the negative, as indicated by the learned Chief Justice. The document in question need not be stamped.

THE SECRETARY TO THE COMMISSIONER OF SALT, ABKÂRI AND SEPARATE REVENUE v. THE SOUTH INDIAN BANK, LTD.

TYABJI, J.

(1) (1851) 20 L.J., Ex., 361.
(2) (1849) 4 Ex. Ch., 403 at p. 407.
(3) (1850) 9 C.B., 624 at p. 625.
(4) (1892) 2 Q.B., 484 at p. 490

APPELLATE CIVIL.

Before Mr. Justice Miller and Mr. Justice Sadasiva Ayyar.

1913
February
4, 6, 7 and 10
and
March 5

MUTHUSAMIER AND THREE OTHERS (FIFTH DEFENDANT AND HIS LEGAL REPRESENTATIVES), APPELLANTS,

v.

SREE SREEMETHANITHI SWAMIYAR AVERGAL AND TWELVE OTHERS (PLAINTIFF AND DEFENDANTS NOS. 1 TO 4 AND 6 TO 13), RESPONDENTS.*

Mutt, head of—Lease in perpetuity of mutt properties, validity of—Right of successors to dispute, whether void or voidable—Confirmation by immediate successor—Right of the latter's successor to repudiate the same—Suit to set aside, if necessary—Limitation Act (XV of 1877), arts. 142 and 144—Nature of the estate of a matathipathi (head of a mutt), if an absolute estate or estate for life—Local Boards Act (V of 1884), ss. 63, 66 and 73—Revenue Recovery Act (II of 1864), ss 32 and 42—Sale for arrears of road-cess—No notice to inamdar but to tenant—Sale irregular, not without jurisdiction—Suit to set aside sale—Limitation Act (XV of 1877), art. 12—The Madras Revenue Recovery Act (II of 1864), sec. 59.

The head of a mutt made an alienation by way of a lease in perpetuity in 1872 of some lands which had been granted as inam for the support of the mutt and died in 1890; his immediate successor in the office received the rent reserved by the old lease from the lessee's transferees from 1893 and treated the occupants under the old lease as tenants until his death in 1906; the latter's successor in office brought the present suit in 1908 to set aside the lease and recover possession of the inam lands from the defendants who were sub-lessees or assignees from the original lessee and from the fifth defendant who was a purchaser in a revenue sale of some of the inam lands which were sold in May 1902 for arrears of road-cess due under the Local Boards Act (V of 1884).

Held, that the suit was not barred by limitation, except as regards the lands which were sold in revenue sale.

A permanent lease is in excess of the powers of the head of a mutt.

An alienation by the head of a mutt is not necessarily void and of no effect but is good for the lifetime of the alienor.

A matathipathi (head of a mutt) is not a tenant for life but is in the position of one who, though in a certain sense owner in fee simple, yet in many respects has only the powers of a tenant for life.

* Appeals Nos. 185 and 186 of 1908.

An alienation by the head of a mutt is voidable by the alienor's successors in very much the same way that an alienation by a Hindu widow in excess of her powers is voidable by her successors.

MUTHU-SAMIER v. SREE SREE-METHANITHI SWAMIYAR.

The successor of a matathipathi cannot validate a lease of his predecessor so as to bind his successors; he can validate the lease only for the period during which he holds the office or avoid it altogether.

Abhiram Goswami v. *Shyama Charan Nandi* (1909) I.L.R., 36 Calc., 1003 (P.C.), *Narsaya Upada* v. *Venkataramana Bhatta* (1912) 23 M.L.J., 260, *Vidyapurna Tirthaswami* v. *Vidyanidhi Tirthaswami* (1904) I.L.R., 27 Mad., 435 and *Kailasam Pillai* v. *Nataraja Thambiran* (1910) I.L.R., 33 Mad., 265 (F.B.), followed.

The corpus of the mutt property is inalienable except in special circumstances but the income, subject to the upkeep of the mutt, is at the absolute disposal of the matathipathi (See *Vidyapurna Tirthaswami* v. *Vidyanidhi Tirthaswami* (1904) I.L.R., 27 Mad., 435).

Where owing to the failure of the holders of a portion of the inam lands to pay the local-cess due under the Local Boards Act (V of 1884) the Revenue officers sold some of the inam lands without giving notice of the proceedings to the head of the mutt as the defaulter but notice was given to the tenant in occupation of the lands, the sale was irregular but not one held without jurisdiction, and was consequently liable to be set aside, but the suit to set aside the same was barred as not brought within the time allowed by section 59 of the Madras Revenue Recovery Act (II of 1864) or article 12 of the second schedule of the Limitation Act (XV of 1877).

Ramachandra v. *Pitchaikanni* (1884) I.L.R., 7 Mad., 434, *Chinnasami Mudali* v. *Tirumalai Pillai and the Secretary of State for India* (1902) I.L.R., 25 Mad., 572, *Malkarjun* v. *Narhari* (1901) I.L.R., 25 Bom. 337 (P.C.), and *Bijoy Gopal Mukerji* v. *Krishna Mahishi Debi* (1907) I.L.R., 34 Calc., 329, referred to.

Per SADASIVA AYYAR, J.—The position of a matathipathi is not analogous to that of a Corporation sole under the English Law, because there is this fundamental distinction, namely, whereas the properties belonging to an English Bishop (a Corporation sole under the English Law), including his savings from the revenues of the benefice devolve upon his legal representatives or heirs, the savings of matathipathi devolve upon the succeeding matathipathi.

The procedure laid down by the Revenue Recovery Act (II of 1864) has been incorporated into the Local Boards Act by section 76 of the latter Act; but the substantive provisions in the Revenue Recovery Act (sections 32 and 33) that the sale for the recovery of arrears of land revenue frees the land from all encumbrances and from all favourably rented leases do not apply to a sale under the Local Boards Act.

See *Ramachandra* v. *Pitchaikanni* (1884) I.L.R., 7 Mad., 434 and *Chinnasami Mudali* v. *Tirumalai Pillai and the Secretary of State for India* (1902) I.L.R., 25 Mad., 572.

APPEALS against the decree of C. KRISHNASWAMI RAO, the Temporary Subordinate Judge of Madura, in Original Suit No. 16 of 1908.

The suit was instituted by the present head of the mutt of dapalli Mulukngalu for the recovery of possession of certain

APPELLATE CIVIL.

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The suit was instituted by the present head of the mutt of dapalli Mulukagalu for the recovery of possession of certain

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lands which formed part of the endowment of the mutt in the inam village of Kulapidarichori in the Sivaganga Zamindari. The village was an inam granted to the mutt for the purpose of worshipping the idols of the mutt, for Gopinathaswami *arathanai* and for other expenses including the maintenance of the matathipathis. On the 16th February 1872, the then matathipathi Sukgnana Nidhi Swami leased the village permanently out of pure favour to one *M*, grandfather of defendants Nos. 6 to 10 for an annual rent of Rs.35 exclusive of road-cess and quit-rent payable to the Circar. The said lessee enjoyed the lands till 1884 and then sub-leased it to four persons, viz., defendants Nos. 1 and 2, the father of defendant No. 12 and the father of defendant No. 13. The said Swami died in 1890, and his successor Sri Sudhi Nidhi Swami had as the manager of the previous Swami even previously leased the village permanently to the sixth defendant in cancellation of the lease of 1872 but the latter did not get possession under his lease; but since 1893 the said Sri Sudhi Nidhi Swami received rent from the transferees of the lessee under the old lease of 1872. For default in payment of road-cess for fasli 1311, one-fourth share in the property was sold at revenue sale in May 1902 and was purchased by the fifth defendant. The plaintiff alleged that the permanent lease granted by the two previous swamis (predecessors-in-title of the plaintiff) were not valid and binding on the plaintiff and that the revenue sale was brought about fraudulently and collusively and was irregularly conducted and was not binding on the plaintiff. The plaintiff became the matathipathi on the 18th March 1906 and gave due notices to the defendants cancelling the leases and demanding surrender of possession on the expiry of the fasli. The defendants did not give up possession. Hence the present suit was instituted by the plaintiff to recover possession of the lands from the defendants. The plaintiff also prayed that, if the revenue sale should be held binding on the plaintiff, he should be decreed payment of the balance of sale-proceeds left after payment of the land-cess out of the same. The Subordinate Judge decided entirely in favour of the plaintiff and directed the defendants to deliver possession of the suit lands with mesne profits. Against the said decree, the fourth defendant who was in possession of three-fourths share of the plaint village, and the

fifth defendant (who was the purchaser in the Revenue auction sale of one-fourth share in the said village) preferred separate appeals to the High Court.

R. Kuppuswami Ayyar for second and third appellants.

C. V. Anantakrishna Ayyar for the fourth appellant.

K. Srinivasa Ayyangar and *T. Subrahmanya Ayyar* for the first respondent.

MILLER, J.—In 1872 the matathipathi Sukgnana Nidhi Swamiar made an alienation of the inam in dispute by way of a lease in perpetuity to a Brahman, Mudgala Chariar, who enjoyed it till 1824 and then sub-leased or assigned his interests to the first and second defendants and to predecessors of the twelfth and thirteenth defendants.

The lessor died in 1890 and was succeeded by Sri Sudhi Nidhi Swamiar, a person who had been managing the affairs of the mutt on behalf of his predecessor during the latter years of his life. In 1889, before his predecessor's death, he, on behalf of the matathipathi, leased the inam to the sixth defendant, cancelling the lease of 1872. The sixth defendant was, however, never able to obtain possession, and from 1893 onwards at any rate, the Swamiar was collecting the rent reserved by the old lease of 1872 from the persons then occupying as transferees of the lessee, and in 1903 the litigation about the sixth defendant's lease having come to an end, he treated the occupants under the old lease as the tenants and recovered rent from them apportioned according to the shares held by them in the inam.

In 1906 Sri Sudhi Nidhi Swamiar died and was succeeded by the plaintiff who sues to set aside the lease and recover possession of the inam.

The principal question, a question which arises in both the appeals, is whether the suit is barred by limitation. It is conceded for the appellants that the lease is in excess of the powers of the matathipathi, and their contention is that the suit is barred because limitation must run from the date of the alienation in 1872, the lease being void, or at the latest from the death o Sukgnana Nidhi Swamiar in 1890.

The respondents do not contend for the view taken by the Subordinate Judge, that each matathipathi has what I may call

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an independent life estate in the mutt, and is in no way bound by any prescriptions by which his predecessor may have lost his title. As his view is not now supported, it is sufficient to say that it is not justified by the judgment of BHASHYAM AYYANGAR, J., in *Vidyapurna Tirthaswami* v. *Vidyanidhi Tirthaswami*(1) on which the Subordinate Judge seems to base it.

The Subordinate Judge however also holds that at any rate the lease was good for the lifetime of Sukgnana Nidhi Swamiar and was adopted by his successor and allowed to run on, and this view is that which is now pressed upon us.

We are bound by the decision of the Full Bench in *Kailasam Pillai* v. *Nataraja Thambiran*(2), the effect of which is, as I understand it, to accept generally the view of a matathipathi's position taken by the learned Judges in *Vidyapurna Tirthaswami* v. *Vidyanidhi Tirthaswami*(1).

In that case BHASHYAM AYYANGAR, J., holds that the corpus of the mutt property is inalienable except in special circumstances, but that the produce, subject to the upkeep of the mutt, is at the absolute disposal of the matathipathi and he recognises what is further emphasised by the Full Bench, that there may be properties vested in the matathipathi as a bare trustee.

I may therefore here state my opinion on the evidence that the inam in question now is not so vested in the plaintiff, the inam registers show that it was granted for the support of the mutt, and the oral evidence is not inconsistent with that. The register shows further that at the time of the inam settlement the produce was used for certain purposes and was not of itself sufficient for the upkeep of the mutt, but that it is not sufficient to warrant us in holding that the grant was for those specific purposes. The statement as to the purposes to which the income was then being applied was obviously made as showing that the inam might properly be confirmed for the support of the mutt. I take it therefore that the inam is one in which the matathipathi has, subject to the upkeep of the mutt, that which is called in *Vidyapurna Tirthaswami* v. *Vidyanidhi Tirthaswami*(1) an absolute right to dispose of the income. It may still be open to us in this Court to hold that even this right is not altogether

(1) (1904) I.L.R., 27 Mad., 435. (2) (1910) I.L.R., 33 Mad., 265 (F.B.).

an absolute right, but that is a question which it is not necessary to decide in this case.

There is nothing in this case to suggest that the lease in question operated to the detriment of the upkeep of the mutt. If it did so operate, if it reduced the income below what is necessary for the upkeep of the mutt, it is possible that it might be held to be absolutely void *ab initio*: that may be a difficult question, but fortunately it does not arise. Before us no one has suggested that as a fact the mutt was not adequately maintained by Sukgnana Nidhi Swamiar or by his successor.

Now if the matathipathi has the management of the land and an absolute right to dispose of the income thereof, it seems difficult to withhold from him the right to make for his own life or rather for the period during which he occupies the position of head of the mutt, a lease of a portion of the property for any rent however small which he may deem sufficient; he may, subject to the reservation of a sufficient fund for the upkeep of the mutt, make gifts of the rents received to any one whom he chooses to favour.

It is unnecessary to decide whether there exist any means of preventing him from so dealing with the surplus income as to create a scandal and bring the mutt into disrepute: here all that has been done is to give land on a favourable rent to one who, we may presume, was a sufficiently pious Brahman.

It is suggested that to allow transfers by way of lease to be made by successive matathipathis, each for the period of his headship of the mutt, would be destructive of the institutions of which they are the heads: all the property, it is argued, even the mutt buildings, might be alienated to a Christian, a Muhammadan or an outcaste. It is probable however that inasmuch as the upkeep of the mutt is the first consideration and the matathipathis' interest is subject to that consideration, the law, if any one is entitled to put it in motion, would be able to prevent the transfer of the mutt buildings to any person incapable of continuing or unwilling to continue, to maintain the institution in accordance with the objects and views of its founder and the conditions laid down by him or imposed by usage. And it seems quite immaterial whether the lands are cultivated by a Christian or Muhammadan farmer, provided he is a good husbandman and pays his rent with regularity.

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MILLER, J.

In *Abhiram Goswami* v. *Shyama Charan Nandi*(1), the Privy Council, as I understand the case, adopted what their Lordships call the "most favourable construction" (of the powers of the alienor I presume) and were of opinion that the alienation was good for the life of the alienor; and his immediate successor being insane, prescription would not run against him; and article 134 being inapplicable, the plaintiff was not barred.

Their Lordships do not, it is true, expressly state the case in this way, but I find it impossible to accept the contention on behalf of the appellants that they may have confined their attention to article 134 of the second schedule of the Limitation Act (Act XV of 1877), and have overlooked the possibility of the extinction of the plaintiff's title by reason of article 144. The report of the argument both in *Shama Charan Nandi* v. *Abhiram Goswami*(2) where the High Court's decision is reported, and in *Abhiram Goswami* v. *Shyama Charan Nandi*(1), indicates that that is very unlikely, and I agree with the learned Judges who in *Narsaya Upada* v. *Venkataramana Bhatta*(3) expressed the opinion that their Lordships proceeded on the view that the alienation was good for the life-time of the alienor, and is therefore an authority that an alienation by the head of a religious foundation is not necessarily utterly void and of no effect. In reliance upon this authority and on *Vidyapurna Tirthaswami* v. *Vidyanidhi Tirthaswami*(4) I am prepared to hold in the present case that the lease of 1872, though beyond the powers of the lessor, was a lease which he could not have avoided during his own lifetime.

And I think we may deduce from *Vidyapurna Tirthaswami* v. *Vidyanidhi Tirthaswami*(4) the further rule that the lease is voidable by the lessor's successors, in very much the same way that an alienation by a Hindu widow in excess of her powers is voidable by her successors. Both the learned Judges in *Vidyapurna Tirthaswami* v. *Vidyanidhi Tirthaswami*(4) hold that a matathipathi has an estate very closely resembling that of certain ecclesiastical corporations sole in England. BHASHYAM AYYANGAR, J., at page 457 holds that he is "as much a corporation sole as a Bishop admittedly is" and at page 456 cites

(1) (1909) I.L.R., 36 Calc., 1003 (P.C.). (2) (1906) I.L.R., 33 Calc., 511.
(3) (1912) 23 M.L.J., 260. (4) (1904) I.L.R., 27 Mad., 435.

the decision of Lord HARDWICKE in *Knight* v. *Moseley*(1) and of Sir GEORGE JESSEL in *Mulliner* v. *Midland Railway Company*(2) as showing that the nature of the estate vested in certain corporations sole is "the fee simple qualified and under restrictions in right of the church."

SUBRAHMANYA AYYAR, J., too takes the same view: the Swamiar for the time being is "a real owner and not a mere trustee. He is, as he would be described in England, a corporation sole" (page 442).

Consequently it seems to me that when the learned Judges speak of "an estate for life in the corpus," and of the individuals composing the line of succession as being "in the position of tenants for life they do not mean that the estate is in fact that of a tenant for life." SANKARAN NAIR, J., in *Kailasam Pillai* v. *Nataraja Thambiran*(3) expressly says it is not, but rather what SIR GEORGE JESSEL pointed out in the case to which BHASHYAM AYYANGAR, J., refers "though in a certain sense owners in fee simple yet in many respects they" (certain corporations sole) "had only the powers of tenants for life."

Being "owners of an inheritance" matathipathis could, but for "restrictions and qualifications in right of" their mutts, make leases so as to bind their successors; in this country we have no statute which declares alienation by the head of a mutt to be "utterly void and of no effect" and we are not bound to hold that the restrictions and qualifications which attach to the estate are, as regards their effect, different from those which prevent a Hindu widow from binding her successors by unjustifiable alienations by way of lease. There are no doubt differences in respect of the purposes which will justify an alienation, but there seems to be no reason to hold that the differences extend also to the duration of the lease as a valid transfer. Of course, the successor of a matathipathi will be unable to validate it for all time. In that respect he will be like a female succeeding to a widow, say a daughter succeeding her mother as her father's heir; he will be able to validate the transfer only for the period during which he holds the office, and will be unable to bind his successors, but he will be able to avoid the lease altogether or

(1) (1753) Ambler, 175, s.c. 27 E.R., 118. (2) 1879 L.R., 11 Ch. D., 611.
(3) (1910) I.L.R., 33 Mad., 265.

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MILLER, J.

affirm it for this period, and it will not be absolutely nullified by the death of the alienor.

This being my view of the position, I have to consider the question whether the plaintiff's immediate predecessor, Sri Sudhi Nidhi Swamiar, adopted the lease and ratified it so far as he could ratify it. In 1889, before he became matathipathi, and purporting to act for his predecessor, he gave, as I have already stated, another lease to the sixth defendant: he is not however shown to have done anything to support the sixth defendant's fruitless efforts to obtain possession, and from 1893, if not before that, he accepted rent from the transferees of the original lessee. I cannot find that after he became matathipathi he did anything to indicate an intention to avoid the lease, and on the other hand by accepting rent he did make clear his intention of adopting it. I am therefore able to accept the finding of the Subordinate Judge on this point.

The question of forfeiture does not in these circumstances require decision, and the only one remaining which I find it necessary to decide is one which arises in Appeal No. 185, the fifth defendant's appeal, and not in No. 186.

It is this: owing to the failure of the holders of a portion of the land to pay the local cesses payable by the inamdar, there was a sale by the Revenue authorities, and the fifth defendant became the purchaser. The question is whether he bought the right of the mutt, or only that of the lessee in occupation. I am not able to agree on this point with the Subordinate Judge that the interest of the mutt was not sold.

The facts are that the Deputy Tahsildar gave no notice of the sale to the mutt but issued his notice only to Ramachariar, who had been paying the taxes. Ramachariar told the Deputy Tahsildar that he had sold his interest in the land to Narayanachariar, and the Deputy Tahsildar put up the land for sale as that of Narayanachariar, and the sale-proceeds, after payment out of them of the amount due to the Local Board, were paid over to Narayanachariar: possession of the land was obtained by the fifth defendant, but I do not find anything to show whether after the sale the mutt continued to receive any rent for the land sold.

I have had considerable doubt whether on this evidence I ought not to hold that the Deputy Tahsildar sold and the fifth

defendant bought the interest of the permanent lessee alone. If the fifth defendant had paid rent to the mutt, that would have been clearer, but it is not shown that any rent was paid. On the whole I think the Deputy Tahsildar intended to sell the defaulter's interest, *i.e.*, the interest of the owner, from whom the cesses were due, but thought that the person in occupation was the owner: the purchaser seems to have been under a similar mistake and to have thought that his purchase entitled him to possession as well as ownership.

The result is that the Deputy Tahsildar sold the interest of the defaulter, the mutt, without giving notice to the matathipathi. The sale was irregular and liable to be set aside, but passed the title and at the date of this suit it was too late to set it aside whether section 59 of the Act II of 1864 or article 12 of the second schedule to the Limitation Act be the provision of law applicable to the case.

Appeal No. 185 will, on this ground, have to be allowed and the suit, so far as it is for possession of the land, dismissed; the alternative prayer of the plaintiff for payment to him of the surplus sale-proceeds received by the third defendant may be allowed, and the decree will be modified accordingly and will be that which my learned brother sets out in the judgment which he will now deliver.

Appeal No. 186 is dismissed with costs.

SADASIVA AYYAR, J. SADASIVA AYYAR, J.—Appeal No. 186 is the principal appeal. It has been brought by the fourth defendant, who is in possession of three-fourths share of the plaint village under deeds executed by the owners of the permanent lease right, which permanent lease right was created by the deed of 1872 in favour of Mudgala Chariar by the former *matathipathi*. I entirely agree, for the reasons given by my learned brother in the judgment just now pronounced by him, that the plaintiff was entitled to repudiate the lease as soon as he became matathipathi in March 1906 and to bring his suit for possession within 12 years of his becoming matathipathi. The Privy Council in *Bijoy Gopal Mukerji* v. *Krishna Mahishi Debi*(1), held that a reversioner, after the death of a Hindu widow, was entitled to bring his suit for possession within 12 years of her

(1) (1907) I.L R., 34 Calc., 329 (P.C.).

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SADASIVA AYYAR, J.

death, *repudiating in pais the widow's alienation, and that such* repudiation may be indicated by the institution of the suit itself. The position of a matathipathi is (as pointed out by my learned brother), neither that of an absolute owner (as he cannot ordinarily alienate the corpus), nor that of a *mere tenant* for life (as he represents fully the ownership of the matam properties for certain purposes), and is, therefore, in many ways analogous to that of the estate of a Hindu female heir to a male's estate. A matathipathi has been compared to a corporation sole in *Vidyapurna Tirthaswami* v. *Vidyanidhi Tirthaswami*(1), but (speaking for myself) I do not like to dwell on that analogy, as (unless we are very careful) that analogy might not only mislead us into the complications and difficulties of considering and construing the varied opinions given in English cases about corporations sole, but there is this fundamental distinction, namely, that whereas "the properties belonging to an English Bishop" (a corporation sole under the English Law) "including his savings from the revenues of the benefice, *devolve upon his* legal representatives or heirs," the savings of a matathipathi devolve upon the succeeding matathipathi. I am also not at all sure that as regards even the income of the mutt properties, a matathipathi has as absolute and unqualified power of disposition as a Bishop over the income of his benefice, that is, to squander it away in even immoral or extravagant ways. I should be very loath to come to the conclusion that section 92 (1) of the Civil Procedure Code (corresponding to old section 539) does not apply to mutts, as was suggested during the course of the arguments in these cases, and that the public and the Advocate-General and the Courts of Justice are powerless to stop the wholesale misuse of the income of a charitable and religious institution like a matam. [In a recent case, the right to protect the religious institution was allowed to a mere disciple in management of the mutt by my learned brother and ABDUR RAHIM, J. See *Kasi Chetty* v. *Srimathu Devasikomony Nataraja Dikshitar*(2).] I concur with SUNDARA AYYAR, J., in the judgment in *Narsaya Upada* v. *Venkataramana Bhatta*(3), and I adhere to the opinion expressed therein as to the effect of the three

(1) (1904) I.L.R., 27 Mad., 435. (2) (1913) M.W.N., 181.
(3) (1912) 23 M.L.J., 260.

recent Privy Council decisions beginning with *Abhiram Goswami* v. *Shyama Charan Nandi*(1) discussed therein. In the result, I agree with my learned brother that Appeal No. 186 should be dismissed with costs.

As regards Appeal No. 185, my conclusion is that it should be allowed. This appeal has been brought by the fifth defendant, who purchased the remaining one-fourth share in the village in a revenue sale held for recovery of road-cess due by the matam. It is clear from section 3 (10), section 64 (2) and sections 66 and 73 of the Local Boards Act (V of 1884) that it is the inamdar (matam) that was liable for the road-cess and not any tenant of the matam. The revenue sale was held according to the procedure laid down by the Revenue Recovery Act, such procedure having been incorporated into the Local Boards Act by section 76 of the latter Act. By Exhibit J1(*b*), Ramachariar, on whom notice was served as the defaulter (that is, I take it, as the landlord inamdar), informed the Deputy Tahsildar in April 1902 that he had sold away his "one-fourth share in the village" to Narayanachariar and that the amount should be collected from Narayanachariar, who was in possession of the one-fourth share in the village. Ramachariar did not inform the Deputy Tahsildar that he and Narayanachariar were not landlords but only lessees.

Exhibit J1(*c*) shows that one-fourth share in the village itself was intended to be sold and not merely a lease right therein. I find it difficult to hold that what was sold was the right not of the defaulter but the rights of a lessee of the defaulter, which lessee could not be made legally liable for the road-cess and whose lease rights also could not be made liable, as a sale held for road-cess under the Local Boards Act is not a sale free of encumbrances or undertenures, but only the rights of the landholder as they stood on the date of sale. Though the sale *procedure* was that prescribed by the Revenue Recovery Act, the substantive provisions in the Revenue Recovery Act (sections 32 and 42) that a sale for recovery of arrears of land revenue frees the land from all encumbrances and from all favourably rented leases, do not apply to a sale under the Local Boards Act. See *Ramachandra* v. *Pitchaikanni*(2), and

(1) (1909) I L R, 36 Calc, 1003 (P.C.). (2) (1884) I.L.R., 7 Mad, 434

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Chinnasami Mudali v. *Tirumalai Pillai and the Secretary of State for India*(1). It seems to be better to hold (if it can be fairly so held) that a sale conducted by a Revenue Officer was conducted with jurisdiction, though irregularly, than to hold that it was conducted wholly without jurisdiction. Purchasers in sales held by Revenue Officers for realisation of public taxes should not have their title remaining in jeopardy for long, and public policy seems to me to require that when such sales are attacked long afterwards on the ground of want of jurisdiction in the Officer conducting the sale, such ground should be strictly established by cogent evidence, which seems to me to be wanting in this case. (That the plaintiff himself thought that the sale was intended to convey away the mutt's interest seems to be indicated by paragraphs 8 and 11 of the plaint. In paragraph 8 he calls the sale an "irregular revenue sale" and not a sale held without jurisdiction. In paragraph 11 he prays in the alternative for the balance of the revenue sale amount.) Taking it then, that the sale was held with jurisdiction, the irregularities committed by the Revenue Officer in having the notices served on Narayanachariar (the man in possession), treating him as the defaulter instead of on the real defaulter (the matam), cannot be now made a basis for attacking the sale, as the time fixed by law for the setting aside of the sale on the ground of irregularities [see *Malkarjun* v. *Narhari*(2)], had expired long before the present suit was brought.

In the result, this appeal must be allowed with appellant's costs payable by the plaintiff and the order of the lower Court directing the plaintiff and the third defendant to pay sums of money to the appellant will be set aside. A money-decree will be given in favour of the plaintiff against the third defendant for the sum of Rs. 382-8-0, balance of the revenue sale-proceeds with interest thereon at 6 per cent. per annum from the date of suit and proportionate costs on that amount from the third defendant in the Lower Court. To this extent, the lower Court's decree will be modified.

(1) (1902) I.L.R., 25 Mad., 572. (2) (1901) I.L.R., 25 Bom., 337.

APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Sundara Ayyar.

1913. February 26 and 27 and March 5.

BODI *alias* LAKSHMAKKA AND THREE OTHERS (DEFENDANTS AND SECOND DEFENDANT'S LEGAL REPRESENTATIVE), APPELLANTS IN ALL,

v.

VENKATASWAMI NAIDU AND TWO OTHERS (PLAINTIFFS), RESPONDENTS.*

Hindu Law—Will—Birth of a son subsequent to the execution of the will, effect of—Death of the son before the testator—No revocation of the will under the Indian law—Revocation under the old English law prior to Wills Act—Statutory Law in India—Indian Succession Act (X of 1865), sec. 57—Probate and Administration Act (V of 1881), sec. 4.

A will, executed by a Hindu testator disposing of his ancestral property, is not revoked in law by reason of the birth, subsequent to the execution of the will, of a son who died before the testator.

The rule of English Law that it was essential to the validity of a devise of freehold lands that the testator should be seized thereof at the making of the will, and that he should continue so seized without interruption until his decease, is no longer in force in England in consequence of the enactment of the Wills Act.

The principle applicable in India is that adopted in the English Wills Act that a will has the same effect as if it were executed at the time of the testator's death.

The statutory law of wills in India has not adopted the principle that a will should be deemed to be revoked in consequence of a change in the circumstances of the testator or a change with respect to his rights to the property disposed of by the will. (See section 57 of the Indian Succession Act)

Survivorship has the effect of rendering a will invalid only with respect to the property which the testator could not dispose of at the time of his death. All other dispositions made by him are valid.

Shib Sabitri Prasad v. The Collector of Meerut (1907) I L R, 29 All., 82 and *Subba Reddi v. Doraisami Bathen* (1907) I.L.R, 30 Mad, 369, followed

SECOND APPEALS against the decrees of K. KRISHNAMA ACHARIYAR, the Temporary Subordinate Judge of North Arcot, in Appeals Nos. 132, 130 and 131 of 1910 respectively preferred against the decrees of P. RAMA RAO Pantulu, the District Munsif of Chittoor, in Original Suits Nos. 112, 110 and 111 of 1907.

* Second Appeals Nos 1372 to 1374 of 1911.

BODI v. VENKATA-SWAMI NAIDU.

These appeals arise out of three connected suits brought by different legatees under a will dated 14th March 1900 executed by a Hindu named Nallamma Nayudu. The facts material for the purpose of the questions raised in the Second Appeal are as follow: The testator had no male issue or any undivided co-parcener at the time of his executing the will which devised ancestral properties to which he was absolutely entitled. But subsequent to the execution of the will, the testator had a son and daughter born to him, but both the son and daughter died shortly after their birth, so that the testator had no son alive at the time of his death which took place in 1906. The common contention, raised in all the cases by the defendants in the lower Courts as well as in the High Court, involved the question of law whether the will in question was revoked by reason of the birth of a son to the testator after the execution of the will in 1900 and before his death in 1906. Both the lower Courts decided this question in the negative and decreed the suit. The defendants preferred Second Appeals to the High Court in all the suits.

The Honourable Mr. *T. V. Seshagiri Ayyar* and *V. Bhashyam Ayyangar* for appellants Nos. 1, 3 and 4.

T. R. Ramachandra Ayyar and *T. R. Krishnaswami Ayyar* for the respondents.

[BENSON AND SUNDARA AYYAR, JJ.]

JUDGMENT.—The suit in this case was instituted by a legatee under a will executed by a Hindu, for recovering the properties devised to him. The first defendant is the widow of the testator. Various pleas were raised in answer to the plaintiff's claim but it is unnecessary to refer to them all, as the contentions in this Second Appeal have been confined to the points of law raised. The first of them is that the will ceased to be legally operative, as it related to the ancestral property of the testator and as a son was subsequently born to him, by which he ceased to have any power of testamentary disposition over the property. It is admitted that the testator was quite competent to dispose of the property by will at the time when he executed it. Mr. Seshagiri Ayyar, the learned vakil for the appellant, argues that the cessation of the testator's absolute estate in the property in consequence of the subsequent birth of a son had the effect of revoking the will in law. He relies on the statement of the law in England as laid down in Jarman on Wills, volume I (page 161), with regard to freehold lands before the enactment of the Wills Act. The

learned author says: "Under the old law, it was essential to the validity of a devise of freehold lands, that the testator should be seised thereof at the making of the will, and that he should continue so seised without interruption until his decease." The appellant argues that this is a general principle of law which is applicable to wills in this country, although it is no longer the law in England in consequence of the enactment of the Wills Act. The next sentence in the learned author's treatise however shows that the observation in question is really made only with respect to cases where the testator subsequent to his will alienates the land devised, by his own act.

. It does not appear that he means to state that a change in the nature of the estate possessed by the testator in consequence of supervening external events and not due to his own voluntary act or to a sale directed by a Court would have the effect of revoking the will. Mr. Seshagiri Ayyar refers also to a passage in 40 American Cyclopædia, page 1207 "An involuntary conveyance of property previously devised also removes it from the operation of the will and has the effect of revoking the will to the extent of the property conveyed." It is not clear that this passage goes further than that cited from Jarman, and that the involuntary conveyance referred to is meant to comprise anything more than a conveyance directed by a Court. He refers also to a note at page 1212 where reference is made to *Long* v. *Aldred*(1), in the following terms: "Where a woman executed a will and then married and subsequently became a widow, her will, which was revoked by the marriage, was not revived by the death of her husband." The passage is of no use to the appellant, for it only lays down that, when a will is revoked by an event which has that effect in law, a subsequent event which makes the testator again competent to make a will will not revive it. The revocation having taken effect, the will ceases to have any validity and the testator if he desires to dispose of his property by testament must execute a fresh will. The same rule applies where the revocation of a will is made by means of an instrument executed for the purpose. If such an instrument is itself subsequently revoked the revoked will would not thereby revive. Apart from the fact that the earlier English authorities

(1) 3 Addams Eccl., 48.

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do not seem to go to the extent contended for by Mr. Seshagiri Ayyar we do not think that the rule in question should be applied in this country on the ground that it embodies a general principle of law. In the first place, we cannot accept the argument that the sound rule of law with regard to wills is embodied in the earlier rule and not in the Wills Act. It is admitted that according to the latter, a will is to be understood as speaking at the death of the testator and its validity is to be determined accordingly. 1 Vict. c. 26, section 23, says: "No conveyance or other act made or done subsequently to the execution of a will of or relating to any Real or Personal Estate therein comprised, except an act by which such will shall be revoked as aforesaid, shall prevent the operation of the will with respect to such estate or interest in such Real or Personal Estate as the testator shall have power to dispose of by will at the time of his death." The same principle applies to cases of conversion by operation of law, as, by an Act of Parliament or by an order for sale pronounced by a Court. The reason of the earlier rule was that a will was regarded as a conveyance speaking at the time of its execution but the disposition made thereby to come into effect after the death of the testator. See William's Real Property, page 242, 19th Edition. It was therefore held that, if the property ceased to belong to the testator subsequent to the will it ceased in law to have any operation. The principle applicable in this country is that adopted in the English Wills Act that a will has the same effect as if it were executed at the time of the testator's death. [See section 77 of the Succession Act which lays down the rule as to the interpretation of wills.] Moreover, as pointed out in *Subba Reddi* v. *Doraisami Bathen*(1), the statutory law of wills here has not adopted the principle that a will should be deemed to be revoked in consequence of a change in the circumstances of the testator or a change with respect to his right to the property disposed of by the will (see section 57 of the Indian Succession Act). It cannot be doubted that property which a person does not possess at the time of the will may be validly bequeathed. There is no reason why the same principle should not apply with respect to property which he owns absolutely both at the time of the

(1) (1907) I.L.R., 30 Mad., 369.

bequest and at the time of his death, but with respect to which he loses the right of testamentary disposition during some time between the two dates. In the present case the change resulting by the birth of the son consisted in the conversion of the testator's absolute right in the property disposed of to the fluctuating right of a Hindu co-parcener in joint family property. But the fluctuation eventually resulted in his acquiring absolute estate again before his death. We see no reason for holding that this intermediate alteration in the character of his right in the property should render invalid a disposition which he could validly make, both when he executed the will and when the will came into operation in law. Section 4 of the Probate and Administration Act vests the property of a testator in his executor excepting that which would have passed by survivorship to some other person. The effect of the section is merely to prevent the vesting of the property which the testator had no right to bequeath at the time of his death. Survivorship has the effect of rendering a will invalid only with respect to property which the testator could not dispose of at the time of his death. All other dispositions made by him are valid. Mr. Seshagiri Ayyar was not able to cite any decided case in respect of his contention. On the other hand, there is a dictum of the Allahabad High Court against him [*Shib Sabitri Prasad* v. *The Collector of Meerut*(1).] We hold that the will was not revoked by the subsequent birth of a son to the testator.

The next contention urged for the appellant is that the plaintiff is not entitled to the property before the death of the testator's widow. There is no substance in this contention. The will does not vest any estate in the widow. Her right under it is only to maintenance. The provision that the plaintiff should support the widow during her lifetime and that, after her death, he should perform her funeral rites, and then take full possession of all the properties bequeathed to him means no more than that, during her lifetime, the property should be subject to her right of maintenance. This is made perfectly clear by a later provision in the will.

The last contention raised is that inasmuch as the will provides that, in case a son or sons are born, certain specified

(1) (1907) I.L.R., 29 All., 82 at p. 85.

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properties and all other properties which the testator might subsequently acquire should go to him or them and inasmuch as a son was in fact born, the plaintiff has no right to any property to which the subsequently born son would have been entitled if he had survived the testator. This argument is also baseless. The plaintiff is the residuary heir under the will, and is, therefore, entitled to all the property not validly disposed of in favour of any one else. The will does not divest the plaintiff of any properties in consequence of the birth of the son except of such as might in fact pass to such son. In the result we dismiss the Second Appeals with costs.

APPELLATE CIVIL.

Before Sir Charles Arnold White, Kt, Chief Justice, and Mr. Justice Oldfield.

1913. March 31 and April 24.

T. SITHARAMA CHETTY AND ANOTHER (DEFENDANTS), APPELLANTS,

v.

C. KRISHNASWAMI CHETTY (PLAINTIFF), RESPONDENT.*

Limitation—Admission in a previous suit of liability for a debt—Debt barred at the date of admission—No estoppel from pleading, in a subsequent suit—Plea of limitation, agreement against or waiver of—Estoppel against an act of the legislature—Difference between the English and the Indian law—Limitation Act (Act IX of 1908), sec. 3, arts 74, 75, 80 and 120—Instalment bond—Default in payment of instalments, meaning of—Tender by debtor—Refusal of acceptance by creditor, no default—Waiver.

The plaintiff released his interest in a certain business in favour of the defendants for a consideration of Rs 20,000, for which the defendants executed to the plaintiff on the same date (12th December 1904) a promissory note payable by monthly instalments of Rs. 1,000, the whole sum being recoverable in the event of three successive defaults. After sixteen instalments were paid, the plaintiff refused to receive further instalments tendered by the defendants but brought a suit in August 1906 to set aside the release deed on the ground that it had been obtained by fraud. The suit was dismissed and, on appeal, the dismissal was confirmed on 19th January 1910.

In the Appellate Court an oral application was made on behalf of the plaintiff that a decree might be passed in that suit for the amount of the balance of the instalments. The defendants stated in the Appellate Court that they were always ready and willing to pay the amount but pleaded that no decree could

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* Original Side Appeal No. 51 of 1912.

be passed in that suit for the amount and the Appellate Court refused to pass a decree for the same.

The plaintiff then made a demand on the defendants on 25th January 1910 for the balance of the instalments due on the promissory note and on refusal by the defendants brought the present suit. The defendants pleaded the bar of limitation. The Trial Judge held that the defendants who had admitted their liability for the amount in resisting the plaintiff's application in the previous suit were estopped (though not under section 115 of the Indian Evidence Act) on general principles of law and equity from pleading that the suit for the amount of the instalments was barred by limitation. The defendants appealed:

Held (on appeal):

That the defendants were not estopped from pleading that the suit was barred by limitation.

Rangayya Appa Rau v. *Narasimha Appa Rau* (1896) I.L.R., 19 Mad., 416 *and Khetro Mohan Chatterjee* v. *Mohim Chandra Das* (1913) 17 C.W.N., 518, referred to.

Seshachala Naickar v. *Varada Chariar* (1902) I.L.R., 25 Mad., 55 and *Baij Nath Ram Goenka* v. *Hem Chunder Bose* (1906) 10 C.W.N., 959, distinguished.

Mohummud Zahoor Ali Khan v. *Mussumat Thakooranee Rutta Koer* (1867) 11 M.I.A., 468, explained.

There can be no estoppel against an Act of the Legislature.

Jagadbandhu Saha v. *Radhakrishna Pal* (1909) I.L.R., 36 Calc., 920 and *Abdul Aziz* v. *Kanthu Mallik* (1911) I.L.R., 38 Calc., 512, referred to.

Under the Indian law parties cannot waive or contract themselves out of the law of limitation.

Article 75 of the second schedule of the Limitation Act (Act IX of 1908) is not applicable to the case because there was no default within the meaning of the article on the part of the defendants in the payment of the instalments but there was only a refusal on the part of the plaintiff to receive the instalment tendered by the defendants.

Article 74 of the Limitation Act, and not article 120 was applicable to the case and accordingly the suit as to nine out of the fourteen instalments was barred by limitation.

Difference between the English and the Indian law as to the plea of limitation pointed out.

Per WHITE, C.J.—Assuming there was default, the plaintiff waived the benefit of the provision when he repudiated the agreement which gave him the benefit of the provision.

Per OLDFIELD, J.—Mere absence of completed payments for which the debtors have not been responsible, cannot be treated as equivalent to the default referred to in the first column of article 75.

Where there is no default in payment the question of waiver of the benefit of the provision for immediate payment does not arise.

Article 75 must be held applicable only to the class of suits in which a default has occurred and in which the provision as to waiver may be material.

Article 74 or the more general article 80 is applicable to this case.

ORIGINAL SIDE APPEAL from the judgment of WALLIS, J., in Civil Suit No. 53 of 1910 in the exercise of the ordinary original civil jurisdiction of the High Court.

SITHARAMA v. KRISHNA-SWAMI.

The material facts of the case appear from the judgment of the learned Trial Judge and are as follow:—

This is a suit instituted by the plaintiff to recover certain instalments due on a bond which was executed in his favour by the defendants under an award made in a dispute between the plaintiff and the defendants as to the share which he was entitled to in their business. Under the award the defendants executed a promissory note, which is Exhibit A, dated 12th December 1904, by which the sum of Rupees thirty-thousand (Rs. 30,000) only, with interest at 9 per cent. per annum was payable by monthly instalments of Rs. 1,000, the first instalment being due on the 15th January 1905 and each instalment being payable with interest on the unpaid portion of the principal. If the amount of three instalments be allowed to fall into arrears, the balance of principal and interest then due shall at once be recoverable without reference to the aforesaid provision for instalments. The defendants duly paid the instalments, under the bond including the instalment of April 1906. But the cheque they sent was returned to them. Then they wrote to the plaintiff a letter, Exhibit C, dated 13th May 1906, enquiring the reasons for the refusal; and in answer to that, the plaintiff's solicitors wrote Exhibit D of the 22nd May 1906, in which they said that the whole settlement was a fraud upon the plaintiff and that he was not going to be bound by it. Again in June 1906 the defendants appear to have tendered the instalment for that month which was returned to them and in July they wrote the letter, Exhibit E, mentioning the two instalments having been returned, and asked whether the plaintiff "would not in future receive payments tendered for the instalments of the bond, so that we may cease to go through the farce of sending a cheque every month only to be returned." To that letter they received no answer but in the following month a suit was filed by the plaintiff to set aside the whole award and recover the share of the business to which he claimed to be entitled. The suit was eventually dismissed by a decree of the Appellate Court confirming the decree of this Court. Then the plaintiff demanded the payment which was due to him under the instalment note but payment was refused; when the present suit was filed the defendants pleaded that the claim had become barred by limitation." The learned Trial Judge holding that the plaintiff was entitled to the remaining fourteen instalments observed

that the defendants had committed no default which could have caused the whole sum to be due, and that there was the clearest possible evidence of waiver by the plaintiff and consequently article 75 of the Limitation Act was inapplicable as there was no default which was not waived; His Lordship held further that (a) article 74 of the said Act would apply and the suit in respect of five out of the fourteen unpaid instalments would in any event not have been barred, but that (b) the defendants were estopped from raising the plea of limitation in this suit with reference even to the nine instalments by reason of their admission and conduct in resisting an oral application of the plaintiff on appeal in the previous suit, which was made in the Appellate Court for obtaining a decree for the unpaid instalments due on the note. His Lordship in dealing with the question of estoppel observed as follows:—

"For the purpose of inducing the Appellate Court to reject that application they stated, through their vakil, that, to use the words of the judgment: 'The defendants do not deny their liability to pay and they submit they have been always ready and willing to pay, but they contend that no decree should be passed in this suit.' Now it was perfectly open to the defendants to submit that no decree should be passed in that suit against them on this instalment bond. But was it open to them, for the purpose of getting that application rejected, to state to the Court that they did not deny their liability and had always been ready and willing to pay and then when they got the application rejected upon that basis, as soon as ever they were asked to pay, to turn round and plead that before that application had been made the suit had become entirely barred? No precedent has been cited before me which exactly corresponds to this case, probably, I cannot help thinking, because rarely is ever, have defendants taken so ill-advised a course as they have taken in this case. It seems to me that it would be a lamentable thing if it were open to parties to play fast and loose with the Court in this manner. It may very well be that if the defendants had made no admission at all, exactly the same result would have followed and the application would have been dismissed. But I am not the Appellate Court, I cannot put myself in their place. I cannot say what effect it might or might not have had upon the Court if no such admission had

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been made. I know that the admission was made in the defendants' interest with regard to the application before the Court and that they authorised the eminent vakil who appeared for them to make it, though ever that is challenged in the pleadings. One knows very well that Mr. Sundara Ayyar would never have made such an admission unless he had been authorised to make it. As I have already said, I find myself in this position, that it is impossible for me to say whether the result of the application would have been the same if no such admission had been made.

"It appears to me that it would be opposed to good conscience to allow the defendants who for the purpose of resisting an application against them, have stated that they did not deny liability and were always ready and willing to pay, to turn round immediately afterwards and allege that long before the date of their admission the suit had become barred by limitation. In my opinion there must be a finding for the plaintiff on the third issue,—'Are the defendants estopped from denying their liability as alleged in paragraph 17 C of the plaint?'."

The learned Judge consequently decreed the whole claim in favour of the plaintiff.

The defendants preferred this appeal against the decree to the High Court on its Appellate Side.

K. Srinivasa Ayyangar for the appellants.

T. R. Ramachandra Ayyar and *G. S. Ramachandra Ayyar* for the respondent.

WHITE, C.J.

WHITE, C.J.—The first question for consideration in this appeal is whether WALLIS, J.'s finding on the question of estoppel is right.

The circumstances in which the question has arisen are these:—

On the 12th December 1904 there was an agreement (Exhibit B) between the plaintiff and the defendants under which the plaintiff released to the defendants his interest in a certain business for an amount which had been fixed by arbitrators. On the same date, for the consideration specified in Exhibit B, the defendants executed in the plaintiff's favour a promissory note for Rs. 30,000 payable by monthly instalments of Rs. 1,000. The defendants paid sixteen instalments up to April 1906.

In August 1906 the plaintiff instituted a suit against the defendants in which he asked that the release (Exhibit B) should

be set aside on the ground that it had been obtained by fraud. He declined to accept instalments under the promissory note after April 1906. Fourteen instalments have not been paid. The plaintiff's suit was dismissed. On appeal the Appellate Court declined to set aside the release, but held the plaintiff was entitled to receive a further sum of Rs. 1,400 odd with which, he ought to have been credited on the taking of the account, as representing his share of certain debts which had been collected by the firm. In the judgment their Lordships observe: "Mr. Ramachandra Ayyar further claims payment of the amount due under the promissory note. The defendants do not deny their liability and they submit they have been always ready and willing to pay but they contend that no decree for the same should be passed in this suit and we think they are right." The judgment of the Appellate Court was delivered on the 19th January 1910. On the 25th January the plaintiff demanded payment of the balance of instalments on the promissory note (Rs. 14,000) and then brought the present suit. The defendants pleaded limitation. WALLIS, J., gave the plaintiff a decree for the amount claimed. It was contended that a statement by one of the defendants in an affidavit (Exhibit G) amounted to an acknowledgment within section 19 of the Limitation Act. I agree with the learned Judge that this statement cannot be regarded as an acknowledgment within the meaning of the section.

The learned Judge was not prepared to hold that section 115 of the Evidence Act applied but he held on the facts that the defendants were precluded from pleading the statute. The learned Judge after citing certain passages from Mr. Bigelow's treatise on the Law of Estoppel, puts it thus:—"It appears to me that it would be opposed to good conscience to allow defendants, who for the purpose of resisting an application against them, have stated that they did not deny their liability and were always ready and willing to pay to turn round immediately afterwards and allege that long before the date of their admission the suit had become barred by limitation."

The application which the defendants resisted was an application made on behalf of the plaintiff in the suit of 1906 (in which he sought to have the release set aside) that he should be given a decree for the unpaid instalments on the promissory note. The plaintiff had refused to accept instalments after April 1906,

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because he had repudiated the agreement under which the instalments were payable. It was not a case as it seems to me in which leave to amend, by adding an alternative claim for payment of the instalments, could properly have been given. The learned Judges themselves say that they think the defendants were right in their contention that no decree on the note could be given in that suit. At the time when, as it is suggested, leave to amend might have been given, the right to recover some, at any rate, of the instalments had become time-barred. It was not a case of leave to amend by setting up a claim to a different relief on the same cause of action but by setting up a cause of action wholly inconsistent with that set up in the plaint. As a matter of fact no application for leave to amend was ever made.

In these circumstances since no advantage was obtained and there was no change of position, I feel doubtful whether, the defendants notwithstanding their admission as to their liability with regard to instalments which were time-barred can be said to be precluded on any principle of estoppel from setting up the statute when sued on the note. I do not think it can be said that if the admission had not been made the plaintiff would have pressed for judgment on the note in the suit of 1906 because the parties seem to have agreed, and certainly the Court was of opinion, that judgment on the note could not be given in that suit.

It seems to me, with all respect, that the learned Judge in dealing with this question failed to give due weight to the express provisions of section 4 (now section 3 of the new Act) of the Limitation Act which enacts that every suit instituted after the prescribed period of limitation shall be dismissed although limitation has not been set up as a defence. It is well settled that there can be no estoppel against an act of the Legislature. *Jagadbandhu Saha* v. *Rathakrishna Pal*(1) and *Abdul Aziz* v. *Kanthu Mallik*(2). In England a party relying on the statute must plead it as regards personal actions, other than actions in penal statutes, the defence of the statute must be specially pleaded, even if it appears in the face of the statement of claim that the cause of action accrued out of the limited time. Darby and Bosanquet on the Statutes of Limitations ex. 2, page 542. The law here is otherwise. Mr. Ramachandra Ayyar on behalf of the plaintiff

(1) (1909) I.L.R., 36 Calc., 920. (2) (1911) I.L.R., 38 Calc., 512.

contended that a party could waive the statute if he liked, that the defendant's admission in the suit of 1906 amounted in effect to an anticipatory waiver of the statute as regards any claim which might subsequently be made upon the note and that this being so, the plea of limitation raised in the suit, should on equitable grounds be disregarded. The answer to this, as it seems to me, is that the parties cannot waive the statute by agreement. It would appear to be the law of this country that parties cannot waive or contract themselves out of the law of limitation. The law is thus stated by Mr. Mitra in his book on the Law of Limitation . . . . "An agreement by a person against whom a cause of action has arisen, that he would not take advantage of the statute, cannot affect its operation on the original cause of action, unless indeed such agreement amounts to an acknowledgment of liability which the statute itself recognises as an exception to the rule." Mitra, edition 5, volume I, page 38. Again, on page 86, "Reasons of public policy having dictated the enactment of the Law of Limitation, the Indian Legislature has since 1871, expressly declared that, whether the defence of limitation be pleaded or not, the Courts, whether of first instance or of appeal, are bound to give effect to such law. (See sec. 4, Act IX of 1871, and sec. 4, Act XV of 1877, and the illustrations.) The bar of limitation cannot be waived, and suits and other proceedings *must* be dimissed if brought after the prescribed periods of limitation." And on page 248 "A Law of Limitatian and prescription may appear to operate harshly or unjustly in particular cases, but where such a law has been adopted by the State, for reasons which justify the rule in the majority of cases, it must, if *unambiguous*, be applied with stringency; and no individual case to which these reasons are inapplicable can be expected from its operation. The general good of the community requires that even a hard case should not be allowed to disturb the law. The rule must be enforced even at the risk of hardship to a particular party. The Judge cannot, on equitable grounds, enlarge the time allowed by the law, postpone its operation, or introduce exceptions not recognised by it." The latest decision upon the point would seem to be *Khetro Mohan Chatterjee* v. *Mohim Chandra Das*(1), a case to which Mr.

(1) (1913) 17 C.W N., 518.

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Srinivasa Ayyangar called our attention after the hearing of the appeal. Mr. Ramachandra Ayyar who appeared for the respondent relied on *Rangayya Appa Rau* v. *Narasimha Appa Rau*(1), and *Seshachala Naickar* v. *Varada Chariar*(2), where it was held that when a party has abandoned the plea in the Court of first instance he cannot revive it on appeal in a case where the Appellate Court cannot deal with the plea on facts found or admitted. These cases seem to me to be clearly distinguishable. In the case now before us in the first place, the defendants are said to have abandoned the plea by an admission made in another suit and in the second place, it cannot be said that the plea cannot be disposed of on the facts found or admitted in this suit. Another case on which Mr. Ramachandra Ayyar relied was *Baij Nath Ram Goenka* v. *Hem Chunder Bose*(3). There in an administration suit, a receiver, in the presence of the executor, admitted a creditor's debt and the Court directed the creditor to bring a suit. When the suit was brought the executor pleaded limitation. It was held the executor was estopped. This case seems clearly distinguishable. There the admission was made by an officer of the Court, the Court was of opinion that, but for the admission, the creditor would have brought his suit in time and the suit which he did bring was in pursuance of the direction of the Court. It may be that an action would lie for breach of an agreement not to plead the statute (See *The East India Company* v. *Oditchurn Paul*(4) but that, of course, is a question with which we are not now concerned.

Mr. Ramachandra Ayyar relied on the directions given by the Privy Council in *Mohummud Zahoor Ali Khan* v. *Mussumat Thakooranee Rutta Koer*(5). Their Lordships in that case after considering whether they should dismiss the appellant's suit without prejudice to his right to bring a fresh suit, pointed out that such a suit would probably be met by a plea of limitation which, in the circumstances, would be inequitable.

They then allowed the appellant to amend the plaint. Their Lordships took this course to avoid the raising of a plea of limitation which they considered would be inequitable. They

(1) (1896) I.L.R., 19 Mad., 416. (2) (1902) I.L.R., 25 Mad., 55 at p. 60.
(3) (1906) 10 C.W.N., 939. (4) (1849) 5 M.I.A., 43
(5) (1867) 11 M.I.A., 468.

did not say that this plea, if raised, would have been ineffectual. The fact that they thought it desirable not to give the defendant an opportunity of raising the plea would rather suggest the contrary. Further, the amendment allowed did not set up a new cause of action but merely changed the nature of the relief claimed.

We are only concerned with the question whether on legal or equitable grounds, the Judgment of the learned Judge on this part of the case can be supported. With all respect, after very careful consideration, I have come to the conclusion that it cannot.

It was further contended on behalf of the appellant that as there had been failure to pay one or more instalments in August 1906 default was then made, and under article 75 of the second schedule to the Limitation Act the whole of the claim was time barred.

The note provided that if three instalments were allowed to fall into arrears the *whole amount should be recoverable.* The amendment of the article to which WALLIS, J., refers in his judgment was apparently intended to meet an agreement like the one in the present case.

It was contended for the appellant that default meant nothing more than non-payment and that default was made in June or July 1906. I cannot accept this contention. The defendants sent cheques in May and June which were returned. In July they wrote Exhibit (E) "Please let us know whether we are to understand that you will not in future receive payments tendered for the instalments of the bond, so that we may cease to go through the farce of sending a cheque every month, only to be returned." It is their case that at any rate up to the institution of the present suit they were ready and willing to pay. The defendants, for their own purposes, and in order to get the benefit of the law of limitation, now say there was default in payment of three instalments in July 1906. On these facts I am prepared to hold that there was no default within the meaning of the article. Assuming there was default, it seems to me the plaintiff waived the benefit of the provision in May 1906, or thereabouts, when he repudiated the agreement which gave him the benefit of the provision. It was argued that waiver implied the giving up of an existing right and that the plaintiff could not be heard to say there was an existing right

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since he repudiated the agreement. I do not feel called upon to construe the word "waiver" in this restricted sense. In my opinion the plaintiff gave up the contract and with it the benefit of the provision contained therein. It may be that refraining to sue will not in itself constitute a waiver (see *Seshan Patter* v. *Veera Raghavan Patter*(1), but here the plaintiff did not merely refrain to sue. He repudiated the whole transaction. His subsequent claim on the note after the judgment of the Appellate Court, does not in my opinion preclude him from saying he waived the benefit of the provision. For these reasons I do not think article 75 applies.

On behalf of the respondent it was contended that article 120 applies, but it seems to me the Judge was right in holding that the article applicable is article 74. Under article 74, time runs from the expiration of the respective terms of payment. The right to recover the instalment due in May 1906 became barred in May 1909, the right to receive the instalment due in June 1906 became barred in June 1909, and so on. Thus the right to recover nine out of the fourteen unpaid instalments is in my opinion barred. The claim for the instalments due in February, March, April, May and June 1907, is, in my opinion, not barred.

I would modify the decree of the learned Judge by giving the plaintiff a decree for those five instalments with interest at the contract rate. I would not interfere with the order of WALLIS, J., as to costs and I would make no order as to the costs of this appeal.

OLDFIELD, J.

OLDFIELD, J.—I have nothing to add to the judgment of the learned Chief Justice with regard to the plea of estoppel and confine myself to the question of limitation.

It is not necessary to state the facts again. Appellants' argument is that there was a default in payment of certain instalments in 1906, that it was followed by no waiver, that time consequently began to run in respect of the whole amount still due and that the suit is therefore barred under article 75, schedule I, Act IX of 1908.

Firstly, was there a default in respect of any instalment? Respondents plead one for their own advantage and the plea must be scrutinized closely. There is no dispute as to the facts. There is no doubt that cheques were sent for the instalments due in May and June 1906, but were returned.

(1) (1909) I.L.R., 32 Mad., 284.

In July there was no actual tender. But readiness and willingness to make one for that and the following months are implied in the wording of Exhibit E, in which appellants asked whether they would go through the farce of sending cheques in future; and though respondents' attorneys gave no explicit answer to this enquiry in Exhibit D, the tenor of that communication is clearly that respondent intended to have the contract between the parties avoided and with reference to that intention dispensed with performance thereof in that and subsequent months. Throughout these, the absence of completed payments has been the result, not of any failure, unreadiness or unwillingness on the part of appellants, but of the conduct of respondent alone. The provision for immediate recovery in the promissory note sued on, Exhibit A, must be regarded as introduced for respondent's benefit. The construction of it, required by appellants' contention, is that he could at any time have secured the advantage of a special method of recovery, though his debtors were not in fault; and that cannot have been contemplated by either party to the contract. It follows that the mere absence of completed payments, for which throughout appellants have not been responsible, cannot be treated as equivalent to the default referred to in the first column of article No. 75.

Next as to waiver. The waiver in question in the article is of the benefit of the provision for immediate recovery of the whole amount still due in case of default. The contingency in which that benefit can be taken or waived is the occurrence of a default; and, as I have held, that contingency never arose. It is therefore in my opinion useless to consider whether respondent's conduct, including the sending of the Exhibit D, amounted or could in any circumstances have amounted to a waiver, immediate or prospective.

But, though there was no default, it is clear that there was money due and unpaid and that respondent (apart from limitation) had a cause of action. It remains to decide what article is applicable to it. The authorities cited afford no guidance, since they deal only with cases of default and of waiver of the special provision for immediate recovery. The difficulty arises from the abnormal wording of article No. 75. For in other articles, relating to breaches of an obligation to be fulfilled in accordance with the terms of a contract, as for instance Nos. 53, 63, 65, 66,

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73 and 74, the third column is expressed with direct reference to that date, and not to the conduct of the promisor, as it is in article No. 75, where the word "default" is used. The difference can be material only with reference to the small class of suits, such as the present, in which there is no default. There may have been no intention to make any special distinction or to do more than combine the third column of article No. 74 concisely with reference to the result of the provision for immediate recovery. But in order to apply the article to the present case it would be necessary in consequence of my finding against the occurrence of a default, to understand the word "default" in the third column as meaning simply "failure to pay on the due date," although the wider interpretation above referred to for the word in the first column would have to be retained. This construction would be violent; and I hesitate to adequate it, the provision for immediate recovery having no direct importance in cases such as this, in which there is no default, and its inclusion in Exhibit A affording no reason for allowing respondent a longer time in which to sue than he would have had under any other article in a similar cause of action. Article No. 75, must, I think, be held applicable only to the class of suits to which that under disposal does not belong, those in which a default has occurred and in which the provision as to waiver may be material. I would for these reasons apply article No. 74, which deals with suits on contracts not containing such a provision, or the more general article, No 80. So these two articles are in my opinion applicable, the application of the residuary article No. 120, for which respondent contends, need not be considered.

The application of either article No. 74 or article 80 entails concurrence in the conclusion proposed by the learned Chief Justice; the respondent is entitled to recover the last five instalments, which fell due before the date of plaint. I agree with him also as regards costs. I therefore concur in the decree which he proposes.

APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Sundara Ayyar.

UMADI RAJAHA RAJAI DAMARA KUMARA THIMMA NAYANIM BAHADURVARU, RAJA OF KALAHASTI (PETITIONER—DEFENDANT), APPELLANT,

1913. March 20 and April 15, 16 and 29.

v.

SRI RAJA VELUGOTI SRI RAJAGOPALA KRISHNAYACHENDRA BAHADURVARU, K.C.I.E., MAHARAJA OF VENKATAGIRI AND ANOTHER (RESPONDENT—DECREE-HOLDER AND THE LEGAL REPRESENTATIVE OF THE DECEASED PURCHASER), RESPONDENTS.*

Civil Procedure Code (Act V of 1908), O. XXI, r. 66—Setting aside a sale—Material irregularity in publication of sale proclamation—Understatement of revenue due on the land—Undervaluation of property—Statement of the same by the decree-holder—No objection by the judgment-debtor to the amount of Government revenue or valuation—Mistake of the judgment-debtor as to interest in the property sought to be brought to sale—Duty of Courts in India in conducting sales in execution—Mistake of judgment-debtor due to action of decree-holder—Rule of estoppel judgment-debtor, no application—Right of auction purchaser before and after confirmation of sale—No absolute right for confirmation of sale.

Though it was not incumbent upon the Court to state the value of the property in a proclamation for sale, a materially incorrect statement of the revenue or of the value of the property where the value is stated would constitute an irregularity which if it caused substantial injury to the judgment-debtors, would entitle him to have the sale set aside

Where the judgment-debtor's act in not objecting to the statement of the peishcush and in stating the value on the footing of the peishcush being correctly stated by the decree-holder was due to a mistake of fact regarding what the Court intended to sell, the judgment-debtor should not be held to be estopped from objecting to the sale on the ground of material irregularity.

A party who does not raise an objection to the proclamation which he ought to have raised is estopped from complaining of an irregularity resulting from an erroneous statement which he should have corrected.

Gridhari Singh v *Hurdeo Narain Singh* (1876) 3 I.A., 230 and *Olpherts* v. *Mahabir Pershad Singh* (1882) 10 I.A , 25, referred to.

Arunachellam v. *Arunachellam* (1889) I L R , 12 Mad , 19 (P.C.) and *Behari Singh* v. *Mukhat Singh* (1906) I L.R., 28 All., 273, referred to.

In India an execution sale is an act of the Court Where an act of a Court is induced by the mistake of parties, it may be set aside.

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* Appeal Against Order No. 113 of 1912.

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OLDFIELD, J.

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But the Court will not apply the rule of estoppel to cases where the judgment-debtor was not aware of the facts to which he was bound to object.

APPEAL against the order of L. G. MOORE, the District Judge of North Arcot, in the Civil Miscellaneous Petition No. 810 of 1910, in Execution Petition No. 120 of 1907 in Original Suit No. 2 of 1907.

This appeal arises out of an application made in the District Court of North Arcot under Order XXI, rule 90 of the Civil Procedure Code (Act V of 1908) by the judgment-debtor, the Zamindar of Kalahasti to set aside the sale of Chindaipalli village which was sold in Court auction on the 30th August 1910 and purchased by the agent of the second respondent, the Zamindar of Tuni for Rs. 7,950. The sale was held in execution of a mortgage-decree obtained by the first respondent, the Zamindar of Venkatagiri on a mortgage-bond executed by the Raja of Kalahasti in favour of the first respondent in 1896. It appears that the village of Chindaipalli was given in exchange by the then Zamindar of Kalahasti to one Panuganti Narasimha Rayaningar (the brother-in-law of the judgment-debtor) in exchange for the village of Challagarigalla under an instrument dated 2nd January 1898, which provided that the said P. Narasimha Rayaningar should pay Rs. 507-2-9 annually to the Kalahasti estate from the income of the said Chindaipalli village; but the said P. Narasimha Rayaningar was not made a party to the mortgage-suit. In the draft sale proclamation the appropriate peishcush payable on the village of Chandaipalli was given as Rs. 198-10-8 and the valuation of the village as Rs. 2,800. With his counter-petition the judgment-debtor filed a statement in which the average annual income of the village was stated to be Rs. 619. Taking fifteen times the annual income, the valuation of the village was stated to be Rs. 9,285. The District Judge in his order, dated 3rd December 1908, directed that as regards the peishcush the defendant should give his valuation, both sides having agreed that the defendant's valuation should be accepted as the price to be mentioned in the sale proclamation. The judgment-debtor accordingly filed a statement giving the approximate peshkash of the village as aforesaid at Rs. 188-11-10 per annum. This figure was entered in the sale proclamation the upset price

being fixed at Rs. 9,285. The judgment-debtor's interest was stated in the sale proclamation to be "The Ayan (landlord's) interest and other interest of the judgment-debtor." The judgment-debtor alleged in his application to set aside the sale that the annual beriz of the village was Rs. 4,000, the village being worth Rs. 60,000, and that the judgment-debtor, being under the erroneous impression that what was intended to be sold was merely the right to the annual jodi payable by P. Narasimha Rayaningar in respect of the village under the deed of exchange abovementioned, gave the approximate peshkash as Rs. 188–11–10. The petitioner (judgment-debtor) contended that there was material irregularity in the publication of the sale proclamation which caused serious loss to the judgment-debtor inasmuch as the peshkash was wrongly stated in the proclamation of sale. The learned District Judge refused *to set aside the sale holding that the judgment-debtor was* estopped in law from objecting to the sale proclamation as he was himself responsible for the amount of the peshkash and the valuation specified in the proclamation of sale. The judgment-debtor appealed to the High Court.

The Honourable Mr. *L. A. Govindaraghava Ayyar* for the appellant.

V. Ramesam and *S. Srinivasa Ayyangar* for the respondents.

BENSON AND SUNDARA AYYAR, JJ.

JUDGMENT.—This appeal is against an order of the District Court of North Arcot refusing to set aside the sale of a village Chintapalli held in the execution of a mortgage-decree. The mortgagor judgment-debtor is the Rajah of Kalahasti, and the mortgagee is the Maharaja of Venkatagiri. The purchaser at the Court sale is the Rajah of Tuni. Subsequent to the mortgage which was the subject of the decree, the mortgagor entered into a transaction of exchange with one Narasimha Rayaningar by which Chintapalli was given to Narasimha in exchange for some other property. Under the terms of the instrument of exchange the mortgagor was entitled in addition to the village received by him in exchange to an annual sum of Rs. 507–2–9 from the income of the Chintapalli village. This arrangement was apparently made in order to compensate the mortgagor for the difference in value between Chintapalli and the village given by him in exchange for it. The suit and the decree on the mortgage were subsequent to the exchange, but the mortgagee was of course not bound by

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the exchange. Narasimha Rayaningar, to whom the equity of redemption had passed under the exchange transaction, was not a party to the suit on the mortgage. It may be mentioned in passing that there were several other items of property comprised in the mortgage and the decree passed thereon. In execution of the decree, the mortgagee realised the greater part of the money due to him by the sale of other properties; he then brought to sale Chintapalli village for the recovery of the balance. In the application for sale-proclamation to be settled by Court under Order XXI, rule 66, the decree-holder stated the revenue payable on the village to be Rs. 108-11-10, and estimated its value at Rs. 2,800. There seems to have been some objection raised to the draft of the sale-proclamation, and the judgment-debtor was called upon to give his own estimate of the value of the village. He stated that the value was Rs. 9,285 calculated at 15 times the average annual gross income of Rs 619. It is not now disputed that both the decree-holder and the judgment-debtor were quite mistaken with respect to the value that each gave of the village. The cause of the mistake was clearly this: the decree-holder acted on the footing that what was to be sold in execution of the decree was the mortgagor's right, title and interest as it existed at the time of the sale. This right, it will be observed, was only a rent charge of Rs. 507-2-9 a year in consequence of the transaction of exchange which took place subsequent to the mortgage. As a matter of fact the mortgagee was entitled to bring to sale the mortgagor's right in the village as it stood at the time of the mortgage. Whether the mortgagee was under the mistaken impression that he was entitled to sell only the mortgagor's equity of redemption as it then stood, or whether, on account of his having omitted to make Narasimha Rayaningar a party to the suit as he was bound to do under section 85 of the Transfer of Property Act, he contented himself with bringing the equity of redemption to sale, is not quite clear. It is however certain that the judgment-debtor in giving his own valuation and in stating the annual income and revenue of the village also proceeded on the footing that the mortgagee intended to bring to sale only his rent charge over the village. He calculated the value at 15 times the gross annual income, he took the rent charge and the land-cess which was also payable by Narasimha Rayaningar to the mortgagor to be the annual income and the

peshkash which appears to have been calculated at one-third of the rent charge, in accordance with the usual estimate made of the proportion borne by the peshkash to the actual income, was stated to be Rs. 188-11-10, the same figure as had been adopted by the decree-holder. The right of the defendant in the village to be brought to sale was described as "defendant's *ayan* interest and other interest." The description is undoubtedly vague. The expression "ayan interest" would apparently be consistent with the interest of the defendant as it stood at the time of the mortgage or at the time of the sale. What the words "other interest" mean is not quite clear. Possibly they were put in to denote that all the right, title and interest of the debtor was to be brought to sale, but this again is consistent with the intention that what was to be sold should be the right mortgaged by the judgment-debtor to the plaintiff in the suit or the interest of the mortgagor as it stood at the time of the sale. The price fetched at the auction sale was Rs. 7,950. The judgment-debtor applied under Order XXI, rule 90, to set aside the sale. The application proceeded on the basis that the sale-proclamation would have the effect of passing to the purchaser the entire right of the mortgagor as it stood at the time of the mortgage to the plaintiff. The application was not opposed by the decree-holder, but it was resisted by the purchaser, who maintained that what was sold to him was what was mortgaged to the plaintiff and not merely the rent charge which the judgment-debtor had at the time of the sale. The District Judge has also proceeded on the view that the entire right in the village was sold by it and passed to the purchaser. The arguments in appeal have also proceeded on the same footing. It will be observed that in this view the auction-purchaser would not have a safe title, as Narasimha Rayaningar who had a substantial interest in the village at the time of the suit was not made a party to it, but the purchaser is apparently prepared to take the title to the village with this defect. It is not disputed that the price fetched at the auction sale must be regarded as very much less than the real value of the village. In his petition the judgment-debtor stated that the annual gross income of the village was about Rs. 4,000 and that the value would be about Rs. 60,000. His clerk, the first witness at the enquiry held by the Judge, said that the annual beriz of the village was Rs. 2,000. The second

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witness, another clerk, stated that Narasimha Rayaningar had after the exchange spent about Rs. 4,000 in improving the village. The Karnam of the village, the third witness, gives Rs. 3,400 as the average annual income. The figures given by these witnesses are disputed by the auction-purchaser, and he relies upon a statement made by the judgment-debtor at an earlier stage of the proceedings that the annual income was not less than Rs. 1,200. The value of the village would then be about Rs. 18,000 taking the gross income for 15 years to represent the market value. It is at any rate clear that the price fetched at the sale was much less than the market value of the village. The petitioner requested the lower Court for an adjournment to examine two witnesses who did not attend at the hearing, but the District Judge refused the adjournment, as in the view he took of the case there was no defect or irregularity in the publication and conduct of the sale, and it would be useless for the petitioner to prove that the sale was made for a grossly insufficient price.

The learned vakil for the purchaser does not seriously contend before us that Rs. 7,950 would be an adequate price for the village, his argument being that the sale cannot be set aside as there was no irregularity in publishing and conducting it. The District Judge's order refusing to set aside the sale is based on the ground that the judgment-debtor is estopped from objecting to the statement contained in the sale proclamation regarding the peshkash and the value of the village and from seeking to set aside the sale on the ground of the incorrectness of these statements. Mr. Ramesam on behalf of the purchaser maintains that this view is correct. Order XXI, rule 66, lays down that "the proclamation of sale should specify as fairly and accurately as possible . . .

(b) the revenue assessed upon the estate . . .

(e) every other thing which the Courts consider material for a purchaser to know in order to judge the nature and value of the property."

It is not incumbent upon the Court to state the value of the property in the sale proclamation. It is not denied that a materially incorrect statement of the revenue or of the value of the property where the value is stated would constitute an

irregularity which if it caused substantial injury to the debtor, would entitle him to have the sale set aside.

Now, in India an execution sale is an act of the Court. The title of the purchaser is derived from the Court's act. The Court has, according to rule 66, to give notice to the decree-holder and the judgment-debtor before a proclamation to sell is drawn up. The decree-holder is bound to put in a verified statement of the matters required to be stated in the sale proclamation. The Court is entitled to summon any person whom it thinks necessary and to examine him in respect to any of those matters in order to ascertain correctly the particulars stated in the proclamation.

Although the settlement and publication of the proclamation are acts done by the Court, it is of course largely dependent upon information given by the parties with respect to the particulars to be given in the proclamation. It has therefore been held by the Privy Council and by the Courts in India that a party who does not raise an objection to the proclamation which he ought to have raised and thereby fails in the duty which he owes to the Court should be held to be estopped from complaining of an irregularity resulting from an erroneous statement which he should have corrected. Mr. Ramesam contends that this rule of estoppel must be applied to this case and relies on *Girdhari Singh* v. *Hurdeo Narain Singh*(1), *Olpherts* v. *Mahabir Pershad Singh*(2), *Arunachellum* v. *Arunachellum*(3) and *Behari Singh* v. *Mukat Singh*(4). The question for decision is whether the rule is applicable against a judgment-debtor in the circumstances of the case. It has to be remembered that the mistake in the proclamation was in the first instance due to the action of the decree-holder, who calculated the peshkash on the value of the rent charge possessed by the judgment-debtor at the time of the sale. Now there was nothing to prevent the decree-holder from bringing to sale only the judgment-debtor's equity of redemption as it stood at the time of the sale. Whether he voluntarily intended to get only the judgment-debtor's rent charge sold or whether he was under the impression that that was what he was entitled to bring to sale, it cannot be said that the judgment-debtor was bound to

(1) (1876) 3 I.A., 230. (2) (1882) 10 I.A., 25.
(3) (1889) I.L.R., 12 Mad., 19 (P.C.). (4) (1906) I.L.R., 28 All., 273.

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assume that his right in the village at the time of the mortgage was to be brought to sale in the face of what was indicated by the decree-holder's statement of the peshkash. If the description of the judgment-debtor's interest had been more definite and showed more clearly that the rent charge alone was intended to be sold, no possible trouble could have arisen. The amount realised by the sale was sufficient to discharge the balance due to the decree-holder on his mortgage. The sale would not then be impeachable on the ground that Narasinha Rayaningar was not made a party to the suit. It is the inconsistency between the description of the property to be sold (as it is assumed to be by all the parties concerned in these proceedings) and the statement of the peshkash and the value of what was to be sold that has caused detriment to the judgment-debtor. The description of the judgment-debtor's right was certainly not such as to show clearly that what was to be brought to sale was not the rent charge only. In the circumstances it is hardly reasonable to charge the judgment-debtor with any neglect or failure of duty in proceeding on the footing that what was to be sold was only his rent charge. It is by no means clear that he could not successfully insist that the purchaser has acquired only the rent charge by the sale. But both he and the other parties concerned as well as the lower Court have proceeded on the footing that the description would embrace all that was mortgaged to the decree-holder; and it is in this view that we have to decide whether there was not a material irregularity which the judgment-debtor is entitled to complain of. We are not prepared to hold that the judgment-debtor's act in not objecting to the statement of the peshkash and in stating the value on the footing of the peshkash being correctly stated should be held to estop him from complaining that the statement as applied to his entire right in the village at the time of the mortgage is incorrect and constitutes a substantial irregularity which would vitiate the sale. In the view that this entire right has been sold by the Court, the judgment-debtor's acquiescence in the statement of the peshkash must be clearly held to be due to a mistake of fact regarding what the Court intended to sell. He was certainly not aware that anything more than the rent charge was to be sold. It cannot be held that he was bound to be aware that the Court was going to sell anything more than the rent charge. The occasions relied

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on by Mr. Ramesam do not apply to a case where the judgment-debtor's failure to object to the proclamation was due to a mistake for which he could not be held to blame. If the decree-holder voluntarily chose to sell only the rent charge, though aware that he could sell more, then the judgment-debtor was not bound to object to his doing so. *If*, on the other hand, the decree-holder was under the impression that he could not sell more than the rent charge even then the judgment-debtor was probably under the same mistake; at any rate he was not bound to object to the decree-holder's selling less than what he might be entitled to bring to sale. The Court will not apply the rule of estoppel to cases where the judgment-debtor was not aware of the facts to which he was bound to object—see *Dhanukdhari Singh* v. *Nathuni Sahu*(1), *Basanta Kumari Guha* v. *Ramkanai Sen Poddar*(2), and *Kabidamund Thakur* v *Pirthi Chand Lal*(3). In this case the judgment-debtor was not aware that all his right in the Chindaipalli village as it stood at the time it was mortgaged was intended to be sold, and we are not in a position to say that he ought to have been aware that such was the case. To such a case the doctrine of estoppel will not apply, where an act of a Court is induced by the mistake of parties, it may be set aside—see *Huddersfield Banking Company, Limited* v. *Henry Lister and Son, Limited*(4), *Moore* v. *Peachey*; *The Charing Cross Bank, Garnishee*(5), and Freman on Execution, volume 2, page 1802. The irregularity is the mistake in the proclamation made by the Court. *That mistake was no doubt induced in part by the debtor's* omission to object to the statement of the peshkash and to his proceeding to state the value in accordance with that statement; but his omission was due to a mistake for which he cannot be held responsible, as already pointed out. Mr. Ramesam contends that, as against his client who is the auction-purchaser, the judgment-debtor cannot rely on his failure to object to the proclamation being due to the act of the decree-holder, but a purchaser at a Court auction has no absolute right to have the sale confirmed where there is an irregularity in the publication or the conduct of the sale, although he could in no manner be responsible for the irregularity. The sale being the act of the Court, the

(1) (1907) 6 C.L.J., 62 at p. 67.
(2) (1911) 13 C.L.J., 192.
(3) (1911) 14 C.L.J., 316.
(4) (1895) 2 Ch., 273.
(5) (1892) 66 L.J., 198.

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auction-purchaser has no absolute right to its being confirmed where there are irregularities in the Court's action. There is a considerable difference between an auction-purchaser's rights before and after the confirmation of the sale. Where there has been substantial irregularity in publishing or conducting a sale and material injury has been suffered by the judgment-debtor in consequence, the auction-purchaser has no right to the confirmation. We must therefore reverse the order of the lower Court and set aside the sale. The case is not one in which we should make any order as to costs either in this or in the lower Court. The purchase money should be refunded to the auction-purchaser.

APPELLATE CIVIL.

Before Mr. Justice Sankaran Nair and Mr. Justice Sadasiva Ayyar.

1912. December 9 and 1913 April 30.

NARAYANA AIYAR AND THREE OTHERS (DEFENDANTS (NOS. 3 TO 6), APPELLANTS,

v.

RAMA AIYAR AND TWO OTHERS (PLAINTIFF AND DEFENDANTS NOS. 1 AND 2), RESPONDENTS.*

Limitation Act (XV of 1877), arts. 120 and 125, applicability of—Suit by one adopted later to set aside his maternal grandmother's alienation after her death—Attestation and ratification by next presumptive reversioners to a female's alienation, effect of.

A Hindu widow sold the suit properties in 1881 and 1889 and died in 1899. Her daughter adopted the plaintiff in 1903 and he sued in 1907 to set aside the sales during the life-time of his adoptive mother.

Held, that (*a*) the suit was not barred, (*b*) that article 120 and not 125 of the Limitation Act was applicable and (*c*) that the cause of action for the plaintiff to question the sales arose only from the date of his adoption when alone he became a reversioner.

Of the two sales in this case, the first was assented to by the daughters and attested by the next male reversioner, the second was acquiesced in by the daughters and in 1894 ratified by the then presumptive male reversioner.

Held, that the plaintiff was estopped under the circumstances from questioning the sales as a *reversioner.*

For the application of article 125 of the Limitation Act, (*a*) the suit must be one brought *during the life time* of the alienating female and (*b*) the plaintiff

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* Second Appeal No. 62 of 1912.

must be the person entitled to the possession of the land if the female died at the date of the institution of the suit. NARAYANA v. RAMA.

Chiruvolu Punnamma v. *Chiruvolu Perrazu* (1906) I L R., 29 Mad., 390 (F.B), explained and distinguished.

Gajjala Veerayya v. *Gajjala Gangamma* (1912) M.W N., 912, *Abinash Chandra Mazumdar* v. *Harinath Shaha* (1905) I.L.R, 32 Calc, 62 at p. 71 and *Govinda Pillai* v. *Thayammal* (1905) I.L R., 28 Mad, 57, followed

Per SADASIVA AYYAR, J—Consent to an alienation by the next reversioner and a ratification of past alienations stand on the same footing.

Effect of attestation by a reversioner to a female's alienation considered.

SECOND APPEAL against the decree of F. D. P. OLDFIELD, the District Judge of Tinnevelly, in Appeal No. 654 of 1910, preferred against the decree of S. SUBBAYYA SASTRI, the Additional District Munsif of Tinnevelly, in Original Suit No. 19 of 1909.

The defendants Nos. 3 to 6 who are the alienees of the suit properties preferred this second appeal. The other facts of the case appear from the judgment of SADASIVA AYYAR, J.

T. R. Ramachandra Ayyar for the appellants.

C. V. Ananthakrishna Ayyar for the respondents.

SADASIVA AYYAR, J.—The defendants Nos. 3 to 6 are the appellants before us. The suit was by a reversioner for a declaration that the two alienations of 1881 and 1889 made by a widow, Aramvalarthammal, under Exhibits I and II *(b)* respectively, are invalid against the minor plaintiff. Aramvalarthammal died in 1899, and the next reversioners are her daughters, defendants Nos. 1 and 2. The plaintiff is the adopted son of the first defendant, having been adopted in May 1903. The suit was brought in 1907 within five years of the plaintiff's adoption but more than 12 years from the dates of the alienations by the plaintiff's maternal grandmother, Aramvalarthammal. The Lower Appellate Court decreed the plaintiff's suit on the following findings and reasonings :— SADASIVA AYYAR, J.

(a) The alienations under Exhibits I and II *(b)* were not made for purposes binding on the reversioner.

(b) Though the sale under Exhibit I was attested by the next presumptive male reversioner (Aramvalarthammal's brother) and though the next presumptive female reversioners, the daughters, assented to the alienation, and though the male reversioner, Chinna Aiyavu Ayyar, who attested Exhibit I, owned the land next to the alienated land and was using the well on the land sold, it cannot be held that there is anything to show

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affirmatively that Chinna Aiyavu Ayyar understood or considered the merits of the sale-deed, Exhibit I, and hence his mere attestation is useless to show that he consented to the alienation.

(c) Exhibit II (*b*), the alienation of the plaint properties in 1889 by Aramvalarthammal, is not attested by the next male reversioner though acquiesced in by the female reversioners, the daughters But the alienee under Exhibit II (*b*) resold the land and a house-site to Aramvalarthammal and her daughter, the second defendant, in 1893 under Exhibits B and II (*a*), and the site alone was sold under Exhibit II in 1894 by the second defendant to the third defendant. The plaintiff's first witness who was the male presumptive reversioner on the date of Exhibit II has attested it. He has been examined as a witness and the learned District Judge remarks that the inference from his attestation is stronger than the inference from the attestation of Chinna Aiyavu Ayyar to Exhibit I and that nothing directly impairing the effect of this attestation was suggested to him by the plaintiff or elicited from him. The attestation of Exhibit II, which alienates only the site, by the plaintiff's first witness does not however involve an inference that the plaintiff's first witness ratified the previous alienation under Exhibit II (*b*) of both the land and the site mentioned in the second schedule to the plaint. Even as regards the site it is not established that his consent was with full notice and appreciation of the facts. Hence even as regards the site in the second schedule, the alienation is invalid.

The Lower Appellate Court did not deal with the question of limitation, but the District Munsif held—

(*a*) that article 125 of the Limitation Act does not apply because it relates to a suit filed during the life of a female alienor by the nearest reversioner and in this case, Aramvalarthammal had died before this suit was brought ;

(*b*) that the article applicable is article 120, which prescribes a period of 6 years from the date on which the right to sue accrues ;

(*c*) that though the alienations took place in 1881 and 1889, the right to sue accrued to the plaintiff only when his adoption took place and he became the daughter's son and next male reversioner in 1903, and that the suit brought in 1907, within 6 years, is therefore not barred. The District Munsif further remarked that the plaintiff derived his title as reversioner directly

from the last male owner (his maternal grandfather) and not through his adoptive mother, the first defendant.

The defendants Nos. 3 to 6 who are the appellants before us contend--

(1) that the suit is barred by limitation as the cause of action for all reversioners, even though they may not have been in existence, arose on the date of alienation and all had only either 12 years or 6 years from the date of alienation to bring their suit,

(2) that the attestation of the next presumptive reversioner in Exhibit I in 1881 should, in the circumstances, be treated as his having consented to the alienation and hence the alienation is valid against the reversioner,

(3) that the attestation of Exhibit II by the plaintiff's first witness validates the alienation under Exhibit II (*b*) of both the site and the land mentioned in the second schedule, and

(4) that such attestation of Exhibit II in any event validated the alienation of the site sold under Exhibit II (and alienated under Exhibit II (*b*) along with another land) as against the plaintiff.

First on the question of limitation ; this divides itself into three sub-heads—

(*a*) whether article 125 is applicable,

(*b*) whether article 120 is applicable, and

(*c*) when did the cause of action arise to the plaintiff, whether under article 125 or under article 120.

As regards the first sub-head, it is clear that the plaintiff does not come under the designation of a person who sues to have an alienation of a land made by a Hindu female declared to be void, *while being himself the person who, if the female died on the date of instituting the suit, would be entitled to the possession of the land.* Article 125 therefore does not apply to the present case on two grounds, viz., that the suit is not brought during the life of the alienating female and again that the plaintiff was not entitled to the possession of the land at the date of instituting the suit, as his mother and his aunt were alive. The next question is what other article applies to the plaintiff's suit. As no other specific article applies, article 120 must apply. The last question under this heading of limitation is, when does the right to sue accrue under the third column of article 120?

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Now it has been finally decided that (unless, as in the exceptional case of *Muthuswami Mudaliar* v. *Masilamani*(1), the presumptive reversioner brings the suit *expressly on behalf of all the reversioners*), no succeeding presumptive reversioner claims under a deceased earlier presumptive reversioner and that each reversioner has got his own separate cause of action to set aside the widow's alienation. The latest case in which many of the authorities have been considered and the above proposition has been re-affirmed is *Gajjala Veerayya* v. *Gajjala Gangamma*(2). But it is argued that there is a dictum in the Full Bench case of *Chiruvolu Punnamma* v. *Chiruvolu Perrazu*(3), that "an unauthorised alienation by a qualified owner gives rise to a cause of action for a declaratory suit from the date of the alienation to *all the reversioners*." In the first place, the dictum is clearly *obiter* because the question referred to the Full Bench in that case was only whether the decree in a suit by the presumptive reversioner *to set aside an adoption is res judicata* against succeeding presumptive reversioners. In the second place, the dictum that an unauthorised alienation by a qualified owner gives rise to a single cause of action to all the reversioners cannot be considered to mean that it gives a cause of action to remote or presumptive reversioners *who were not in existence on the date of the alienation*, though, as regards remoter reversioners who *were* alive on the date of alienation, their causes of action also might have arisen on such date. In *Gajjala Veerayya* v. *Gajjala Gangamma*(2), SUNDARA AYYAR, J., and myself held that, as the remoter reversioner was a minor on the date of the alienation, though he was in existence, he had three years from his attaining majority (reading article 125 and section 7 of the Limitation Act together) to bring his own suit to set aside the alienation by the widow, though his father, who was the next presumptive reversioner on the date of the alienation, might have been barred from bringing such a suit. As said by MUKERJEE, J., in *Abinash Chandra Mazumdar* v. *Harinath Shaha*(4), "It is only reasonable to hold that the right of any reversioner to sue for a declaration cannot accrue before he is born. This view is in accord with that taken

(1) (1910) I.L.R., 33 Mad., 342.
(2) (1912) M.W.N., 912.
(3) (1906) I.L.R., 29 Mad., 390 at p. 411.
(4) (1905) I.L.R., 32 Calc., 62.

in *Govinda Pillai* v. *Thayyammal*(1)." Thus even holding that the *obiter dictum* of the Full Bench in *Chiruvolu Punnamma* v. *Chiruvolu Perrazu*(2) should be followed, it might properly be restricted to cases where the reversioner who brings a suit to set aside the alienation *was in existence on the date of the alienation.* See also *Govinda Pillai* v. *Thayammal*(1), which followed *Bhagwanta* v. *Sukhi*(3). It might be argued that, if each presumptive reversioner who was *not* in existence on the date of the alienation had six years from the date when his right to sue accrued (*i.e.*, when he came into existence) to set aside the alienation, numerous suits might be brought as each such presumptive reversioner came into existence. Practically, however, it is very unlikely that, during the remainder of a widow's lifetime after the date of her alienation, more than a very few distinct sets of presumptive reversioners who were not in existence on the date of her alienation would come into existence. As I have said in *Garikapatti Paparayudu* v. *Rattammal*(4): "The very object of allowing a suit by a contingent reversioner has been unfortunately (if I may be permitted to say so) defeated to a very large extent by the decisions which are binding on us to the effect that the decree passed in favour of, or against such, a reversioner is not binding on a remoter reversioner. I might be permitted to hope that the Legislature might see fit to enact that the decree in a suit *bonâ fide* brought and litigated by the then nearest reversioner is binding on the remoter reversioners." But so long as the law treats each presumptive reversioner as having a separate right to sue in respect of setting aside alienations by the widow, the inconvenience of allowing different suits by separate sets of reversioners cannot be avoided. We must therefore hold that the plaintiff's suit is not barred by limitation.

The next question which I shall take up is whether the attestation of Exhibit II by the plaintiff's first witness validated the alienation of only the site to which it relates or whether it also validated the alienation of the land which along with the house site had been alienated under Exhibit II (*b*). This, of course, assumes that the attestation by the plaintiff's first witness is proof of ratification by him of the alienation under Exhibit II (*b*) of the site alone or of the site and the land. The question of

(1) (1904) I.L.R., 28 Mad., 57; s.c. 14 M.L.J., 209.
(2) (1906) I.L.R., 29 Mad., 390 (3) (1900) I.L.R., 22 All., 33.
(4) (1912) M.W.N., 1176 at p. 1179.

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in Court, he did not know that he had attested the document, should be believed in the circumstances. In *Ahmedabad United Printing and General Agency Company, Limited* v. *Ardesir Kavasji*(1), the learned Judges say "We have, however, the fact that he (Eruchsha) was an attesting witness. He was a Government servant who must have understood the effect of the deed which he was attesting and which was executed by his brother who was in *vahivat* of all the family properties." And then the learned Judges held that, considering the surrounding circumstances, he was bound by the mortgage-deed which he had attested. The effect of the attestation was also considered in *Chunder Dutt Misser* v. *Bhagwat Narain Thakur*(2), and the learned Judges held that, under the circumstances of that case, the party's attestation may support the inference that he was a consenting party, the attestor in that case not being a mere remote relative as in *Raj Lukhee Dabea* v. *Gokool Chunder Chowdhry*(3), but the next presumptive reversioner.

On the whole, I see no sufficient reason to recede from the opinion I expressed in *Kandasami Pillai* v. *Rangasami Nainar*(4), that a presumption is raised, when an adult man of full mental capacity attests a deed *and when such a man has admittedly a tangible interest in the property affected by the deed*, that his attestation has been taken as a proof of his consent to and knowledge of the correctness of the recitals in the deed and it lies upon the person, who contends that such an attestor did not know all the recitals in the deed and did not consent to the alienation made by the deed, to prove the contrary. I do not intend to lay down that the attestation of a *casual* witness *who had then no interest in the property affected by the deed* must estop him for all time and when he afterwards acquires an interest in the property affected by the deed. In the present case, the circumstances clearly raise the presumption that the next reversioners did consent to the respective alienations under Exhibits I and II. As regards Exhibit II, the reversioner who attested it has been examined in the case and the District Judge says "the inference from the attestation is so far stronger as regards Exhibits II and II(b) that the attestator has been examined and that nothing directly impairing the effect of

(1) (1912) I.L.R., 36 Bom., 515.
(2) (1898) 3 C.W.N., 207.
(3) (1869) 13 M.I.A., 209.
(4) (1912) 23 M.L.J., 301.

his attestation was suggested to him or elicited." Instead of, however, giving the natural effect to the attestation, the learned District Judge says that it was for the fourth defendant to have elicited that the attestation also involved the conscious assent on the part of the attestor. I think the burden of proof lay on the other side. Not only this, the learned District Judge overlooked the fact that the attesting witness, the plaintiff's first witness, says: "The third defendant asked me to attest Exhibit II and I attested it *as he said that he would build a house thereon next to mine which would be a security to my house.*" This conclusively shows his knowledge of the contents of the deed and that he gave even his consent to a substantial house being built upon the site alienated by Exhibit II. I therefore hold, differing from the District Judge, that the alienation of the property in the first schedule and of the site in the second schedule to the plaint cannot be questioned by the plaintiff as those alienations were consented to and ratified by the then presumptive male reversioners and by the female reversioners. The District Judge's decree should be modified by allowing the plaintiff's claim only as regards such of the plaint properties as are not covered by Exhibits I and II. As it appears that there are no properties in the plaint schedules not covered by Exhibits I and II, the suit will stand dismissed. The parties will bear their respective costs in all the Courts.

SANKARAN NAIR, J.—I agree. The reversioner who is really prejudiced by the widow's alienations will be ascertained only after the death of the widow and on the death of the last surviving daughter. Nevertheless it has now been settled that all persons who may possibly live to succeed her have a right of suit, under certain circumstances, to declare the alienation invalid and that one possible reversioner does not represent another in such suits. The plaintiff is admittedly such a reversioner and his right to sue as such is not denied, though he became a member of this family by adoption only after the alienations. If he has the right of suit, it is obvious that limitation can run against him only when he could sue.

As to the effect to be given to attestation by a witness, it will depend upon the facts of each case. In this case I agree with my learned colleague as to the inference to be drawn from it.

PRIVY COUNCIL.*

1915. February 3 and March 15.

VENKATANARAYANA PILLAI (PLAINTIFF),

v.

SUBBAMMAL (DEFENDANT).

[On appeal from the High Court of Judicature at Madras.]

Appeal to Privy Council—Death of plaintiff-appellant—Suit to set aside adoption by widow as invalid and as affecting reversionary interest of plaintiff—Right of contingent reversioners to be joined as plaintiffs in presumptive reversioner's suit—Civil Procedure Code (Act V of 1908), O. I, r. 1—Suit to set aside alienation by widow—Revivor of appeal—Substitution of parties on record—Survival of right to sue.

The appellant brought a suit against the respondents to set aside the adoption of the second respondent by the first respondent as being illegal and invalid under the Hindu Law, and for a declaration that it did not affect his interest in the ancestral estate of one V of whom he claimed to be the nearest reversionary heir. The suit was dismissed by both Courts in India, and the appellant filed an appeal to His Majesty in Council, pending which he died. In an application by his grandson as the sole surviving member of his grandfather's family, and also on his death the next reversionary heir to the estate of V for an order that his name be substituted on the record for that of the appellant, and that the appeal be revived.

Held, that the petitioner was entitled to the order asked for under Order I, rule 1 of the Civil Procedure Code (Act V of 1908), which declares the persons who may be joined in one suit as plaintiffs. A suit to set aside an adoption is brought by the presumptive reversioner in a representative capacity and on behalf of all the reversioners. The act complained of is to their common detriment, just as the relief sought for is for their common benefit. Under the above rule the contingent reversioner may be joined as plaintiff in the presumptive reversioner's suit, and, if so, it follows that on his death the "next presumable reversioner" is entitled to continue the suit begun by him.

The two kinds of suits which the Indian law permits to be brought in the life-time of a female owner by reversioners for a declaration that an adoption made by her is invalid, or an alienation effected by her is not binding against the inheritance [see articles 118 and 125 of schedule I of the Limitation Act (IX of 1908)], although they differ in character, will be found to be the same in both instances as regards the position of the plaintiffs so far as the point for decision is concerned, and the test of *res judicata* is irrelevant to the inquiry whether the contingent reversioner is entitled to continue the suit commenced by the presumptive reversioner. It is the common injury to the reversioners which

* *Present*:—Lord DUNEDIN, Lord SHAW, Sir GEORGE FARWELL, Sir JOHN EDGE and Mr AMEER ALI.

entitles them to sue, and the question is whether the "right to sue survives" apart from any consideration whether or not the next presumable heir is the "legal representative" of the deceased presumptive reversioner.

PETITION for an order that the name of the petitioner be substituted on the record of the appeal for that of the appellant, and that the appeal be revived.

The suit which gave rise to the appeal was brought by Venkatanarayana Pillai, the appellant, in the High Court at Madras in its ordinary *Original Civil Jurisdiction against* the respondents as defendants, to set aside the adoption of the second respondent by Subbammal, the first respondent, as being illegal and invalid under Hindu Law, and for a declaration that it therefore did not affect his right in the estate of one Venkatakrishna Pillai, the deceased adopted son of the deceased husband of the first respondent of whom he claimed to be the next reversionary heir. The respondents contested the suit, the defence being that Subbammal had her husband's authority to make the adoption under his will, dated 8th September 1889. As to that the appellant alleged that the authority to adopt had been revoked by a later will of 21st March 1890 which had been admitted to probate. The construction of these wills was the main issue in the suit; and the Court of first instance had, by a decree of 26th March 1909, held that the later will did not revoke the authority to adopt given by the earlier will, and accordingly dismissed the suit; which decision was affirmed by the Appellate Court on 12th March 1912. Leave was granted by the High Court to appeal to the Privy Council, and this appeal was admitted on 6th November 1913. The appellant died on 11th November 1913, leaving the petitioner Kuppusami Pillai, his grandson, the sole surviving member of his family, and also the next reversioner to the estate of Venkatakrishna Pillai.

Sir R. Finlay, K.C., and *B. Dube* for the petitioner contended that he was entitled to be brought on the record as legal representative of the deceased appellant and allowed to proceed with the appeal. If the appeal be not prosecuted, all the reversioners including the petitioner would be estopped by the decision of the High Court in any suit they might bring. In *Arunachalam* v. *Vellaya*(1) a decision referred to by the High

(1) (1912) 23 M.L.J., 719.

VENKATA-NARAYANA PILLAI v. SUBBAMMAL.

Court in its report of the present case to this Board it was held that the appeal in such a case as this abated. It was submitted however that that case was wrongly decided, and that the right to sue survived, as was held by a Full Bench in *Chiruvolu Punnamma* v. *Chiruvolu Perrazu*(1) where a distinction was drawn between suits to set aside an adoption and suits to set aside alienations by qualified owners. That decision, it was submitted, was right.

DeGruyther, K.C., and *Kenworthy Brown* for the respondents, contended that on the death of the appellant the suit abated, and relied on *Arunachalam* v. *Vellaya*(2), as having been rightly decided. The Judges by whom it was decided were parties to the decision in *Chirovolu Punnamma* v. *Chirovolu Perrazu*(1), but that was decided on the special facts referred to the Full Bench. There was a consensus of opinion in India that a suit by one reversioner did not bind the other reversioners. During the life of the widow there was no one reversioner who had any estate vested in him. Each one had merely, a possible right of succession to the deceased husband's estate, if he survived the widow, and he claimed by reason of his relationship to the husband, and not through any other of the reversioners. His right was not one transferable under the Transfer of Property Act (IV of 1882). His suit for a declaration of right was governed by section 42 of the Specific Relief Act (I of 1877); see explanations (e) and (f) of that section; and by section 43 the declaratory decree is only binding on the parties and persons claiming through them. His right to sue was only a personal right, and did not survive: Order XXII, rule 1, therefore, of the Civil Procedure Code (Act V of 1908) was not applicable. The right of the petitioner was not the same as that of the appellant. Substitution of parties was governed by the Civil Procedure Code, 1908, Order IV. So far as his cause of action was concerned, the petitioner was not the "legal representative" of the appellant within the meaning of section 2, sub-section (11) of the Civil Procedure Code. A person who claimed not through the deceased plaintiff but in his own right, could not, it was submitted, be said to represent the deceased reversioner, and all the other possible reversioners. All the

(1) (1906) I.L.R., 29 Mad., 390. (2) (1912) 23 M.L.J., 719

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Courts in India have decided that in case of a suit to set aside an alienation on the death of a widow by a reversioner the suit abates on the death of the plaintiff, and the right to carry on the suit does not survive to any other reversioner. Reference was made to *Sakhyahani Ingle Rao Sahib* v. *Bhavani Bozi Sahib*(1), *Bhagwanta* v. *Sukhi*(2), *Govinda Pillai* v. *Thayammal*(3) and *China Veerayya* v. *Lakshminarasamma*(4). The same view has been taken by this Board in *Doorga Persad Singh* v. *Doorga Konwari*(5) and *Isri Dut Koer* v. *Hansbutti Koerain*(6). Similar principles, it was submitted, were applicable to a suit by a reversioner to set aside an adoption. In this case the petitioner could not have been joined as a party plaintiff in the suit; *Rani Anand Kunwar* v. *The Court of Wards*(7). These not being a joint cause of action such a suit was prohibited by section 3 of the Civil Procedure Code, see Order II, rule 3 of the Code.

Sir R. Finlay, K.C., in reply—Order II, rule 3, of the Civil Procedure Code, did not prevent the petitioner from being joined. The Court had a discretion to allow a reversioner other than the next reversioner to be joined; see Order I, rule 6, of the Code. A suit to set aside an adoption, and one to set aside an alienation by the widow are quite different. In any case the petitioner was entitled as legal representative to revive the proceedings in order to relieve the estate, from the orders as to costs. —*Muthusami Mudaliar* v. *Masilamani* (8).

The judgment of their Lordships was delivered by

LORD DUNEDIN, LORD SHAW, SIR GEORGE FARWELL, SIR JOHN EDGE AND MR. AMEER ALI.

Mr. AMEER ALI.—The question for their Lordships' decision arises upon a petition for substitution of the petitioner in place of the deceased appellant, Venkatanarayana, who has died since the filing of his appeal to His Majesty in Council.

Venkatanarayana brought a suit, on the 29th of July 1907, in the High Court of Madras in its ordinary civil jurisdiction to obtain a declaration that the adoption of the second defendant by Subbammal, the first defendant, was invalid, and did not affect his (Venkatanarayana's) reversionary interest in the

(1) (1904) I.L.R., 27 Mad., 588.
(2) (1900) I.L.R., 22 All., 33.
(3) (1904) I.L.R., 28 Mad., 57.
(4) (1914) I.L.R., 37 Mad., 406.
(5) (1879) I.L.R., 4 Calc., 190 at p. 199; s.c., L.R., 5 I.A., 149 at p. 163.
(6) (1882) I.L.R., 10 Calc., 324 at p. 332; s.c., L.R., 10 I.A., 150 at p. 157.
(7) (1881) I.L.R., 6 Calc., 764 at p. 773; s.c., L.R., 8 I.A., 14 at p. 22.
(8) (1910) I.L.R., 33 Mad., 342 at p. 356.

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DeGruyther, K.C., and *Kenworthy Brown* for the respondents, contended that on the death of the appellant the suit abated, and relied on *Arunachalam* v. *Vellaya*(2), as having been rightly decided. The Judges by whom it was decided were parties to the decision in *Chirovolu Punnamma* v. *Chirovolu Perrazu*(1), but that was decided on the special facts referred to the Full Bench. There was a consensus of opinion in India that a suit by one reversioner did not bind the other reversioners. During the life of the widow there was no one reversioner who had any estate vested in him. Each one had merely, a possible right of succession to the deceased husband's estate, if he survived the widow, and he claimed by reason of his relationship to the husband, and not through any other of the reversioners. His right was not one transferable under the Transfer of Property Act (IV of 1882). His suit for a declaration of right was governed by section 42 of the Specific Relief Act (I of 1877); see explanations (e) and (f) of that section; and by section 43 the declaratory decree is only binding on the parties and persons claiming through them. His right to sue was only a personal right, and did not survive: Order XXII, rule 1, therefore, of the Civil Procedure Code (Act V of 1908) was not applicable. The right of the petitioner was not the same as that of the appellant. Substitution of parties was governed by the Civil Procedure Code, 1908, Order IV. So far as his cause of action was concerned, the petitioner was not the "legal representative" of the appellant within the meaning of section 2, sub-section (11) of the Civil Procedure Code. A person who claimed not through the deceased plaintiff but in his own right, could not, it was submitted, be said to represent the deceased reversioner, and all the other possible reversioners. All the

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MR. AMEER ALI.—The question for their Lordships' decision arises upon a petition for substitution of the petitioner in place of the deceased appellant, Venkatanarayana, who has died since the filing of his appeal to His Majesty in Council.

Venkatanarayana brought a suit, on the 29th of July 1907, in the High Court of Madras in its ordinary civil jurisdiction to obtain a declaration that the adoption of the second defendant by Subbammal, the first defendant, was invalid, and did not affect his (Venkatanarayana's) reversionary interest in the

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ancestral estate of one Venkatakrishna, deceased. Subbammal, in her answer, alleged that the adoption which the plaintiff sought to set aside was made by her under the authority of her husband given under a will. The plaintiff, on the other hand, contended that the authority so given was revoked by a subsequent will. The Courts in India have held on the construction of this document that it did not amount to a revocation. Venkatanarayana, after the decision of the High Court in its appellate jurisdiction dismissing his suit, applied for the usual certificate to appeal to His Majesty in Council, which was duly granted, and an appeal was filed and was pending when he died on the 19th of November 1913.

The petitioner Kuppusami Pillay applies to be substituted in the place of the deceased appellant and for an order for revivor of the appeal and for leave to prosecute it "in the usual way." He alleges that Venkatanarayana in his lifetime was a member of a joint undivided Hindu family consisting of himself, two sons, and two grandsons, one of whom was the petitioner; and that he was now the sole surviving member thereof, and entitled to the reversionary interest in Venkatakrishna's ancestral properties.

The application is opposed on the ground that, as the petitioner is not the legal representative of Venkatanarayana in respect of the reversionary right claimed by him to the estate of Venkatakrishna, he cannot be substituted in place of the deceased appellant. It is contended on the authority of certain decisions of the High Court of Madras that where a transaction by a Hindu female taking a limited estate in the inheritance of the last male owner is impugned by the next or presumptive reversioner as invalid and beyond her competency, any adjudication against him does not operate as *res judicata* against the contingent reversioners, and consequently on the death of the presumptive reversioner the others have each, in order of succession, a separate right of suit, and cannot claim to prosecute an action brought by the deceased reversioner as they do not derive their right through him.

Their Lordships think this argument proceeds on an obvious fallacy. Under the Hindu Law the death of the female owner opens the inheritance to the reversioners, and the one most nearly related at the time to the last full owner becomes entitled to

possession. In her lifetime, however, the reversionary right is a mere possibility or *spes successionis*. But this possibility is common to them all, for it cannot be predicated who would be the nearest reversioner at the time of her death. The Indian Law, however, permits the institution of suits in the lifetime of the female owner for a declaration that an adoption made by her is not valid, or an alienation effected by her is not binding, against the inheritance. The two articles of the Indian Limitation Act (IX of 1908) which deal with these two classes of suits differ widely in their language; article 118, Schedule I., contains no restriction as to the person entitled to sue; whilst in article 125 the suit is contemplated to be by the person "who, if the female died at the date of instituting the suit, would be entitled to possession." But it does not follow from these words that the suit brought in the latter case by the nearest reversioner is for his personal benefit, for the object is to remove a common apprehended injury to the interests of all the reversioners, presumptive and contingent alike. Of course, the two classes of suits covered by these two articles are distinct in their scope and character: one relates to status and involves the adjudication of a right *in rem*; the other raises a question of mere justifiable necessity. But in both "the right to sue" is based on the danger to the inheritance common to all the reversioners which arises from the nature of their rights.

In the present case Venkatanarayana sued for a declaration that the adoption of the second defendant was invalid. Such a suit brought by the presumptive reversioner is in a representative capacity and on behalf of all the reversioners. The act complained of is to their common detriment just as the relief sought is for their common benefit. On the death, therefore, of the presumptive reversioner the next presumable reversioner would clearly be entitled to continue the action instituted by the deceased plaintiff, unless there is anything in the Procedure Law of India to preclude him from so doing.

The Madras High Court has drawn a distinction between a suit brought to challenge an adoption and one to declare an alienation by a qualified owner as not binding beyond the lifetime of the alienor. In the first class of cases it has been recognised that the presumptive reversioner's suit is in a representative character; in the other, however, chiefly on the ground that the

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adjudication relating to an alienation in the suit of the presumptive reversioner does not operate as a *res judicata* against the contingent reversioners, it has been held that these have no right to continue an action brought by him. Although, no doubt, as their Lordships have already remarked, there is great difference in the character of the two classes of suits, the position of the plaintiffs in both instances when closely examined will be found, so far as the point for decision is concerned, to be the same. The test of *res judicata* applied by the Madras High Court seems, therefore, to be irrelevant to the inquiry whether the petitioner is entitled to continue the action commenced by his grandfather.

What has to be considered is whether "the right to sue," in the words of the statute, "survives," and if it does, who can continue the action to obtain the relief that is sought?

For the purposes of this application it must be assumed that the facts stated in the petition, which their Lordships note are not controverted, are true, and that Venkatanarayana was the nearest reversioner when he brought his suit, and that the present petitioner was at the time only a contingent reversioner. In *Rani Anand Kunwar* v. *The Court of Wards*(1) this Board gave expression to the principles applicable to suits by reversioners to impugn the validity of transactions by Hindu females. They said that:—

"As a general rule, such suits must be brought by the presumptive reversioner,—that is to say, by the person who would succeed if the widow were to die at that moment."

But in laying down this broad rule their Lordships pointed out in clear terms that under certain circumstances the "next presumable reversioner would be entitled to sue."

There is nothing to preclude a remote reversioner from joining or asking to be joined in the action brought by the presumptive reversioner, or even obtaining the conduct of the suit on proof of laches on the part of the plaintiff or collusion between him and the widow or other female whose acts are impugned. It is the common injury to the reversionary rights which entitles the reversioners to sue. Apart, therefore, from the question whether "the next presumable heir" is "the legal

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representative" of the deceased presumptive reversioner, there remains the outstanding fact of identity of interest on the part of the general body of reversioners, near and remote, to get rid of the transaction which they regard as destructive of their rights.

Rule 1, Order XXII, in the new Civil Procedure Code of India (Act V of 1908), which corresponds with section 361 of Act XIV of 1882, declares that "the death of a plaintiff or defendant shall not cause the suit to abate if the right to sue survives." Rule 3, clause 1, provides that—

"Where one of two or more plaintiffs dies and the right to sue does not survive to the surviving plaintiff or plaintiffs alone, or a sole plaintiff or sole surviving plaintiff dies and the right to sue survives, the Court, on an application made in that behalf, shall cause the legal representative of the deceased plaintiff to be made a party and shall proceed with the suit."

The words "legal representative" have for the first time been defined in sub-section 11, section 2, of Act V of 1908, which runs thus :—

"'Legal representative' means a person who in law represents the estate of a deceased person, and includes any person who intermeddles with the estate of the deceased and where a party sues or is sued in a representative character the person on whom the estate devolves on the death of the party so suing or sued."

Sub-section 11 was embodied in Act V of 1908 with the object of putting in statutory language the result of the decisions of the Indian tribunals on the meaning of the words "legal representative"; but it is not clearly worded and has already been the subject of criticism by at least one of the High Courts in India. The phraseology of sub-section 11, in their Lordships' opinion, is fairly open to the contention that the suit was brought by the deceased plaintiff as representing, in his reversionary right, the estate of the last male owner, and that on his death such right devolved on the petitioner. They think, however, that his right to be substituted in place of the deceased appellant rests on a broader ground.

Rule 1, Order I, of Act V of 1908, which brings the Indian practice into line with the English rule, provides as follows :—

"All persons may be joined in one suit as plaintiffs in whom any right to relief in respect of, or arising out of the same act or transaction, or series of acts or transactions, is alleged to exist, whether jointly, severally, or in the alternative, where, if such

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persons brought separate suits, any common question of law or fact would arise."

It seems to their Lordships that under this rule the contingent reversioners may be joined as plaintiffs in the presumptive reversioner's suit. The right to relief on the part of the reversioners exists severally in order of succession, and arises out of one and the same transaction impugned as invalid and not binding against them as a body; and the dispute involves a common question of law, viz., the validity or invalidity of the act challenged as incompetently done. If the contingent reversioners may be joined as plaintiffs in the presumptive reversioner's action, it follows that on his death the "next presumable reversioner" is entitled to continue the suit begun by him. Their Lordships are of opinion that in this case the right to sue survives, and that the petitioner is clearly entitled to the order asked for. The costs of this application will be costs in the appeal.

Application granted.

Solicitor for the petitioner—*John Josselyn.*

Solicitor for the respondent—*Douglas Grant.*

APPELLATE CIVIL.

Before Mr. Justice Sundara Ayyar and Mr. Justice Sadasiva Ayyar.

1912. September 11.

AMBUJA AMMAL (PLAINTIFF), APPELLANT,

v.

APPADURAI MUDALI AND FOUR OTHERS (DEFENDANTS NOS. 2, 4, 3, 1 AND 5), RESPONDENTS.*

Civil Procedure Code (Act V of 1908), O. XLI, r. 27, cl (b)—Additional evidence on appeal—Powers of the Appellate Court—Test to be applied for admitting—State of mind of the Judge, after hearing the appeal—No external standard—'Any other substantial cause,' meaning of.

Where a Subordinate Judge first heard an appeal and then passed an order for the admission of some additional documents in evidence on the ground that "it was necessary to have the documents before the Court to enable it satisfactorily to pronounce its judgment,"

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* Second Appeal No. 819 of 1911.

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Held, that the admission of the documents as additional evidence was permissible under Order XLI, rule 27 of the Code of Civil Procedure, Act V of 1908.

The test laid down under clause (*b*) of Order XLI, rule 27, is not whether any tribunal would be unable to pronounce any judgment without production of the additional evidence in question but whether the mind of the Appellate Judge is in such a condition on the evidence on record that he requires any documents to be examined to enable him to pronounce judgment.

The expression 'any other substantial cause' added in Order XLI, rule 27, confers a wide discretion on the Appellate Court to admit additional evidence when the ends of justice require it to be done.

Kessowji Issur v. *G I P. Railway Company* (1907) I.L R , 31 Bom , 381 (P.C.), explained and distinguished.

Krishnama Chariar v. *Narasimha Chariar* (1908) I.L R., 31 Mad., 114, referred to.

Andiappa Pillai v. *Muthukumara Thevan* (1913) I L.R , 36 Mad., 477; s.c. (1912) M.W.N., 450, followed.

Subba Naidu v. *Ethirajammal* (1912) 22 M L.J , 14, dissented from.

SECOND APPEAL against the decree of K. KRISHNAMACHARIYAR, Temporary Subordinate Judge of North Arcot, in Appeal No. 120 of 1910, preferred against the decree of K. S. LAKSHMINARASA AYYAR, District Munsif of Ranipet, in Original Suit No. 909 of 1907.

The facts appear from the judgment of SUNDARA AYYAR, J.

T. R. Ramachandra Ayyar and *T. R. Krishnaswami Ayyar* for the appellant.

The Honourable Mr. *L. A. Govindaraghava Ayyar* for the respondents.

SUNDARA AYYAR, J.

SUNDARA AYYAR, J.—In this case, there is no ground for interference in Second Appeal unless we are prepared to adopt the appellants' contention that the Subordinate Judge acted illegally in admitting certain additional documents in evidence in appeal. The appeal was first heard on the 14th September 1910. The Subordinate Judge then observed "I think it is necessary to have the documents described as 1 and 2 in the list attached to the petition, and also the will of the original mortgagee before the Court to enable it satisfactorily to pronounce its judgment." On that ground, he allowed the additional evidence to be received. It is contended that in doing so he acted in excess of his powers. The appellate Court's right to receive additional evidence in appeal is restricted by Order XLI, rule 27 of the Code of Civil Procedure, 1908. The rule is in substantially the same terms as section 568 of the

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repealed Civil Procedure Code. It runs as follows:—"The parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary in the appellate Court. But if [clause (b)] the Appellate Court requires any document to be produced or any witness to be examined to enable it to pronounce judgment, or for any other substantial cause, the Appellate Court may allow such evidence to be produced or document to be received or witness to be examined." Considering the clause apart from the decided cases, it appears to me that the test laid down in clause (b) "if the appellate Court requires any document to be produced or any witness to be examined to enable it to pronounce judgment," is one relating to the state of *mind of the appellate Court and not an external standard.* In other words, the test is not, whether any tribunal would be unable to pronounce any judgment without the production of the additional evidence in question, but, whether the mind of the appellate Judge is in such a condition on the evidence on record *that he requires any document to be produced or any witness to* be examined to enable him to pronounce judgment. The object appears to me to be to enable the appellate Judge to satisfy his own mind, when he entertains a doubt; the test proposed is therefore not an external one, viz., whether some other mind or an average mind would require additional evidence to be produced in order to pronounce some judgment or other.

In this case the Subordinate Judge states explicitly that he wished to have the additional evidence in order to be able to pronounce his opinion on the merits of the contest between the parties. But it is argued for the appellant that there are authorities which we cannot disregard, which compel us to hold that the power to admit additional evidence does not exist in such a case. The most important decision is that delivered by the Judicial Committee of the Privy Council in *Kessowji Issur* v. *G.I.P. Railway Company*(1). In that case the application for the admission of additional evidence was made prior to the hearing of the appeal and, so far as the report shows, the appeal had not been heard before permission was given for the admission. The appellate tribunal, therefore, did not feel it to be necessary to have additional evidence in order

(1) (1907) I.L.R., 31 Bom., 381 (P.C.)

to enable it to pronounce judgment. Their Lordships of the Privy Council held that the additional evidence should not have been admitted. So far the case presents absolutely no analogy to the present one. It is the duty of the appellate Court, according to the section, to give its reasons for admitting further evidence. No reasons had been stated in the judgment of the Bombay High Court, nor does it appear that any difficulty was felt by the appellate Court in coming to a proper conclusion on the case without the help of the additional evidence admitted. Their Lordships lay stress on the fact that no reason was given for allowing further evidence to be adduced. They then go on to say that the appellate Court was merely 'reviewing and reversing TYABJI, J's. refusal of a review and they point out that further evidence was ordered not after the appeal had been heard on the merits and the evidence as it stood had been examined, but on special and preliminary application. They then make the observation on which stress is laid. "The legitimate occasion for section 568 is when, on examining the evidence as it stands, some inherent *lacuna* or defect becomes apparent, not where a discovery is made out-side the Court, of fresh evidence and the application is made to import it." I do not understand the expression 'defect' as meaning a defect which makes it impossible to come to any conclusion at all; but a defect which makes it difficult for the appellate Judge to come to a conclusion satisfactory to his own mind. Nor do I think the expression '*lacuna*' carries the case any further. The general principle applicable to a Court of Appeal having plenary jurisdiction over a cause is that it has got all the powers of the Court of first instance. See section 107 of the Code of Civil Procedure, 1908. Rule 27 of Order XLI is a restriction placed on the powers of the Court of first instance itself in admitting evidence at a late stage of the case. It appears to me that a wide discretion is given to the trying Judge, when he feels a difficulty himself or when he considers it proper in the interests of justice, to admit evidence which as a matter of discipline between party and party might be rejected. I think that rule 27 of Order XLI embodies no more than the same principle. I may observe, further, that in addition to a case where the appellate Court feels a difficulty in coming to a satisfactory conclusion on the evidence on record, additional evidence may be admitted

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also "for any other substantial cause." In *Subba Naidu* v. *Ethirajammal*(1), ABDUR RAHIM, J. was inclined to hold that that phrase must be interpreted as meaning a cause of a nature similar to the classes of cases referred to in the preceding clause. I find it difficult to understand what a cause of the same kind as is referred to in the preceding clause would be. In my opinion, the object of adding "any other substantial cause" was to give a wide discretion to the appellate Court to admit additional evidence when the ends of justice should require it to be done. In *Krishnama Chariar* v. *Narasimha Chariar*(2), no interpretation was put on "any other substantial cause." On the other hand in *Andiappa Pillai* v. *Muthukumara Theran*(3), a more liberal interpretation was put on the powers of the appellate Court to admit additional evidence. My learned brother SADASIVA AYYAR, J., referred there to the powers given to the Court of first instance in order to enable the Court to do justice. In my opinion similar powers are vested in the Court of Appeal although a restriction is placed, in the interests both of discipline and of preventing concoction of evidence, on the discretion vested in the appellate Court. I am of opinion that there are no grounds for holding that the additional evidence was wrongly admitted in this case. I dismiss the Second Appeal with costs.

SADASIVA AYYAR, J.

SADASIVA AYYAR, J.—I concur in the judgment of my learned brother.

(1) (1912) 22 M.L.J., 14. (2) (1908) I.L.R., 31 Mad., 114.
(3) (1913) I.L.R., 36 Mad., 477; s.c., (1912) M.W.N., 450.

APPELLATE CIVIL.

Before Sir Charles Arnold White, Kt., Chief Justice, Mr. Justice Sankaran Nair and Mr. Justice Tyabji.

1913. March 11 and 12.

P. ABDUL KHADIR (SECOND COUNTER-PETITIONER), APPELLANT,

v.

A. AHAMMAD SHAIWA RAVUTHAR AND FOUR OTHERS (PETITIONERS AND COUNTER-PETITIONERS), RESPONDENTS.*

Civil Procedure Code (Act V of 1908), sec 48—"Fraud or force of one judgment-debtor, not extending the twelve years as against others."

The fraud or force of one of several judgment-debtors in preventing execution against him of a decree enables the decree-holder to get an extension of the 12 years provided for execution of the decree by section 48, Civil Procedure Code (Act V of 1908), only as against that judgment-debtor but not as against his other co-judgment-debtors who have not been guilty of such conduct.

Per Curiam.—The policy of the Limitation Act in the matter of execution of decrees may be different.

APPEAL under article 15 of the Letters Patent against the order of PHILLIPS, J., in appeal against Appellate Order No. 45 of 1910, preferred against the order of M. J. MURPHY, the acting District Judge of North Malabar, in Appeal No. 449 of 1909, presented against the order of B. CAMMARAN NAIR, the District Munsif of Cannanore in Regular Execution Petition No. 705 of 1909.

The following facts are taken from the judgment of SUNDARA AYYAR, J.:—

These are proceedings "in execution of the decree of the District Munsif's Court of Cannanore for money in Original Suit No. 591 of 1896. The present application for execution was presented on the 27th September 1909. The decree was passed on the 15th January 1897. So this application was put in more than twelve years after the date of the decree The judgment-debtors objected that the application was barred by section 48 of the Code of Civil Procedure, as more than twelve years had elapsed since the date of the decree and the decree-holder had made a prior application for execution. The application immediately preceding the present one was presented on the 11th January 1909 for attachment of the defendants' moveables and for their arrest. While that application was still pending, the

* Letters Patent Appeal No. 120 of 1911.

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present one was put in. In addition to the reliefs asked for in the previous application the plaintiff prayed also for the attachment of immoveable properties belonging to the defendants. The District Munsif disallowed the objection, holding that the defendants were fraudulently evading the execution of the decree and that therefore the bar under section 48, Civil Procedure Code, did not apply. On appeal the District Judge confirmed the Munsif's finding of fraud so far as the first defendant was concerned, as he had evaded the execution of warrants of arrest taken out against him in order to defeat the execution. But he held that no fraud was proved against the second defendant. He was, however, of opinion that, as fraud had been proved against the first defendant, the plaintiff was entitled to execute the decree against both the defendants."

The second defendant appealed to the High Court against the order of the District Judge. On appeal SUNDARA AYYAR, J., dismissed the execution application in so far as the new prayer for attachment of the immoveables of the second defendant was concerned, holding that the fraud of the first defendant in preventing execution did not give the decree-holder an extension of the twelve years provided by section 48 of the Civil Procedure Code as against the second defendant also while PHILLIPS, J., holding the contrary allowed the execution application as against the second defendant also. The judgments of SUNDARA AYYAR and PHILLIPS, JJ., are reported in *Abdul Khadir* v. *Shaiwa Ravuthar*(1). Owing to this difference of opinion the present Letters Patent Appeal was filed by the second defendant.

J. L. Rosario, for the appellants.

C. V. Ananthakrishna Ayyar, for the respondents.

WHITE, C.J.

WHITE, C.J.—The only statement of fact which is necessary for the purpose of dealing with the question of law as to the construction of section 48 of the Civil Procedure Code which has been raised in this appeal is, I think, this. A creditor has obtained a joint and several decree against two judgment-debtors, defendants Nos. 1 and 2. The first defendant has by force or fraud prevented the execution of the decree at some time within twelve years immediately before the date of the application to execute the decree. The second defendant has not. I think it is reasonably clear that, if we give to the words of

(1) (1912) 23 M.L.J., 35.

sub-section 2 (*a*) in section 48 their natural meaning and construe the paragraph as meaning what it says, the construction adopted by SUNDARA AYYAR, J., is the right construction. The sub-section is as follows:—"Nothing in this section shall be deemed to preclude the Court from ordering the execution of a decree upon an *application presented after the expiration of the* said term of twelve years, where the judgment-debtor has, by fraud or force, prevented the execution of the decree at some time within twelve years immediately before the date of the application." Now the words are "the judgment-debtor." No doubt the expression "the judgment-debtor" in the singular includes the plural. But as it seems to me it includes the plural *in this sense*: "where the judgment-debtor has, or if there are two or more judgment-debtors, the judgment-debtors have, by fraud or force, prevented the execution of the decree, etc." That construction of the section is in accordance with the literal meaning of the words and with the well-known principle of construction, which is now embodied in the statute, that the singular includes the plural. I express no opinion as to whether, when there are two or more joint judgment-debtors, the judgment-creditor can only ask for the extension of the period of limitation when all the judgment-debtors have by force or fraud prevented the execution of the decree. That question was not argued. The *contention on the one hand* was that *the judgment*-creditor could only pray in aid the benefit of the enactment as against the judgment-debtor who had by force or fraud prevented the execution of the decree and on the other hand that in a case where a joint judgment-debtor has by fraud or force prevented the execution of the decree, etc., the judgment-creditor is not only entitled to the benefit of the enactment as against that judgment-debtor but also as against any joint judgment-debtor who has not by fraud or force prevented the execution of the decree. It seems to me that the only way in which we could make it clear that the intention of the legislature was as Mr. Anantakrishna has contended would be, to add to the sub-section a definition clause to this effect; "for the purposes of this section the judgment-debtor means the judgment-debtor who has by fraud or force prevented the execution of the decree" or any joint judgment-debtor of that debtor. That would be *reading into* the section a great deal which is not there and, as it seems to me

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would be doing violence to the express language of the section. The other construction, in my opinion, is in accordance with the natural meaning of the words used. Mr. Ananthakrishna Ayyar has suggested that the policy of the Limitation Act is that where a decree is alive against one of several joint debtors, it is alive against all the joint debtors. I am not sure that I am prepared to accept that as a statement of the general policy of the Act; but even if it be so, when we have on the one side what is said to be the general policy of the Act and, on the other, the express words of a section dealing with a specific matter, I think that the express words ought to prevail.

Reliance has also been placed, in support of the contention against the view adopted by SUNDARA AYYAR, J., on article 182 of the Limitation Act. Mr. Ananthakrishna Ayyar has pointed out that under paragraph 5 the time was from the date of applying in accordance with law to the proper Court for execution, and that *Explanation I* says that where the decree or order has been passed jointly against more persons than one, the application, if made against any one or more of them, shall take effect against them all. That seems to me to be a very different matter from the matter which we are dealing with in this appeal. The principle, I take it, is that if the judgment-creditor does something which keeps alive a joint decree as against one of his joint judgment-debtors, the decree is to be regarded as alive as against all the joint judgment-debtors and if it is alive, it is of course capable of execution. That is a very different matter from the present case which is not the case of a judgment-creditor having done something but of the judgment-debtor having done something which, as regards him, no doubt entitled the judgment-creditor to say "my time has been extended." So far as I can see, there is no reason or principle why the judgment-creditor should be entitled to say, that, as regards the men who had not prevented by fraud or force, etc., he should also have the benefit of the enactment. I cannot see that there is any equity which the judgment-creditor can set up in this case, although it may be that in the cases which are referred to in article 182 of the Limitation Act there is an equity arising by the fact that he had done something for the purpose of realising the fruits of his judgment. Here the creditor does nothing but relies upon something which one of his joint judgment-

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debtors has been doing. An argument was based on paragraph 2, in the third column of article 182, a suit (a decree ?) is kept alive by the fact that an appeal has been brought and it is reasonable enough that time should begin to run in favour of a party who does not appeal not from the date of the decree of the Court of First Instance, but from the date of the decree of the Appellate Court. It seems to me that there is not only no equity in favour of the judgment-creditor but that it would be inequitable that a judgment-debtor should be deprived of the benefit of the prescribed limitation by reason of acts done by his joint judgment-debtor, over whom he has presumably no control and for whose action he is not responsible. I may refer to the principle which is embodied in the Mercantile Law Amendment Act and that is in accordance with the principle which I think is applicable here. Before the Mercantile Law Amendment Act of 1856, the English law was that where one or more of several joint debtors were beyond the seas when the causes of action arose, the time did not begin to run either in favour of those abroad or those at home until the return of the former. Section 11 of the Mercantile Law Amendment Act provided that, where the cause of action lay against two or more joint debtors, the person who was entitled to the same should not be entitled to any time within which to commence and sue against any one or more of such joint debtors who shall not be beyond the seas at the time such cause of action or suit accrued, by reason only that some other one or more of such joint debtors was or were at the time such cause of action accrued beyond the seas.

In my opinion, SUNDARA AYYAR, J., was right and the plaintiff's application is barred as against the second defendant so far as the prayer for attachment of immoveables is concerned. The order will be modified accordingly. No order as to costs throughout.

SANKARAN NAIR, J.—I agree.

TYABJI, J.—I also agree.

SANKARAN NAIR, J. TYABJI, J.

APPELLATE CIVIL.

Before Mr. Justice Sundara Ayyar and Mr. Justice Sadasiva Ayyar.

1912. September 11 and 1913. May 2.

K. VENKATASUBBIAH *et al*, (PLAINTIFFS AND DEFENDANTS NOS. 2 TO 18), APPELLANTS,

v.

THE SECRETARY OF STATE FOR INDIA IN COUNCIL (REPRESENTED BY THE COLLECTOR OF NELLORE) (FIRST DEFENDANT), RESPONDENT.*

Grant, construction of—Water-cess—Madras Water-cess Act (VII of 1865)—Free grant of water before—No right to impose water-cess thereafter.

If for some consideration or other or even for no consideration a grant was, before the passing of Madras Water-cess Act (VII of 1865), made by the Government of a particular quantity of water or a certain definite share of the water of a tank to a person, irrespective of the use he might make of it, the grant is in law a free grant, and the Government is not entitled to any kind of payment thereafter for the water, under Madras Act VII of 1865.

Maria Susai Mudaliar v. The Secretary of State for India in Council (1904) 14 M.L.J., 350, followed.

Secretary of State for India v. Swami Naratheeswarar (1911) I.L.R., 34 Mad., 21, distinguished.

SECOND APPEAL against the decrees of E. L. VAUGHAN, the District Judge of Nellore, in Appeals Nos. 122, 128 and 136 of 1909, preferred against the decree of V. BHASHYAM AYYANGAR, the District Munsif of Nellore, in Original Suits Nos. 1369 of 1908, 80 of 1909 and 435 of 1908.

These were suits against the first defendant and the Government(1) to establish the right of the *landholders* of Brahmanakraka Agraharam (plaintiffs and defendants Nos. 2 to 18) to irrigate their agraharam lands, free of water-cess or *tirwajasti* and *faslijasti*, by a fourth share of the water of Anumakondapallem tank; (2) to recover Rs. 541-1-4 being the amount of water-cess collected by first defendant in fasli 1315, with interest thereon and (3) to obtain a permanent injunction restraining the first

* Second Appeals Nos. 536 to 538 of 1911.

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defendant from levying such cess in future. The Secretary of State admitted the right of the plaintiffs to the use of a fourth of the water but denied that the plaintiffs were entitled to any exemption from water-cess under Act VII of 1865 as amended, for which exemption, he pleaded that the plaintiffs should prove an engagement with the Government entitling them to the exemption. The District Munsif decreed the suits as prayed for. But the District Judge on appeal reversed the decrees of the District Munsif and dismissed the suits but without costs. The plaintiffs and defendants Nos. 2 to 18 thereupon preferred these Second Appeals. The Secretary of State put in memoranda of objections for the costs disallowed.

P. Nagabhushanam for the appellants.

The Honourable Mr. *L. A. Govindaraghava Ayyar*, the acting Government Pleader, for the Crown.

SUNDARA AYYAR AND SADASIVA AYYAR, JJ.

JUDGMENT.—We observe that in the judgment of the District Munsif reference is made to the judgments in Original Suit No. 211 of 1894 and in the appeal therefrom as furnishing important evidence that the plaintiffs are entitled to a fourth of the water in the Anumakonda tank. In that suit the plaintiffs claimed certain reliefs on the basis of their right to a fourth of the water of the Anumakonda tank. The Secretary of State for India in Council was the first defendant in the suit. The reliefs were claimed against him and the second defendant therein. The Secretary of State for India in Council admitted that the plaintiffs and their co-sharers were entitled to the use of a fourth of the water flowing into the Brahmanakraka Anumakonda tank. He denied the right to the reliefs claimed in that suit on the ground that the admitted right of the plaintiffs had not been infringed. The plaintiffs in the suit obtained a decree. The right to the use of the one-fourth of the water was the basis of the judgment in that case. If the effect of that judgment be that the plaintiffs were absolutely entitled to the use of a fourth of the water of the tank, irrespective of the use they made of it, it is possible that that judgment may make the question, raised in the present suit, of the plaintiffs' absolute right to one-fourth of the water *res judicata*. We do not wish to decide this matter now, as no issue was framed on the question apparently because the plaintiffs did not put forward that judgment as constituting the matter in dispute

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here *res judicata*. We think it desirable that an issue should be framed to try the question. We accordingly frame the following issue :—" Is the question of the plaintiffs' absolute right to one-fourth of the water of the Anumakonda tank without liability to pay any water-cess *res judicata* in consequence of the judgment of the District Munsif's Court of Kavali in Original Suit No. 211 of 1894 and of the Subordinate Judge's Court of Nellore in Appeal No. 171 of 1896 (Exhibits C, and Q and E). Both parties may adduce any evidence they may be advised to on this issue. The finding should be submitted within two months from the date of receipt of this order in the Lower Court.

Seven days will be allowed for filing objections.

In obedience to the order contained in the above judgment, the District Judge of Nellore submitted the following finding :—

" My finding on the issue therefore is that the question of plaintiffs' absolute right to one-fourth of the water of the Anumakonda tank without liability to pay water-cess is not *res judicata* in consequence of the judgment of the District Munsif's Court of Kavali in Original Suit No. 211 of 1894 and of the Subordinate Judge's Court of Nellore in Appeal No. 171 of 1896."

These Second Appeals coming on for final hearing after the return of the finding of the Lower Court upon the issue referred by this Court for trial the Court delivered the following judgment :—

SUNDARA AYYAR, J.

SUNDARA AYYAR, J.—The District Judge has found that in Original Suit No. 211 of 1894 the plaintiff's right to one-fourth of the water flowing through Yellareddi Kalva into the Anumakondapallem tank was established; but he has held that the question of the plaintiff's liability for the payment of the water tax complained of in this suit is not barred as *res judicata*. He is no doubt right in saying that in Original Suit No. 211 of 1894 the liability of the plaintiffs to pay water-cess was not in question. But their exemption from liability must be held to follow from the right that was established in their favour in that suit. Their claim there was that they were absolutely entitled to a fourth of the water irrespective of the use that they made of it and not merely to water necessary for irrigating any particular lands belonging to them. They complained of the opening of a vent which affected their right to a fourth of the

water of the tank. The Government admitted their right to the use of one-fourth of the water. It was expressly found in that case that the right claimed by the plaintiffs was established, as the plaintiffs proved their immemorial enjoyment of a fourth of the water. A legal origin must be presumed for the exercise of the right claimed by the plaintiffs. The proper presumption is that there was some grant or contract entitling the plaintiffs to a fourth of the water. Mr. Govindaraghava Ayyar contends on behalf of the Government that, even if the plaintiff's ownership to a fourth of the water be held to be proved, that circumstance would not be sufficient to entitle them to claim exemption from the payment of water-cess under Act VII of 1865 as amended. He argues that an engagement between the Government and the plaintiffs entitling them to the exemption must be proved. But if there was a contract or grant by virtue of which the plaintiffs became entitled to a fourth of the water, it would be unreasonable to suppose that the Government would still be entitled to levy a cess as remuneration for the water, the right to which had already become vested in the plaintiffs before the enactment of the Water-cess Act. The cess imposed under Act VII of 1865 was intended to compensate the Government for the use by holders of land of water belonging to it or conserved by works constructed by it by empowering them to levy a remuneration from those using the water for irrigation; where such remuneration is otherwise paid by the landholder, that would be sufficient to establish an engagement of the kind referred to in the proviso to section 1 of the Act. Thus, where land in the possession of an owner is classified as wet and wet assessment is levied from him, it is taken that the wet assessment itself includes all payment due to Government for the use of the water required to irrigate the land, and this constitutes an engagement which would exempt the owner from the further payment of any cess under Act VII of 1865.

There can be no doubt that, when for some consideration or other, or it may be without consideration, a grant is made by the Government of a particular quantity of water or a certain definite fraction of the water of a tank to a person irrespective of the use he might make of it, the proper presumption is that it is a free grant without claim to any kind of payment for the water. This was the principle adopted in *Maria Susai*

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Mudaliar v. *The Secretary of State for India in Council*(1). In *Secretary of State for India* v. *Swami Naratheeswarar*(2), the learned Judges who decided the case held that a grant of water by Government must be taken to mean a grant without any claim for future payment for the water granted. Mr. Govindaraghava Ayyar urges that the actual decision in the last case is in his favour. But this argument cannot be accepted. There it was held that, when a portion of a *taruvai* belonging to a proprietor received water from a Government source, the mere fact that he was entitled to all the water that flowed to his portion of the *taruvai* after it reached it without obstruction by any one would not entitle him to exemption from the payment of cess for the water which was found to have been derived from a Government source. There was no grant of the water which flowed into his portion of the *taruvai*. His right was merely to the free flow of water to the *taruvai* without obstruction. It must therefore be held that the plaintiff's right to a fourth of the water established in the previous litigation entitles the plaintiffs to exemption from payment of water-cess. The decree of the District Judge must be reversed and that of the District Munsif restored with costs here and in the lower appellate Court. The Government will make the payment directed under this decree within four months from this date. Second Appeals Nos. 537 and 538 follow. The memoranda of objections are dismissed.

SADASIVA AYYAR, J.

SADASIVA AYYAR, J.—From a perusal of the order of remand, I am of opinion that it was assumed on that occasion that, if the judgment in Original Suit No. 211 of 1894 decided that the plaintiffs were entitled absolutely to the use of a fourth of the water of the plaint tank of Anumakonda, it carried with it an exemption from liability to pay any water-cess to Government for the use of that water. The order contains the following sentences: "If the effect of that judgment" (*i.e.*, the judgment in Original Suit No. 211 of 1894) "be that the plaintiffs were absolutely entitled to the use of a fourth of the water of the tank, irrespective of the use they made of it is possible that that judgment may make the question, raised in the present suit, of the plaintiffs' absolute right to one-fourth of the water *res*

(1) (1904) 14 M.L.J., 350. (2) (1911) I.L.R., 34 Mad., 21.

judicata. We do not wish to decide this matter now, as no issue was framed on the question apparently because the plaintiffs did not put forward that judgment as constituting the matter in dispute here *res judicata*. We think it desirable that an issue should be framed to try the question. We accordingly frame the following issue:—"Is the question of the plaintiff's *absolute right* to one-fourth of the water of the Anumakonda tank *without liability to pay any water-cess, res-judicata* in consequence of the judgment of the District Munsif's Court of Kavali in Original Suit No. 211 of 1894 and of the Subordinate Judge's Court of Nellore in Appeal Suit No. 171 of 1896 (Exhibits C, and Q and E)." I am, holding the above view as to what we intended in the order of remand, inclined to hold that Mr. Govindaraghava Ayyar is not entitled to argue that, even if the former judgment established the absolute right of the plaintiffs to the ownership of a fourth of the water, it did not also establish any right to exemption from liability to pay water-cess for that one-fourth of the water. Assuming, however, that he is entitled to argue that question, my mind is clear that the Government is not entitled to charge water-cess for the use of the water which does not belong to it. Mr. Govindaraghava Ayyar however with his usual subtlety of argument contended that the decision in *Secretary of State for India* v. *Swami Naratheeswarar*(1), and the words of section 1 of Act VII of 1865 gave the Government the right to charge water cess even for the use of the water which belongs to the plaintiffs. I do not mean to deny that the Government by Act VII of 1865 in its amended form took the power to charge water cess in some instances for water which, according to the ordinary principles of jurisprudence, might be held to belong to a landowner or ryot, provided it had belonged to the Government and it became the landowner's water only through a technical rule of law. When water of one land percolates or overflows into another land the water so collected becomes (according to the technical rules of law) the property of the owner of the land into which it has so percolated or over which it has flowed. The Government thought that, when their water so percolated or overflowed, it was hard upon Government to lose the right to tax the use of

(1) (1911) I.L.R., 34 Mad., 21.

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such water, simply because they were unable owing to natural difficulties to retain their water or regulate the distribution of their water as they wished. It was considered that, as the ownership in such water had passed to the ryot or landholder (into whose land the water had percolated) through no fault of Government, it was inequitable to deprive the Government of the right to collect the cess for the use of such water by the lucky man into whose land it had gone (*sic*). But to extend this extraordinary power of taxing another man's water to cases where the water admittedly belongs to the landowner, *not on account of its having been Government water which percolated or overflowed against the will of the Government into the land of the ryot*, but belongs to him absolutely by grant, or agreement or engagement (express or implied) is not only patently inequitable but, I think, is against the clear intention of the legislature and of the Government; and I do not think that the words of the Act constrain us to hold that the Government is entitled to levy such an inequitable assessment.

As regards *Secretary of State for India* v. *Swami Naratheeswarar*(1), I find after looking through the printed papers that in that case the water of the *taruvai* (swampish water spread) which was in question, was not intended for irrigation purposes at all. The sheet of water in that case was formed of drainage surplus waters and the right of fishery in that tank belonged in the proportion of three-fifths and two-fifths to the Government and the landholder respectively. In such a case, the water belonged to Government as the whole of it first flowed over the three-fifths area belonging to the Government and only then passed on to the landholder's two-fifths area and even though a portion of the water afterwards so spread over the two-fifths of the area which belonged to the inamdar and would have become his property according to the ordinary principles of jurisprudence, the right of the Government to levy a cess for the use of that water which came upon the inamdar's land after passing through Government land was preserved or rather created by the statute; and it was held that that right could not be taken away by the mere fact that Government water (consisting of extraordinary flood water flowing through a

(1) (1911) I.L.R., 34 Mad., 21.

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Government channel) had so afterwards come upon the land of the inamdar or landholder or became mixed up with the water that belonged to him. Without questioning the correctness of the decision in *Secretary of State for India* v. *Swami Naratheeswarar*(1), I must say that I am not prepared to go one inch beyond the rule laid down in that case, as I am of opinion that it is impossible to give a wider right to Government on the most favourable construction which can be placed on the words of the Act in favour of the Government.

In the present case one-fourth of the water of the tank absolutely belongs to the landholder by reason of the finding in the former suit and such one-fourth share is not proved to have ever belonged to Government, and I therefore hold that that water could not be taxed under the provisions of Act VII of 1865 unless it had belonged to Government and had ceased to belong to it owing to its having percolated or overflowed into the land of the landholder. In other words, the water must have been the water of the Government before it ceased to be such through the percolation or overflowing or through its discharge into the landholder's land or tank, etc. I therefore agree with the decree that is proposed to be passed by my learned brother.

Second Appeals Nos. 537 and 538 follow The memoranda of objections are dismissed

(1) (1911) I.L.R., 34 Mad., 21.

APPELLATE CIVIL.

Before Mr. Justice Sadasiva Ayyar and Mr. Justice Tyabji.

1913, July 16 and 17.

P. PARASURAMAYYA (PLAINTIFF), APPELLANT IN BOTH CASES,

v.

V. RAMACHANDRUDU (DIED) AND TEN OTHERS (DEFENDANTS), RESPONDENTS.*

Limitation Act (IX of 1908), sec. 28, art. 47—Suit to recover possession of lands—Magistrate, order of, under Criminal Procedure Code (Act V of 1898), sec. 145—Order passed without proper inquiry—Notice not legally served on the plaintiff—Plaintiff aware of proceedings—Order not without jurisdiction—Applicability of article 47—Tenant for a term—Landlord treating tenant as a trespasser after the expiry of the term—Subsequent registered notice to quit—Cause of action, when

Article 47 of the Limitation Act (IX of 1908) is applicable to a suit for recovery of possession of lands in respect of which an order had been passed by a Magistrate acting under section 145 of the Code of Criminal Procedure, although the Magistrate might not have made the proper inquiries which he ought to have made before he passed the order, if the plaintiff had notice of the proceedings though the notice was not served on the plaintiff in accordance with law

Gangadaram Aiyar v. *Sankarappa Naidu* (1891) 9 M L T., 91, followed.

Where the defendants were tenants for a term under the plaintiff and continued in possession of the lands after the expiry of the term but the plaintiff did not treat the defendants as tenants holding over but as trespassers after the date of the expiry of the term, and the magisterial order under section 145 of the Code of Criminal Procedure was passed in the defendants' favour subsequent to the said date:—

Held, that the suit for recovery of possession of the lands brought by the plaintiff more than three years after the said order was barred under article 47 of the Limitation Act

Tukaram v *Hari* (1904) I L R., 28 Bom, 601 (F B.), *Bapu bin Mahadaji* v. *Mahadaji Vasudeo* (1884) I L R, 18 Bom, 348 and *Wise* v *Ameerunnissa Khatoon* (1879) 7 I A., 73, referred to.

Bolai Chand Ghosal v *Samiruddin Mandal* (1892) I L R, 19 Calc, 646, distinguished

SECOND APPEALS against the decrees of T. VARADARAJULU NAYUDU, the temporary Subordinate Judge of Masulipatam, in Appeals Nos. 480 and 522 of 1910, preferred against the decrees of A. Venkataramayya Pantulu, the District Munsif of Gudivada in Original Suits Nos. 108 and 109 of 1909.

* Second Appeals Nos. 1548 and 1549 of 1911

The material facts appear from the judgment of SADASIVA AYYAR, J.

V. C. Seshachariar and *O. P. Venkataraghavachariar* for the appellant.

V. Ramadoss for the respondents Nos. 2 to 8.

SADASIVA AYYAR, J.—The plaintiff is the appellant before us. He sued for recovery of possession of lands which had been let to the defendants in fasli 1312 for that particular fasli and which the defendants had been holding over without the plaintiff's consent in the subsequent faslis before suit. There were proceedings instituted by the Magistrate at the instance of the defendants under section 145 of the Criminal Procedure Code on account of the plaintiff's attempt to eject the defendants in the beginning of fasli 1313. The Magistrate took a statement from the plaintiff and then passed orders under section 145 declaring the defendants to be entitled to retain possession till they were ousted by the decree of a Civil Court. That order was passed in August 1903.

SADASIVA AYYAR, J.

The present suit for possession was brought in March 1909, more than three years from the date of the Magistrate's order declaring the defendants to be entitled to retain possession and prohibiting the plaintiff from ejecting them till they were ousted by an order of a Civil Court.

The question is whether the suit is barred by article 47 of the Limitation Act. The appellant's learned Vakil Mr. Seshachariar contends firstly, that the order of the Magistrate under section 145 of the Criminal Procedure Code was passed without jurisdiction and hence it is not a binding order, and that article 47 of the Limitation Act provides for limitation of three years from the date of the order of the Magistrate only if such order was a binding order passed with jurisdiction. Secondly, he contends that the plaintiff had no right to possession as against the defendants during the pendency of the proceedings before the Magistrate, that he acquired such title only by virtue of a notice to quit given by him in December 1903 and that under such circumstances article 47 has no application.

As regards the first branch of the argument, I am not prepared to hold that the Magistrate acted without jurisdiction in passing the order for possession under section 145. He might have acted illegally and irregularly in the exercise of his

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jurisdiction under section 145. He might not have made the proper enquiries which he ought to have made before he passed the order, but the record seems to show that the plaintiff had notice of the proceedings and though the notice may not have been served on him in accordance with law, he appeared and put in a statement before the Magistrate. I cannot hold, on the strength of a few general expressions in some of the Calcutta cases, that a Magistrate who merely acts against law or irregularly under section 145 also acts without jurisdiction in passing such an order under the section. I have perused the printed records in *Gangadaram Aiyar* v. *Sankarappa Naidu* (1) out of which the decision *Gangadaram Aiyar* v. *Sankarappa Naidu*(1) arose. In that case also, there seem to have been illegalities and irregularities alleged against the order passed by the Magistrate but the learned Judges held that the Magistrate could not be said to have acted without jurisdiction by reason of the illegalities and irregularities he was alleged to have committed. They applied article 47 (second schedule) and section 28 of the Limitation Act and held that the second defendant's title in that case was barred by article 47. I am unable to distinguish that case from the present. Mr. Seshachari also relies upon *Tukaram* v. *Hari*(2). So far as I understand the decisions pronounced in that case, they seem to have proceeded upon the ground that all orders made by a *mamlatdar* under the Bombay Mamlatdars Act do not come within the meaning of the phrase "order respecting the possession of immovable property" used in article 47, that such orders passed by *mamlatdars* under the Mamlatdars Courts Act may be classified under three different heads and that only orders coming under the first head which positively declare or award possession to a particular party or prevent another party from disturbing the possession of one of the parties could come within the meaning of the phrase in article 47, above referred to. So far as orders under section 145 of the Criminal Procedure Code, clause 6, are concerned they are more analagous to the first class out of the three classes of orders which can be passed by a mamlatdar than to the other two classes of orders *Tukaram* v. *Hari*(2), does not dissent from *Bapu bin Mahadaji* v. *Mahadaji Vasudeo*(3) where

(1) (1911) 9 M.L.T., 91. (2) (1904) I.L.R., 28 Bom., 601 (F.B.).
(3) (1884) I.L.R., 8 Bom., 348.

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it was held that article 47 would apply where a *mamlatdar* passed a positive order for possession.

As regards the second branch of the appellant's contention, the allegations in the plaint and the proceedings before the Magistrate under section 145 seem to show that the plaintiff did not treat the defendants as tenants holding over after the expiry of the prescribed term but treated them as trespassers after that date. If so, his right to possession as against the defendants accrued on the 1st July 1903 before the magisterial proceedings under section 145 arose. The notice to quit possession against the defendants, which notice was given in December 1903, did not therefore in any way create or perfect the plaintiff's title to possession as against the defendants, and the principle of the decision in *Bolai Chand Ghosal* v. *Samiruddin Mandal*(1), cannot therefore apply to this case.

In the result, the Second Appeal is dismissed with costs.

Second Appeal No. 1549 of 1911 follows.

TYABJI, J.

TYABJI, J.—I agree. The question for decision is whether the suit out of which the present appeal arises was barred by operation of article 47 of the Limitation Act. It was argued before us that the proceedings under section 145 of the Criminal Procedure Code must be considered as not having been taken at all because of their having been *ultra vires* (this is the expression employed in the memorandum of appeal to the Lower Court). I entirely agree with what my learned brother has said to the effect that there is nothing in support of the allegations on which this argument is founded and we must proceed therefore on the footing that the order under section 145 of the Criminal Procedure Code is binding on the appellant.

The next point, which seems to me to be the only important point in the appeal, is whether article 47 of the Limitation Act applies to a suit based on an alleged title to the ownership of the property or whether the application of that article must be restricted to suits asking merely for possession of the property without basing the claim on any title to own it. It seems to me that there is a good deal of substance in the argument that the legislature cannot be taken to have cut down the period of limitation for the purpose of establishing title to immovable

(1) (1892) I.L.R., 19 Calc., 646

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property, which as a general rule, is twelve years, unless there is something very definite to bring one to that conclusion. It must be admitted, that the law is not as clearly laid down in the enactments as might be desirable, and whatever decision we may come to, a certain amount of anomaly in the law must result. The difficulties may well be considered in connection with the decisions in *Tukaram* v. *Hari*(1) and *Wise* v. *Ameerunnissa Khatoon* and *Wise* v. *Collector of Backergunge*(2).

In the former decision a Full Bench of the Bombay High Court held that where the proceedings had consisted of an application to the Court under the Mamlatdar's Courts Act, and had resulted in the *mamlatdar* rejecting the plaint presented to him, the period of limitation was not governed either by article 47 of the Limitation Act or section 21 of the Mamlatdars Courts Act. But on an examination of the judgments in that case, it appears that the reasoning on which the decision was based was that the proceedings taken under the Mamlatdars Courts Act in that case were not such as to bind any party with reference to the possession of the property in question: they resulted merely in that the *mamlatdar* rejected the plaint. The Bombay High Court therefore held that there was no order having reference to the title to the property within the terms of article 47 of the Limitation Act inasmuch as it did not bind any person with respect to the possession of any immovable property. On the other hand in the case of orders under section 145 of the Criminal Procedure Code, though the proceedings are in the first instance concerned with the preservation of peace and not with the title to the property, yet by reason of the 6th sub-section of section 145 there is an order respecting the possession of the property binding the parties. So that in regard to this point the proceedings under section 145 of the Criminal Procedure Code, are distinguishable from such proceedings under the Mamlatdars Courts Act as had to be considered by the Full Bench in *Tukaram* v. *Hari*(1).

The difficulty suggested by the other decision to which I have referred namely *Wise* v. *Ameerunnissa Khatoon* (2), is that the Privy Council lays down that the lapse of three years (which

(1) (1904) I.L.R., 28 Bom., 601 (F.B.).
(2) (1879) 7 I.A., 73; s.c., 6 C.L.R., 249.

in accordance with article 47 is the period of limitation for instituting suits) does not suffice for founding a title by prescription, so that, though one of the two claimants may be precluded from setting up any title to the land by reason of the lapse of the three years contemplated by article 47, yet the opposing claimant is not entitled to rely upon the lapse of the same period in order to base thereon his title to the ownership of the land. This no doubt creates an anomaly in the law. But it seems to me that the anomaly is less flagrant than that which could be created if we were to hold that article 47 refers merely to a possessory suit, inasmuch as the law relating to possessory suits as laid down in the Specific Relief Act, section 9, gives a period merely of six months for instituting a suit, and it would have to be held (were the appellant's contention before us accepted) that taking proceedings under the Criminal Procedure Code, section 145, increases the period of limitation from six months to three years: but the policy of the law seems to be to shorten and not to enlarge the period of limitation when there have already been judicial proceedings between the parties with reference to the rights in question or to allied rights.

For these reasons, not without a certain amount of hesitation, I have come to the same conclusion as my learned brother and agree that this appeal should be dismissed with costs.

APPELLATE CIVIL.

Before Mr. Justice Miller and Mr. Justice Sankaran Nair.

1913. July 18.

LODD GOVINDOSS KRISHNADOSS (PLAINTIFF),

v.

RUKMANI BAI (DEFENDANT).*

Presidency Small Cause Courts Act (XV of 1882), sec. 69—Limitation Act (IX of 1908), sec. 20, proviso—Part-payment of principal—Literate debtor—Part-payment signed, but not written by him—Whether sufficient compliance within the proviso.

When two or more Judges of the Small Cause Court are sitting together for the purpose of exercising the jurisdiction conferred by section 38 of the Presidency Small Cause Courts Act (XV of 1882), they are sitting "in a suit" within the meaning of those words in section 69, and if a reference is made to the High Court under its provisions, such reference is valid.

Section 20 of the Limitation Act requires that in the case of a part-payment of the principal of a debt, the entry recording the payment should be written by the person who makes the payment when such person knows how to write, his mere signature to the entry written by another is not a sufficient compliance with the section.

Joshi Bhaishankar v. *Bai Parvati* (1902) I.L.R., 26 Bom., 246, *Jamna* v. *Jaga Bhana* (1904) I.L.R., 28 Bom., 262, and *Mukhi Haji Rahmuttulla* v. *Coverji Bhuja* (1896) I.L.R., 23 Calc., 348, followed.

Sesha v. *Seshayya* (1884) I.L.R., 7 Mad., 55, and *Ellappa* v. *Annamalai* (1884) I.L.R., 7 Mad., 76, distinguished.

REFERENCE under section 69 of the Presidency Small Cause Courts Act (XV of 1882), by C. KRISHNAN, the Chief Judge, V. C. DESIKACHARIAR and S. RAMASWAMI AYYANGAR, the Judges of the Presidency Court of Small Causes, Madras, in Full Bench Application No. 83 of 1912 in Suit No. 8513 of 1912.

The plaintiff as indorsee of a pro-note executed by the defendant sued to recover on the note. Among other pleas, defendant pleaded that the suit was barred by limitation. The note was dated 4th August 1908 and the suit was filed on 19th June 1912. To save limitation plaintiff relied on a part-payment of Rs. 100 towards the note by the defendant coupled with an indorsement on the back of the note which ran thus: "Paid one hundred rupees only." Though, as found, defendant was a lady who knew

* Referred Case No. 19 of 1912.

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how to write, this indorsement was in the handwriting of a third person but it was signed by the defendant. It was also found that the payment was towards the principal of the debt. The indorsement was dated 18th June 1909 and if the part-payment with the indorsement gave rise to a new period of limitation under section 20 of the Limitation Act, the suit was within time as 18th of June 1912 was a day on which plaints were not received in the Presidency Small Cause Court. The question on which Judges of the Small Cause Court differed was whether the indorsement was a sufficient compliance within the meaning of the proviso in section 20 of the Limitation Act. Two of the Judges held that under the ruling in *Ellappa* v. *Annamalai*(1), the indorsement was a sufficient compliance as it was signed by the defendant though she did not write the indorsement herself; the third Judge held that as she knew to write and did not write the indorsement and as no reasons were alleged why she did not herself write the indorsement, her signature to it was immaterial and there was not a sufficient compliance with the proviso.

The question submitted for the opinion of the High Court under section 69 was as follows.—

"Where a debtor, who knew to write, made a part-payment towards the principal of the debt and the fact of such payment appeared in a writing signed by the debtor but not written by him, was there a sufficient compliance with the proviso to section 20 of the Limitation Act and could a new period of limitation be computed from the time when such payment was made."

V. C. Seshachariar for the plaintiff.

Venkatasubba Rao and *Radhakrishnayya* for the defendant.

MILLER, J.

MILLER, J.—There is a preliminary objection that section 69 of the Presidency Small Cause Courts Act (XV of 1882) does not provide for the reference made to us, but in my opinion when two or more Judges of the Small Cause Court are sitting together for the purpose of exercising the Jurisdiction conferred by section 38, they are sitting in a suit within the meaning of those words in section 69. The preliminary objection, therefore, fails.

Then, on the merits, I think that the decisions in *Sesha* v. *Seshaya*(2) and *Ellappa* v. *Annamalai*(1), may properly be

(1) (1884) I.L.R., 7 Mad., 76. (2) (1884) I.L.R., 7 Mad., 55.

LODD GOVINDOSS KRISHNA-DOSS v. RUKMANI BAI. MILLER, J.

confined to the case with which they dealt,—the case, that is to say in which the person making the payment is, by reason of his inability to write, unable to make an entry in his own hand of the fact of payment. No doubt in the judgment of HUTCHINS, J., in *Ellappa* v. *Annamalai*(1) there is language which suggests that, in the opinion of that learned Judge, a person, whether he can write or not, might be said to make that his own handwriting which was written by somebody else if he adopts that writing and puts his signature to it. It does not appear to me that KINDERSLEY, J., was entirely of that opinion. He expresses a doubt whether the words of the Limitation Act do not really require that the writing should be made *actually* by the person paying, but he points to a former decision, *Sesha* v. *Seshaya*(2) in which it was decided that a signature by a mark was in the circumstances of the case sufficient compliance with the twentieth section of Act XV of 1877. And he says: "Having ascertained that other Judges approve of that decision, I am content to follow it as expressing the opinion of the majority of the Judges." I think it may be open to doubt as to what exactly the learned Judge means but so far as it appears from the report, I think it would not be wrong to hold that he, at any rate, and the majority of the Judges of the Court were considering only the cases in which the signature to the entry of part-payment is made by the mark of a person unable to write. It seems, therefore, not improper to confine these two cases to the cases which I have suggested The same view appears to have been taken in Bombay and Calcutta. In *Mukhi Haji Rahmuttulla* v. *Coverji Bhuja*(3), it is suggested that the Madras cases refer to cases in which it is impossible that more can be done in the way of writing an entry by the person making the payment than affixing a mark. In *Joshi Bhaishankar* v. *Bai Parvati*(4), the same view is, I think, indicated and we find that in *Jamna* v. *Jaga Bhana*(5). Sir LAWRENCE JENKINS accepts the Madras decisions so far as they decide that in the case of a person who cannot write, a new period of limitation may start from his part-payment of principal which is recorded in the hand-writing of somebody else to which he had affixed his mark. The learned

(1) (1884) I.L.R., 7 Mad., 76.
(2) (1884) I.L.R., 7 Mad., 55.
(3) (1896) I.L.R., 23 Calc., 546.
(4) (1902) I.L.R., 26 Bom., 246.
(5) (1904) I.L.R., 28 Bom., 262.

Judge accepts the Madras decisions so far and apparently considers that they are not in conflict with *Joshi Bhaishankar* v. *Bai Parvati*(1) and consequently takes the view, which I am prepared to take, that they should be confined simply to the cases with which they actually dealt. Now that is not the present case. In the present case the question put to us is "whether a debtor who knows how to write and makes a part-payment towards the principal of the debt and the fact of such payment appears in a writing signed by the debtor but not written by him, is there a sufficient compliance with the proviso to section 20 of the Limitation Act and can a new period of limitation be computed from the time when such payment was made."

In the case of a debtor who knows how to write I am prepared to accept the view of section 20 which is taken by the High Courts of Bombay and Calcutta. The language of the section seems to me very clear. The distinction between section 19 and section 20 of the Limitation Act makes the matter still clearer—it is hardly necessary to discuss the question fully because it has been fully discussed in the judgments of the Bombay and Calcutta Courts whose decisions I accept. And it seems that, so far as I know, there have been no cases in this Court to the contrary; and we ought therefore to hold that in the case of part-payment of the principal of a debt, where the payment is made by a person who knows how to write, the section requires that the entry recording the payment should be written by the person who makes the payment.

That being my view of the case, I would reply to the reference in the negative. The defendants might have the costs of the reference.

SANKARAN NAIR, J.—I agree.

SANKARAN NAIR, J.

(1) (1902) I L R., 26 Bom., 246.

APPELLATE CIVIL.

Before Sir Charles Arnold White, Kt., Chief Justice and Mr. Justice Oldfield.

1913 July 21 and 22.

S VENKATASUBBAIYER (EXECUTOR TO THE FIRST DEFENDANT), APPELLANT,

v.

S KRISHNAMURTHY (MINOR BY HIS NEXT FRIEND S. KANTHAMMA—PLAINTIFF), RESPONDENT.*

Limitation Act (IX of 1908), arts. 164 and 181 of the second schedule—Ex parte *decree, setting aside of—Defendant dead after decree—Executor not brought on the record—Executor, application by, to set aside* ex parte *decree—Application made more than thirty days after decree—Civil Procedure Code (V of 1908), sec. 146.*

Where a decree was passed *ex parte* against a defendant who died seven days after the decree, and an application to set it aside was made by the executor of the deceased defendant more than thirty days after the passing of the decree

Held, that article 164 and not article 181 of the Limitation Act (IX of 1908) applied to the case and that the application was barred.

On the true construction of article 164 of the Limitation Act read with section 146 of the Code of Civil Procedure (Act V of 1908), the word "defendant" in article 164 is wide enough to include the executor of the original defendant, though the executor may not have been brought on the record when the application was made.

Ganoda Prosad Roy v. *Shib Narain Mukerjee* (1902) I.L.R., 29 Calc., 33, referred to.

APPEAL from the order of BAKEWELL, J., in the exercise of the ordinary Original Civil Jurisdiction of the High Court and made in Civil Suit No. 321 of 1910.

The facts of the case appear from the judgment of WHITE, C.J.

A. Ramachandra Ayyar for the appellant.

V. V. Srinivasa Ayyangar for the respondent.

WHITE, C.J. WHITE, C.J.—In this case the plaintiff obtained an *ex parte* decree against the defendant on the 28th August 1912. On the 3rd September the defendant died. On the 30th September his executor made an application to set aside the decree. The executor had not taken out probate and he had not been made a party to the suit when he put in this application. The learned Judge held that the matter was governed by article 164

* Original Side Appeal No. 85 of 1912.

of the first schedule of the Limitation Act and dismissed the application as barred by limitation. The question is "was the learned Judge right?" The learned Judge puts it thus: "The right to make the application accrued to the first defendant on the date of the decree and this right may accordingly be exercised by his executor. The latter has no fresh right apart from his testator. He only comes to the Court asking that the right formerly possessed by the deceased may be exercised by him." On behalf of the appellant it was argued that article 164 did not apply, that the question was governed by the provisions of the general article 181 and that the application was not time-barred. It was argued that the word "defendant" in article 164 did not apply to a person occupying the position of the executor in this matter; but that, if the executor was a defendant, within the meaning of the words in the first column of the article, the summons had not been duly served and time began to run from the time when the executor had knowledge of the decree. It was pointed out that the word used in the third column was not defendant but "applicant." The short answer to the latter contention seems to me to be this. The alternative date applies only where the summons was not duly served and the party with reference to whom that provision was made is the original defendant. Here the summons was duly served on the original defendant. At any rate it has not been suggested it was not. The fact that he unfortunately died soon after the service does not render the service any less effective. The argument on behalf of the respondent was that "defendant" in article 164, reading that article, by the light of section 146 of the Code of Civil Procedure, includes an executor even if he is not, when the application is made, a party to the suit. The application here is made by the executor either under the powers given by section 146 or powers already existing which are recognised by that section That section was probably introduced on account of the conflict of authority in this matter. In *Ganoda Prosad Roy* v. *Shib Narain Mukerjee*(1), it was held that where a defendant against whom a decree has been passed *ex parte* dies, his legal representative when he has been brought on the record is competent to apply under section 108 of the Code of Civil Procedure for an order to

(1) (1902) I.L.R., 29 Calc., 33.

VENKATA-SUBBAIYER v. KRISHNA-MURTHY.

WHITE, C.J.

set aside the *ex parte* decree. (Section 108 of the old Code corresponds to Order IX, rule 13 of the present Act.) In the Allahabad High Court a different view had been taken. It is now settled that where a defendant against whom an *ex parte* decree has been passed dies, his legal representative if he has been made a party to the suit can apply for an order to set aside the *ex parte* decree. But although the original intention of the Legislature may have been to provide for a class of cases such as that, which came before the Calcutta High Court in *Ganoda Prosad Roy* v. *Shib Narain Mukerjee*(1), there is no reason, as it seems to me, why for the purposes of construing article 164 of the Limitation Act, we should restrict the application of section 146 of the Code to the class of cases which, it may be, the Legislature had in mind when they enacted section 146, *i.e.*, cases where the legal representatives were on the record. On the true construction of article 164 read by section 146 it seems to me that the word "defendant" is wide enough to indicate the executor of the original defendant, though he may not have been brought on the record when the application is made.

If the executor had been made a party before he made his application to set aside the *ex parte* decree, but made the application after the expiration of thirty days from the date of the decree, and article 164 had been pleaded, it seems to me the executor would have no answer. If the appellant is right in his contention that article 164 does not apply, the executor, though not on the record, is in a better position than if he were on the record. If he were on the record, he would be within the article and would only have thirty days from the decree. Not being on the record, article 164 does not apply, and he can claim the benefit of article 181. That is the argument. I do not think that any such result was in the contemplation of the Legislature. It may be that cases of hardship may arise by reason of there being only thirty days within which the executor who is on the record, or a party who can apply under section 146 of the Code without being on the record can take action for the purpose of getting an *ex parte* decree against a deceased defendant set aside. But we have to look to the enactments.

I think we ought to dismiss the appeal with costs.

OLDFIELD, J.

OLDFIELD, J.—I agree.

(1) (1902) I.L.R., 29 Calc., 33.

APPELLATE CIVIL.

Before Mr. Justice Sadasiva Ayyar and Mr. Justice Tyabji.

KORAPALU AND ANOTHER (DEFENDANTS Nos. 2 AND 3), APPELLANTS,

1913. July 16 and 24.

v.

NARAYANA *alias* NARANAPPAYA (PLAINTIFF), RESPONDENT.*

Lessor and lessee—Forfeiture for non-payment of rent—Joint lessors—Separation of their ownership in the lands—Receipt by one of the joint lessors of his share of rent from the lessee—Right of the other joint-lessor to enforce the forfeiture—No act done by the lessor previous to the institution of the suit to determine the lease—Election previous to suit not necessary—Waiver—Transfer of Property Act (IV of 1882), sec. III, cl. (g)—Right of re-entry under the old English Common law.

One of several joint lessors who had become separately entitled to his share of the lands leased, is entitled to enforce the forfeiture clause in the lease-deed separately as regards his share of the lands.

Sri Raja Simhadri Appa Rao v. *Prattipati Ramayya* (1906) I.L.R., 29 Mad., 29, followed.

Gopal Ram Mohuri v. *Dhakesuar Pershad Narain* (1908) I.L.R., 35 Calc., 807, dissented from.

Mere breach by the lessee of a covenant involving forfeiture contained in a lease of lands executed for agricultural purposes, gives a sufficient cause of action to the lessor to bring the suit in ejectment, and it is not necessary that the lessor should do some act showing his intention to determine the lease before he brings his suit in ejectment.

Venkatramana Bhatta v. *Gundaraya* (1908) I.L.R., 31 Mad., 403, distinguished.

Padmanabhayya v. *Ranga* (1911) I.L.R., 34 Mad., 161, followed.

Per SADASIVA AYYAR, J.—As the breach of the condition gives rise to a cause of action at once, there is strictly no question of election between two different rights but there is only an election whether the lessor is to retain the right created by the breach or to give up the right. The retention requires no definite physical act while the waiver does.

APPEAL against the decree of D. RAGHAVENDRA RAO, the Subordinate Judge of South Canara, in Appeal No. 384 of 1910, preferred against the decree of C. D. J. PINTO, the District Munsif of Karkal, in Original Suit No. 394 of 1909.

The material facts appear from the judgment of SADASIVA AYYAR, J.

B. Sitarama Rao for the appellants.

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* Second Appeal No. 1593 of 1912.

KORAPALU v NARAYANA — SADASIVA AYYAR, J

K. Yagnyanarayana Adiga for the respondent.

SADASIVA AYYAR, J.—The defendants Nos. 2 and 3 are the appellants. The plaintiff owns one half of certain lands. The sixth and seventh defendants own the other half under an alienation by the fifth defendant, who was the former owner of that other half. The defendants, appellants, were mulgeni tenants under a lease executed by the plaintiff and the fifth defendant jointly in 1889. The lease deed contained a forfeiture clause for non-payment of rent. The plaintiff gave notice in July 1909 to the defendants to give up the lands as they had incurred forfeiture by non-payment of rent, and the suit was brought in September 1909 by the plaintiff on behalf of himself and the fifth defendant whose alienees are the defendants Nos. 6 and 7 to eject the defendants Nos. 2 and 3 from the entire lands. The lower Appellate Court decreed the suit so far as the plaintiff's half share was concerned on the following grounds:—

(*a*) Though the original letting of 1889 was jointly made by the plaintiff and the fifth defendant, the plaintiff had become separately entitled to one half of the lands and was entitled to enforce the forfeiture clause separately as regards his half share.

(*b*) As regards the contention of the defendants 2 and 3 that under section 111 (*g*) of the Transfer of Property Act, where the lessee breaks the condition which provides that on such breach the lessor may re-enter the lessor must do some act showing his intention to determine the lease before the lease is determined under such forfeiture clause, the plaintiff's notice of July 1909 had the legal effect of the doing of some act showing the intention to determine the lease required by section 111 (*g*).

The defendants Nos 2 and 3 contend before us:

(*a*) that the original lease of 1889 could not be split up so as to enable the plaintiff alone to do an act expressing his intention to take advantage of the forfeiture clause as regards his half share.

(*b*) That the notice of 1889, if properly construed, does not indicate a present intention on the plaintiff's part to determine the tenancy in accordance with the forfeiture clause but only a contingent future intention.

As regards joint lessors the judgments pronounced in *Sri Raja Simhadri Appa Rao* v. *Prattipati Ramayya*(1) contain very

(1) (1906) I.L.R., 29 Mad., 29

instructive observations. There the plaintiff and the third defendant were joint owners of certain lands but afterwards became by a partition decree common owners of the said lands. Sir SUBRAHMANYA AYYAR, J., held that the plaintiff (tenant in common) may have ejectment as against the lessees of the land to the extent of the plaintiff's interest and he relied upon the English cases of *Cutting* v. *Derby*(1) and *Doed. Whayman* v. *Chaplin*(2). SANKARAN NAIR, J., relying on certain Indian cases, hesitated to follow the English law as regards the right of a tenant in common to eject the common lessee from the former's particular share of the leased lands. But he considered it unnecessary to give a final opinion on that question as, on other grounds, he concurred in the conclusion of Sir SUBRHAMANYA AYYAR, J. He held that, under the principles of law enbodied in sections 37 and 109 of the Transfer of Property Act, a joint owner who has by division become the owner of a specific share is entitled to enforce separately all the rights appertaining to the particular land which fell to his share, as against the lessee just as if he had given a separate lease of his own share alone originally to the lessee. SANKARAN NAIR, J., in effect held that even though sections 37 and 109 may not directly apply to agricultural leases in the Madras Presidency the principles embodied in those sections ought to be followed by Indian Courts.

Thus taking the view of either Sir SUBRAHMANYA AYYAR, J., or of SANKARAN NAIR, J., it is clear the Calcutta cases [see the latest case of *Gopaul Ram Mohuri* v. *Dhakeswar Pershad Narain*(3)], which are not binding upon us and which were relied upon by the appellant's vakil are opposed to the decision of this High Court in *Sri Raja Simhadri Appa Rao* v. *Prattipati Ramayya*(4), and I prefer to follow *Sri Raja Simhadri Appa Rao* v. *Prattipati Ramayya*(4).

Going to the other question whether the principle embodied in section 111 (*g*) of the Transfer of Property Act should be followed in such cases, in other words, whether the mere breach by the lessee of the covenant of forfeiture gives a sufficient cause of action to the lessor to bring the suit in ejectment, or whether it is further necessary that the lessor should do some

(1) (1776) 2 W.B.L., 1077. (2) (1810) 3 Taunt, 120; s.c. 128 E.R., 49
(3) (1908) I.L.R., 35 Calc., 807. (4) (1906) I.L.R., 29 Mad., 29.

KORAPALU v. NARAYANA.

SADASIVA AYYAR, J.

act showing his intention to determine the lease before he brings the suit in ejectment, it was held in *Venkatramana Bhatta* v. *Gundaraya*(1), that there should be a separate act done prior to the institution of the suit showing such an intention, that such separate act alone can determine the lease and that the mere bringing of the suit is not such an act. *Venkatramana Bhatta* v. *Gundaraya*(1), assumed that the Transfer of Property Act was applicable to the facts of that case. But in *Padmanabhaya* v. *Ranga*(2), it was pointed out that the Transfer of Property Act did not govern the lease in question in *Venkatramana Bhatta* v. *Gundaraya*(1), and that this fact was overlooked in that case. *Padmanabhaya* v. *Ranga*(2), definitely held that, where the lease is not governed by the Transfer of Property Act, a landlord can maintain his suit for ejectment on forfeiture by the tenant without the landlord's having done any prior act evincing his intention to determine the lease. *Padmanabhaya* v. *Ranga*(2), was followed in *Ramakrishna* v. *Baburaya*(3), by the learned WHITE, C.J., and SANKARAN NAIR, J., again distinguishing *Venkatramana Bhatta* v. *Gundaraya*(1), on the ground that it was not brought to the notice of the Judges who decided that case that the lease in question was not governed by the Transfer of Property Act. The provision in section 111 of the Transfer of Property Act (about a further act being necessary besides the breach of the covenant in the forfeiture clause before a suit could be brought) was probably a relic brought over into that Indian Statute from the antiquated technicality of the old English Common Law which required the formality of re-entry by the lessor of the leased lands before the lease could be determined for breach of covenant; but this formality is unnecessary in the case of leases not governed by the Transfer of Property Act. As said in *Padmanabhaya* v. *Ranga*(2), the forfeiture is complete "when the breach of the condition or the denial of the title occurs. But as it is left to the lessor's option to take advantage of it or not the election was not a condition precedent to the right of action but the institution of the action was simply a mode of manifesting the election." I would put it even more strongly by saying that, as the breach of the condition gives rise to a cause of action at

(1) (1908) I.L.R., 31 Mad., 403. (2) (1911) I.L.R., 34 Mad., 161.
(3) (1912) 23 M.L.J., 715

once, there is strictly no question of *election between two different rights*, but there is only an election whether the lessor is to retain the right created or to give up the right. The retention requires no definite physical act while the waiver does. The word 'election' is not the appropriate word to use as regards the bringing of the action based on the right created in the plaintiff by the forfeiture. The word 'election' should be used only where the lessor has elected by an act to waive the right created by the tenant's default. There are not two alternative elections, the one giving rise to a right and the other not giving rise to that right but only one election to waive the right created.

I therefore think that no act was at all necessary on the part of the plaintiff to take advantage, as regards his share of the lands, of the forfeiture clause in the lease deed. On this view it is unnecessary to consider the other contention raised by the appellant that the acts relied upon by the plaintiff, namely, the notice to the first defendant in July 1909 and the acceptance of the sodi chit are not acts showing an intention to determine the lease. In the result, the Second Appeal fails and is dismissed with costs.

TYABJI, J. TYABJI, J.—I am also of opinion that in this case the plaintiff may enforce the forfeiture clause of the lease with respect to his moiety of the land, notwithstanding that those who are entitled to the other moiety have waived the right to enforce the forfeiture clause by receiving their moiety of the rent.

The Transfer of Property Act is not directly applicable; and it seems to me that the principle underlying section 111 of that Act ought not to be applied with stringency in a case like the present where the lessee is prompt in taking steps which leave no room for doubt as to whether he intends to enforce the forfeiture. I take it that, apart from the historical reasons to which my learned brother has alluded and which do not apply in India, the rule introduced in section 111 is now upheld in order to prevent a tenant from being subjected to such doubts. That reason for upholding the rule is not present in this case. I would therefore dismiss the appeal with costs.

APPELLATE CIVIL.

Before Mr. Justice Sadasiva Ayyar and Mr. Justice Tyabji.

1913.
July 23, 24
and 25.

P. KATHIR (SECOND DEFENDANT), APPELLANT,

v.

O. MAREMADISSA AND TWO OTHERS (PLAINTIFF AND DEFENDANTS NOS. 1 AND 3), RESPONDENTS.*

Transfer of Property Act (IV of 1882), sec. 52—Lis pendens—Contentious suit, meaning of—Friendly suit, no contest—Plea of lis pendens *not taken in the written statement—Point of Law—Plea permitted after remand.*

The words "contentious suit" in sec 52 of the Transfer of Property Act (IV of 1882) are used in contradistinction to a friendly suit in which there is no contest Every suit other than such a friendly suit, by its origin and nature, falls within the definition of a contentious suit.

Jogendra Chander Ghose v. *Fulkumari Dassi* (1900) I.L.R., 27 Calc., 77, followed

Krishna Kamini Debi v *Dino Mony Choudhurani* (1904) I.L.R., 31 Calc., 658 and *Upendra Chandra Singh* v *Mohri Lal Marwari* (1904) I L R., 31 Calc., 745, dissented from.

Faiyaz Husain Khan v. *Prag Narain* (1907) I L.R., 29 All., 339 (P C), referred to.

A point of law such as *lis pendens* which was argued before the first court, and which required no further facts than those already on record must be considered by the Appellate Court though the defendants did not plead it in the written statement.

SECOND APPEAL against the decree of K. IMBICHUNNI NAIR, the Subordinate Judge of South Malabar at Calicut, in Appeal No. 113 of 1911, preferred against the decree of T. V. NARAYANAN NAIR, the District Munsif of Mangeri, in Original Suit No. 655 of 1909.

The facts appear from the judgment of the High Court.

T. R. Ramachandra Ayyar for the appellant.

The Honourable Mr. *T. Richmond* for the first respondent.

SADASIVA AYYAR AND TYABJI, JJ.

JUDGMENT.—The Munsif, on remand by the Subordinate Judge, held that the plaintiff, who had obtained an assignment of the rights of one Kotta Athan, was bound by the decision in Original Suit No. 414 of 1907 (Exhibit VI). In that decision it was held that the land referred to in the plaint belonged to the second defendant and not to the said Athan. The plaintiff obtained

* Second Appeal No. 1422 of 1912.

from Athan the assignment on which he relies in January 1908 during the pendency of the said suit. Applying the doctrine of *lis pendens* the Munsif held that the plaintiff could not set up a title to the said land as against the second defendant. The Subordinate Judge on appeal refused to consider the plea of *lis pendens* because it was not raised specifically by the defendants in their written statement, and the Munsif by the remand order was directed to decide the case on the merits irrespective of the effect of the doctrine of *lis pendens.*

The argument based on the doctrine of *lis pendens* had evidently been argued before the Munsif. It was a pure question of law, and required for its disposal no additional evidence beyond what was already on record. It ought therefore in our opinion to have been considered by the Appellate Court.

That question has been fully argued before us. We agree with the decision of MACLEAN, C.J., and BANERJEE, J., in *Jogendra Chunder Ghose* v. *Fulkumari Dassi*(1) that the words "contentious suit" in section 52 of the Transfer of Property Act are used in contradistinction to a friendly suit in which there is no contest. Every suit other than such a friendly suit, by its origin and nature, falls within the definition of a contentious suit. We think that the observations to the contrary in other cases [two of them *Krishna Kamini Debi* v. *Dino Mony Chowdhurani*(2) and *Upendra Chandra Singh* v. *Mohri Lal Marwari*(3)] must be held to be erroneous in view of the dictum of their Lordships of the Privy Council in *Faiyaz Husain Khan* v. *Prag Narain*(4).

In the result we reverse the Lower Appellate Court's decree and dismiss the plaintiff's suit. As the second defendant (appellant) has succeeded on a point not properly raised by him in the Lower Courts, we direct the parties to bear their respective costs throughout.

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(1) (1900) I L R, 27 Calc, 77. (2) (1904) I.L R, 31 Calc., 658.
(3) (1904) I.L R, 31 Calc, 745. (4) (1907) I L R, 29 All., 339 (P C).

ORIGINAL CIVIL.

Before Mr. Justice Wallis.

J. S. BATTIE, PETITIONER,

v.

1913. July 29.

G. E BROWN FALSELY CALLED G. E. BATTIE, RESPONDENT.*

Indian Divorce Act (IV of 1869), sec. 57—Marriage solemnized before the expiry of six months as required by, validity of.

Section 57 of the Divorce Act (IV of 1869) expressly prohibits remarriage within six months of the making of the decree absolute; the Indian law does not completely dissolve the tie of marriage until the lapse of a specified time after a decree of dissolution and the marriage is still in force within the meaning of section 19 (4) so as to give the Court jurisdiction under section 19 to pronounce a decree of nullity regarding such prohibited marriage.

Jackson v. *Jackson* (1912) I.L.R., 34 All, 203, followed

Chichester v. *Mure* (1863) 32 L J., 146 and *Warter* v. *Warter* (1890) L R., 15 Pr. D., 152, refererd to.

SUIT by a husband for a declaration that petitioner's marriage with respondent was null and void.

The respondent had been previously married to another and such previous marriage was dissolved by a decree of the High Court which was made absolute on 17th November 1891.

The present marriage which was sought to be declared void took place on the 25th November 1891 or eight days after the decree absolute.

The petitioner's case was that inasmuch as the present marriage had taken place within six months of the decree absolute it was null and void.

D. Chamier for the petitioner.—The petition is filed under section 19 of the Indian Divorce Act. It is contended that the former husband of the respondent was living at the time of this marriage and that the marriage with such former husband was then in force. Section 57 gives liberty to parties to marry again when six months have passed after the date of a decree of a High Court dissolving the marriage. *Jackson* v. *Jackson*(1)

* Original Matrimonial Suit No. 1 of 1913.

(1) (1912) I.L.R, 34 All, 203.

was also a case of nullity of marriage. That case was decided on the authority of *Warter* v. *Warter*(1) which was also a decision on the Indian Statute though the question arose in connection with the validity of a will. Section 19 (4) which renders it necessary to show that the marriage with the former spouse was in force is answered in this way :—

By the Common Law of England which was inherited by the Supreme Court in India a party to a marriage was incapable of contracting another valid marriage during the life-time of the other party to it. This disability was removed by the English Divorce Act of 1857 and by the Indian Act of 1869. Section 57 of the former resembles in principle section 57 of the latter. But the removal of the disability was not absolute and was subject to the condition in the Indian Act that six months should elapse from the date of the decree dissolving the marriage. The result appears to be that under the ecclesiastical law a marriage always continues to be in force during the life-time of the other spouse, but the legislature validates remarriage if contracted after a certain time has elapsed. It must be said therefore in the present case that at the time of the marriage now in question the marriage of the respondent with her former husband was in force within the meaning of section 19 (4) and that the form of marriage which the parties purported to celebrate was not a valid marriage within the meaning of section 57 as it was contracted before the six months referred to in that section had elapsed. This was the view taken in *Chichester* v. *Mure*(2) which was followed with approval in *Rogers* v. *Halmshaw*(3). Both cases are referred to in Halsbury's Laws of England, volume 16, page 594, note (*e*).

If this contention is not the true one the result might be that a man could find himself lawfully married to two wives, because he could contract a valid marriage within six months of the decree absolute and whilst an appeal was being filed to the Privy Council. In the event of the order absolute being dissolved on appeal the result would be that the first wife would remain validly married to her husband and the husband would at the same time be validly married to the second wife. It is not

(1) (1890) L R , 15 Prob D., 152

(2) (1863) 32 L.J , Prob Matr and Adm., 146

(3) (1864) 33 L.J , Prob., 141.

BATTIE v. BROWN.

easy to suppose that such a state of affairs was contemplated and the other construction if adopted would avoid it. The decree contemplated by the section is a decree absolute, and not merely a decree *nisi*.

The respondent had entered an appearance by solicitors after service of notice of the petition but was not represented by counsel in Court.

WALLIS, J.

JUDGMENT.—This is a case of a very unusual character in which the petitioner seeks a declaration of the nullity of the marriage which he contracted with the respondent in the year 1891, on the ground that the marriage was null and void as having been contracted within six months of the date on which a decree absolute had been passed dissolving the earlier marriage of the respondent. Now I may observe that this marriage was performed by "license." I do not know if the authorities issuing the license were aware that the previous marriage of the respondent had been so recently dissolved, but if they were so aware, clearly the license ought not to have been issued, and this case illustrates the necessity that the licensing authority, when it is brought to its notice that the marriage of one of the parties has been dissolved, should satisfy itself, before issuing the license, that the marriage had been dissolved by a decree absolute six months before the celebration of the new marriage; and it is, of course, equally incumbent on ministers of religion and others who solemnize such marriages so to satisfy themselves. The present suit is unopposed and therefore may be taken to be really by consent. But it is easy to conceive what serious and lamentable results might follow from carelessness of this kind. However, in the present case the only thing I have to do is to see whether the petitioner has made out a case for the declaration of nullity which he prays for. Now the prohibition in section 57 of the Divorce Act against remarriage within six months of the making of the decree absolute, or the determination of an appeal if one has been preferred, is express and differs very little from the similar statutory provision of the English Law. The English section has been held to render a marriage contracted in defiance of its provisions void as in *Chichester* v. *Mure*(1) cited by Mr. Chamier, and the Indian

(1) (1863) 32 L.J., Pr. Matr. and Adm., 146.

BATTIE v. BROWN.

WALLIS, J.

section has been construed in the same way by Sir JAMES HANNEN in *Warter* v. *Warter*(1). The question there was as to the validity of a will and not as to declaration of nullity. But there is an exactly similar decision to this of CHAMIER, J., in *Jackson* v. *Jackson*(2). The only difficulty I felt in regard to this case is not as to the nullity of the marriage which is forbidden in the plainest terms, by section 57, but as to the jurisdiction of this Court to pronounce a decree of nullity, because section 19 which deals with the grounds upon which decrees of nullity may be pronounced gives, as one of the grounds, "that the former husband or wife of either party was living at the time of the marriage, and marriage with such former husband or wife was then in force." It strikes one, at first, as strange to talk of a marriage being "in force" after it has been dissolved by a decree absolute; but as was pointed out in the case, by the earlier law as administered in the Ecclesiastical Courts marriage was indissoluble, and when marriages were dissolved by Act of Parliament, it was considered necessary to insert a special power of remarriage, so that, as Sir JAMES HANNEN said, the result of pronouncing a decree absolute was not completely to dissolve a marriage. "The Indian Law," he says in a passage cited by CHAMIER, J. "like our own, does not completely dissolve the tie of marriage until the lapse of a specified time after the decree." In other words the former marriage is to be considered still in force at any rate to the extent of preventing a subsequent marriage during the life-time of the other party to such marriage until the prohibition resulting from the survival of such other party is removed by virtue of the section. Now the prohibition is not removed by virtue of the section till the lapse of six months, or the happening of the other event therein mentioned. Consequently, I hold that not only was this marriage void on the date when it was solemnized, but also that the previous marriage was still "in force" within the meaning of section 19 (4) so as to give me jurisdiction under section 19 to pronounce a decree of nullity. I accordingly make the decree prayed for.

Solicitors for the petitioner —*Messrs. Short, Bewes & Co.*

Solicitors for the respondent —*Messrs. Rencontre and Tirumalai Pillai.*

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(1) (1890) L.R., 15 P.D., 152. (2) (1912) I.L.R., 34 All., 203.

APPELLATE CIVIL.

Before Mr. Justice Sadasiva Ayyar and Mr. Justice Tyabji.

1913. July 29 and 30.

THE CHAIRMAN, MUNICIPAL COUNCIL, SRIRANGAM (DEFENDANT), APPELLANT,

v.

SUBBA PANDITHAR (PLAINTIFF), RESPONDENT *

Madras District Municipalities Act (IV of 1884), sec. 168—Adverse possession against Municipality—'Lawful encroachment,' meaning of—Right of Municipality to remove encroachments, etc., after title barred—Limitation Act (XV of 1877)—Limitation Amendment Act (XI of 1900)

Adverse possession by a person for twelve years before the Limitation Amendment Act of 1900 came into force, of some portion of a street vested in a Municipality, is sufficient to give the person a clear title as against the Municipality

Under section 168 of the District Municipalities Act, the Municipal Council is not entitled to remove the projections and encroachments made by a person who has acquired full title to them and to the site on which the encroachments stand by adverse possession for the statutory period.

Basavesuara Swami v *Bellary Municipal Council* (1915) I.L.R., 38 Mad., 6; s.c., 23 M.L.J., 478, distinguished.

SECOND APPEAL against the decree of E. L. THORNTON, the District Judge of Trichinopoly in Appeal No. 344 of 1910, preferred against the decree of T. JIVAJI RAO, the District Munsif of Srirangam in Original Suit No. 286 of 1909.

The plaintiff brought the suit against the Municipality of Srirangam for the issue of a permanent injunction restraining the Municipal Council from entering on a *koradu* (pavement) in front of the plaintiff's house or on the land on which the *koradu* was constructed and from removing the same. The plaintiff alleged that the *koradu* in question was in the enjoyment of the plaintiff and his predecessors in title for over a period of sixty years. In 1901, the plaintiff applied to the defendant Municipality for a written permission to renew the structure on the sites in question by erecting a stone pial and *koradu* in the place of a mud structure which was previously in existence. Both the lower courts found that the plaintiff had been in possession and enjoyment of the structure in question (which were encroachments on the street) for more than thirty years. The defendant Council pleaded that the plaintiff had not acquired title by adverse

* Second Appeal No. 577 of 1912.

possession, and that the suit was bad for nonjoinder of the Government as a party to the suit. Both the Lower Courts granted the permanent injunction as prayed for by the plaintiff. The defendant, the Municipal Council, thereupon preferred a second appeal to the High Court.

N. Rajagopala Achariyar for the appellant contended that the plaintiff did not as a matter of fact acquire title by adverse possession for the statutory period, that he was in possession only by sufferance and that in any event the Municipal Council was competent and entitled under the District Municipalities Act, section 168, to remove the structure as an encroachment on the street, irrespective of the question whether the plaintiff had acquired title to the same by adverse possession for the statutory period, and relied on *Basaveswara Swami* v. *Bellary Municipal Council*(1).

V. Viswanatha Sastri for the respondent contended that acquisition of title by adverse possession was a question of fact, and that a Municipality was entitled to demolish only encroachments on streets and not sites or structures on sites which by adverse possession for the statutory period ceased to be part of the street.

SADASIVA AYYAR, J.

SADASIVA AYYAR, J.—The lower courts in considering the question of possession have proceeded on the footing that the plaintiff should have had adverse possession for thirty years before suit before he could acquire title to the street space encroached upon against the Municipality of Srirangam. It is clear that if he had had possession for twelve years before the Limitation Amendment Act of 1900 came into force, that possession was sufficient to have given him a clear title as against the Municipality.

On the question whether under section 168 of the District Municipalities Act, the Municipal Council was entitled to remove the projections and encroachments, even though the plaintiff had acquired full title to them and to the site on which the encroachment stood, I have had serious doubts In *Basaveswara Swami* v. *Bellary Municipal Council*(1) the Government was a party to the suit and their title was not lost. Further, the adverse title established there did not relate to the whole cubic space of the street belonging to the Municipality

(1) (1915) I.L.R., 38 Mad., 6; s.c., 23 M.L.J., 478.

THE CHAIRMAN, MUNICIPAL COUNCIL, SRIRANGAM, v. SUBBA PANDITHAR. — SADASIVA AYYAR, J.

but only to the upper space portion situated over a drain space which still continued vested in the Municipality. An erection which has become lawful by adverse possession might still be an obstruction or encroachment so far as the drain space beneath it (such drain space coming under the definition o "street") is concerned. But where the whole cubic space forming a portion of the street, vested in the Municipality has been effectively occupied and acquired by adverse possession against the Municipality, the whole of such space ceases to be a street, and the original encroachment or obstruction can no longer, it seems to me, be called an encroachment or obstruction in the street, because the street space encroached upon has *wholly ceased to be a street.*

I would distinguish the present case from the 23 Madras Law Journal case on this ground, though, I must admit that the observations in the judgments delivered in that case (especially that of my learned brother SUNDARA AYYAR, J.) are put on the broad ground that the acquisition of title by adverse possession and *the loss of title in the Municipality has nothing* to do with the Municipality's power under section 168 to remove encroachments because clause (3) of section 168 provides for compensation for the removal of lawful encroachments by the Municipality. I might, however, be permitted to remark that clause (3) relates only to encroachments lawfully made (evidently by license) under section (67) and not to encroachments which were unlawful when made but the title to the space covered by which encroachments has become indefeasible *by adverse possession.*

In the result though not without hesitation, I concur in the dismissal of this appeal with costs.

TYABJI, J.

TYABJI, J.—The plaintiff sued for an injunction against the Municipal Council of Srirangam restraining it from entering the land referred to in the plaint. The District Judge agreeing with the District Munsif has found that the plaintiff has been in possession of the land and of the erections over it for over the statutory period and has acquired a title to the land by prescription. This in our opinion is a question of fact, and we cannot interfere with the finding in second appeal.

It seems to me to be clear that if the land belongs to the plaintiff his structure over his own land cannot be demolished by the Municipality.

It is argued before us however that the decision in *Basaweswara Swami* v. *Bellary Municipal Council*(1) entitles the Municipality under section 168 of the District Municipalities Act, to demolish the erections on the land in question. I cannot agree that the effect of the decision referred to is that any erection can be considered to be an encroachment or obstruction under section 168 of the District Municipalities Act after the land over which the erection is made has passed into the ownership of the person who has made it; and for the purposes of the question before us I see no distinction between the transfer of the ownership of the land by adverse possession and transfer in any other manner. In the case cited above the obstruction consisted of a pial (or verandah) erected over drains belonging to the Municipality and thus there was either no passing out of the ownership of the land over which the pial was erected from the Municipality to the person who had erected it, or the pial was an obstruction to the drain belonging to the Municipality in either of which cases the facts would be materially distinguishable from those with which we have to deal.

I therefore think that this appeal should be dismissed with costs.

APPELLATE CIVIL.

Before Mr. Justice Sadasiva Ayyar and Mr. Justice Tyabji.

1913. August 1.

SRI B. B. SARVARAYUDU GARU (FIRST PLAINTIFF), APPELLANT,

v.

K. VENKATARAJU (SECOND PLAINTIFF AND DEFENDANTS Nos. 1 AND 2), RESPONDENTS.*

Madras Estates Land Act (I of 1908), ss. 3 (7), 6, 23, 153 and 157—'Old waste,' ejectment from—Onus of proving 'old waste' on landlord

A landholder claiming to eject a tenant under sections 153 and 157 of Madras Estates Land Act (I of 1908) on the ground that he is a non-occupancy ryot of 'old waste' is by section 23 of the Act bound to prove that the land is 'old

(1) (1915) I.L.R., 38 Mad., 6, s.c., 23 M.L.J., 479.

* Second Appeal No. 1376 of 1912.

SARVARAYUDU v. VENKATARAJU.

waste' within the meaning of section 3, clause (7) of the Act. If neither sub-clause (1) nor the latter part of sub-clause (2) of the definition of 'old waste' would apply to the facts of the case, the first part of sub-clause (2) cannot be used to prove that the land is 'old waste' as that refers to a state of facts subsequent to the passing of the Act, and as section 6 of the Act vested in the tenant in possession occupancy right from the date of the passing of the Act in all ryoti lands not being 'old waste '

SECOND APPEAL against the decree of Diwan Bahadur M. O. PARTHASARATHI AYYANGAR, the District Judge of Godavari at Rajahmundry, in the Appeal No. 260 of 1910, preferred against the decree of R V. SUBBA RAO, Suits Deputy Collector of Godavari, in Summary Suit No. 829 of 1910.

This was a suit under sections 153 and 157 of the Madras Estates Land Act by a landholder against his tenants on the ground that the land was "old waste" let to the tenants on lease for a period of five years from 1904 and that the tenants refused to give up the land at the end of the period. The tenants pleaded that the land was 'ryoti land' in which they had occupancy rights and not 'old waste.' The land in question was a lanka gradually formed in the Vridhagautami river in the Godavari district. Both the Lower Courts found the land was ryoti land and not old waste and that the plaintiff had no right to eject the tenants.

The landholder thereupon preferred this Second Appeal.

The other facts appear from the judgment of TYABJI, J.

G. Venkataramayya for the appellant.

B. Narasimha Rao for the respondents Nos. 2 and 3.

SADASIVA AYYAR, J.

SADASIVA AYYAR, J.—Section 23 of the Madras Estates Land Act says that a land "shall be presumed to be ryoti land *other than old waste*" until the contrary is proved. The important question in issue in this case is whether the plaint land is ryoti land coming under the definition of "old waste" or "ryoti" land not coming under the definition of "old waste." For, if it was not "old waste," section 6 gives the ryot in possession on the date of the passing of the Act an occupancy right in the land; and this suit by the landlord (appellant before us) in ejectment was rightly dismissed by the Lower Courts. "Old waste" is defined in section 3, clause (7). Clause (7) contains two sub-clauses Nos. (1) and (2). The plaint land admittedly does not come under sub-clause (1). As regards sub-clause (2), there are two parts in it. The land in question does not come under the description of

SARVARAYUDU v. VENKATARAJU. — SADASIVA AYYAR, J.

the land in the second part, that is, land in respect of which an ejectment decree against the ryot has been obtained before the coming into force of the Act. As regards the first part of sub-clause (2), it refers to a land which has remained without occupancy rights being held therein at any time within a period of not less than ten years immediately prior to a letting by the landholder after passing of the Act. To find out whether a land was "old waste" or not *at the time of the passing of the Act*, a definition which says that a land shall be considered as old waste at the time of a letting after the passing of the Act, if certain conditions are then fulfilled, cannot be resorted to, because section 6 applied at once on the passing of the Act, and when once occupancy rights are vested in ryot at the time of the passing of the Act, the land ceases to be old waste.

Hence, it seems to me that the plaint land, which was clearly ryoti land (that is, cultivable land other than private land according to the definition in section 3, clause 16) on the date of the coming into force of the Estates Land Act and which land the landlord could not then prove to be "old waste" under either of the sub-clauses of section 3, must be held to have then been ryoti land other than old waste. If so, the defendant got a right of occupancy then under section 6 and could not be ejected thereafter.

As to the argument that the addition made to section 153 by the Amendment Act of 1909, namely, "nothing shall affect the liability of a non-occupancy ryot to be ejected on the ground of the expiry of the term of a lease granted before the passing of this Act," that this addition would become useless if all non-occupancy ryots in possession got occupancy rights on the passing of the Act, there are certain kinds of non-occupancy ryots included in section 6, clauses 3, 4 and 5 of the Act who do not obtain occupancy rights even if they were in possession on the date of the coming into force of the Act The additional clause inserted by the amending Act in section 153 would apply to such lands. On these grounds I would dismiss this Second Appeal with costs.

If the land was "old waste" section 157 of the Act as interpreted in *Atchaparaju* v. *Krishnayachendrulu*(1) will bar this suit. But it is unnecessary to base my decision on that ground, as the

(1) (1913) 24 M.L.J., 402.

SARVA-RAYUDU v. VENKATA-RAJU.

waste' within the meaning of section 3, clause (7) of the Act. If neither sub-clause (1) nor the latter part of sub-clause (2) of the definition of 'old waste' would apply to the facts of the case, the first part of sub-clause (2) cannot be used to prove that the land is 'old waste' as that refers to a state of facts subsequent to the passing of the Act, and as section 6 of the Act vested in the tenant in possession occupancy right from the date of the passing of the Act in all ryoti lands not being 'old waste'

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G. Venkataramayya for the appellant.

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As to the argument that the addition made to section 153 by the Amendment Act of 1909, namely, "nothing shall affect the liability of a non-occupancy ryot to be ejected on the ground of the expiry of the term of a lease granted before the passing of this Act," that this addition would become useless if all non-occupancy ryots in possession got occupancy rights on the passing of the Act, there are certain kinds of non-occupancy ryots included in section 6, clauses 3, 4 and 5 of the Act who do not obtain occupancy rights even if they were in possession on the date of the coming into force of the Act The additional clause inserted by the amending Act in section 153 would apply to such lands. On these grounds I would dismiss this Second Appeal with costs.

If the land was "old waste" section 157 of the Act as interpreted in *Achaparaju* v. *Krishnayachendrulu*(1) will bar this suit. But it is unnecessary to base my decision on that ground, as the

(1) (1913) 24 M.L.J. 402.

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be acquired in lands, that up to the coming into the operation of the Act, were not subject to occupancy rights. Nor does it say in what manner such lands as would come within the description of 'old waste' may be turned into ryoti land. But the section proceeds on the assumption that the lands to which it applies are ryoti lands not being old waste. It is, therefore, to my mind, rather unsatisfactory that when we have to determine the question whether a particular piece of land which at one time was not subject to occupancy rights became subsequently impressed with such rights, we should have to fall back upon a section referring to land that *ex hypothesi* is subject to occupancy rights. I feel constrained, however not without a great deal of hesitation, to come to the conclusion that in such a case also the person claiming that the land is old waste must affirmatively establish that the land in question comes within the definition of old waste, contained in some provision of the Act such as section 3, sub-section 7, clause 1; and as a consequence must, if necessary, prove that there are no occupancy rights in the land. I come to this conclusion on a consideration of the presumption raised under section 23 and the definition of 'ryoti land' contained in section 3, clause 16, together with the provisions of section 3, clause 7, relating to the definition of 'old waste.'

Turning then to the definition of 'old waste' in section 3 (7) and to the means which are provided in it for establishing that any land is old waste after the Act came into operation, it is admitted that the plaintiff has not obtained a final decree of a competent Civil Court establishing that the ryot has no occupancy right before the passing of the Act. It is also admitted that the land in question was not possessed by the landholder or his predecessors in title for a continuous period of not less than ten years. Nor has it continuously remained uncultivated during that time. So that the two modes expressly laid down by the Legislature in the seventh clause of section 3 for establishing that the land is old waste cannot avail the plaintiff. It follows that no facts were proved on proof of which the lower Courts were bound to hold that the plaintiff had established that the land in question was 'old waste.' As the proof that was offered by the plaintiff did not consist of either of the two modes above referred to, it was open to the Lower Courts to hold that the plaintiff had not succeeded in discharging the burden, by

SARVARAYUDU v. VENKATARAJU. — TYABJI, J.

adducing the evidence that he did. Hence their decision cannot be questioned in Second Appeal.

For these reasons I agree that this appeal must be dismissed with costs.

APPELLATE CIVIL.

Before Mr. Justice Ayling and Mr. Justice Sadasiva Ayyar.

1913. August 6.

GOVINDAN NAIR (PULIKOTE PUTHAN VEETTIL, KARNAVAN AND MANAGER) AND EIGHTEEN OTHERS (DEFENDANTS), APPELLANTS,

v.

CHERAL *alias* KRISHNA PANDUVAL PAENGOTPURATH TARWAD, KARNAVAN AND MANAGER (PLAINTIFF AND DEFENDANTS), RESPONDENTS.*

Interest Act (XXXII of 1839)—Debt payable in kind—Interest allowable.

A debt which is specifically expressed as payable in certain fixed measures of grain and at a specified time is a debt *certain* within the meaning of Act XXXII of 1839 and interest is allowable on the same.

Juggomohun Ghose v. *Manickchand* (1859) 7 M.I.A., 263, referred to

Narayan v. *Nagappa* (1910) 12 Bom L.R , 831, dissented from.

SECOND APPEAL against the decree of K. IMBICHUNNI NAIR, the Subordinate Judge of South Malabar at Calicut, in Appeals Nos. 302 and 317 of 1911, preferred against the decree of T. V. NARAYANAN NAIR, the District Munsif of Manjeri, in Original Suit No 584 of 1909.

The facts of the case appear sufficiently from the judgment.

C. V. Anantakrishna Ayyar for the appellants.

T. R. Ramachandra Ayyar for the first respondent.

AYLING AND SADASIVA AYYAR, JJ.

JUDGMENT.—In our opinion the Subordinate Judge's findings *of fact as to the plaintiff's right to redeem cannot be said not to* be based on evidence and must be accepted.

The appellant's vakil argues relying on *Narayan* v. *Nagappa*(1) that the award of interest on a debt payable in kind

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* Second Appeal No. 2109 of 1912.

(1) (1910) 12 Bom. L.R , 831.

is not authorised by Act XXXII of 1839. With great respect to the opinion of the learned Judges who were parties to the decision above quoted, we are unable to agree with their view.

We fail to see why a debt which is specifically expressed in measures of grain and payable at a specified time should not be regarded as a debt certain (assuming the latter adjective in section 1 of the Act to qualify the word "debt" as well as "sum," merely because the commutation rate at the time of payment or suit may have to be subsequently determined. We do not find anything, in the other case quoted by the appellant's vakil, *Juggomohun Ghose* v. *Manickchand*(1) to conflict with this view. In our opinion the award of interest on the porappad in the present case was justified

The rate of interest is however very high (20 per cent.) and it runs for a period of forty years and more. Accepting the finding of the Subordinate Judge that this is the usual rate in Malabar, the Act authorises the award of interest at a rate "not exceeding the current rate" and we consider, that in the present case, the Court would have exercised its discretion wisely in reducing the rate to 6 per cent. The decree will be amended accordingly.

We see no reason why the interest awarded should not be set off against the sums due for kanom amount and improvements.

The appellants will pay half the respondent's costs in this Court. The time for redemption is extended to six months from this date.

The Subordinate Judge's decree with the modification above directed is confirmed.

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(1) (1859) 7 M.I.A., 263.

SASTA-BASTOR v. VENKATA-RAO. TIAGJI, J.

adducing the evidence that he did. Hence their decision cannot be questioned in Second Appeal.

For these reasons I agree that this appeal must be dismissed with costs.

APPELLATE CIVIL.

Before Mr. Justice Ayling and Mr. Justice Sadasiva Ayyar.

1913. August 6.

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The facts of the case appear sufficiently from the judgment.

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AYLING AND SADASIVA AYYAR, JJ.

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We see no reason why the interest awarded should not be set off against the sums due for kanom amount and improvements.

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The Subordinate Judge's decree with the modification above directed is confirmed.

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(1) (1859) 7 M.I.A., 263.

JOHN HOWE v. CHARLOTTE HOWE. —— WHITE, C.J., AYLING AND OLDFIELD, JJ.

They were not cross-examined on behalf of the respondent till September 24, 1912. The respondent's witnesses were examined and cross-examined on that date. The explanation of the delay would seem to be (in part, at any rate) that when the suit came on for hearing, in the first instance, in April 1912, the respondent did not appear. On March 21, 1912, she had applied for a fortnight's adjournment and produced a medical certificate. She stated that she desired to defend the case. The case would seem to have been adjourned till April 18. On that day the respondent did not appear and made no application for a further adjournment. The suit proceeded on April 18 as an undefended suit and, after the evidence of the petitioner and of five witnesses called on his behalf had been heard, was adjourned. Subsequently an order was made (we are told with the consent of the petitioner) that the respondent should be allowed to defend the suit. One thing is clear, and that is that the respondent had ample notice of the case made against her in connection with the birth of the child Moreover she admitted the birth of the child. Her case was that marital intercourse took place between the petitioner and herself during March, April and May 1911, and that the petitioner was the father of the child.

[Then their Lordships dealt with the evidence as to the wife's adultery and concluded as follows :—]

Although the evidence called on behalf of the petitioner in our opinion does not establish adultery by the respondent prior to March 1911, it shows that she was a woman of loose habits and that her house was visited by men in the absence of her husband and against his wishes.

As regards the birth of the child, two questions arise: first, are the petitioner and the respondent competent witnesses? secondly, if they are, are we warranted in holding, on the evidence taken as a whole that the child is illegitimate? General rule of the English common law that evidence of non-access by the husband for the purpose of proving illegitimacy is quite clear. In England the Evidence Act of 1851, and the Evidence Amendment Act of 1853, left the parties to suits for divorce incompetent to give evidence. In 1857, when the English Divorce Act was passed doubts were caused as to how far the old doctrines of the common law in relation to the competency of

JOHN HOWE v. CHARLOTTE HOWE.

WHITE, C.J., AYLING AND OLDFIELD, JJ.

since the passing of the Indian Evidence Act, 1872, parties to proceedings under the Indian Divorce Act, 1869, are not competent witnesses. In England the disabilities of parties as witnesses have been removed piece-meal by a series of legislative enactments. In India we have the enabling enactment in section 118 of the Evidence Act, that all persons are competent to testify, unless the Court considers they are prevented from understanding the questions put to them or from giving rational answers. We have the further enactment in section 120 that in all civil proceedings the parties to the suit, and the husband or wife of any party shall be competent witnesses.

It does not of course follow that, because the husband is a competent witness in divorce proceedings, his competency is not subject to the rule of the English common law as to evidence by him of non-access assuming the rule would in England be held applicable in a case like the present. We think, however, the effect of section 118 is to make the husband a competent witness for all purposes In Ameer Ali and Woodroffe on the Law of Evidence the learned authors observe (edition 2, page 771) after stating the English rule, that no such rule is to be found in or implied from the Evidence Act and in *Rosario* v. *Ingles*(1), the Bombay High Court took the view that the question was governed by section 118 of the Evidence Act.

There remains the question what should be our finding of fact on the question whether the child born to the respondent on February 8th, 1912, was the child of the petitioner or the result of some adulterous connection ?

[Their Lordships after discussing the evidence on the point concluded as follows:—]

We hold it proved by admissible evidence that no matrimonial intercourse took place after March 11, 1911, between the petitioner and the respondent. The case for the respondent was that the child was begotten by the petitioner after he left her and went to live at the Malaparamba house. As we disbelieve this evidence, it seems at least doubtful whether we are called upon to consider whether the child could have been begotten by the petitioner before March 11th. Having regard, however, to the language of section 112 of the Evidence Act, i may be that it is necessary to deal with this question.

(1) (1894) I.L.R., 18 Bom., 468.

JOHN HOWE v. CHARLOTTE HOWE.

WHITE, C.J., AND AYLING AND OLDFIELD, JJ.

If the petitioner was the father of the child, the period of gestation must have been 333 or 334 days. In the print of the judgment the period is stated to be 344 days. If the learned Judge said this it would appear to be inaccurate.

A period of 333 days would be altogether abnormal The opinions of the medical authorities are cited in the judgment of the Allahabad High Court in *Tikam Singh* v. *Dhan Kunwar*(1). It would seem that it may be regarded as proved that the period may be 296 days and that most authorities agree that the interval may be as long as 308 days. The period fixed by the legislature for the purposes of section 112 of the Evidence Act is 280 days. There may be some doubt whether, in view of the language of section 112, evidence as to there lations between the parties or evidence which pointed to immorality on the part of the mother, or evidence of a long interval since the birth of a previous child is relevant to the question we are now dealing with, though these matters were taken into consideration in the Allahabad case to which we have referred. Under the law of England the matter is one of presumption which may be rebutted [see *Morris* v. *Davies*(2)]. Under the Evidence Act the fact that a child was born during the continuance of a valid marriage is conclusive proof of legitimacy, unless it can be shown that the parties had no access to each other at any time *when the child could have* been begotten. It may be said that the considerations to which we have referred are irrelevant as regards the question whether the child could or could not have been begotten prior to March 11th. Under the section it would seem that, we have to decide whether the child could or could not have been begotten immediately before the date when the marital intercourse, which, the law presumes, between the petitioner and the respondent, in fact ceased. With regard to this we are of opinion that, although there was no expert evidence in the Court below, we are entitled under section 60 of the Evidence Act to consider and act upon the opinions of experts contained in the treatises to which we have referred. We are prepared to hold that it has been shown in this case that there was no access by the petitioner at any time during which the child could have been begotten. The decree is confirmed.

(1) (1902) I.L.R., 24 All., 445. (2) (1837) 5 Cl. & Fin., 163.

APPELLATE CIVIL.

Before Sir Charles Arnold White, Kt., Chief Justice and Mr. Justice Oldfield.

1913. August 8.

U. A. SRINIVASA AIYANGAR, APPELLANT,

v.

THE OFFICIAL ASSIGNEE OF MADRAS AND ANOTHER, RESPONDENTS.*

Presidency Towns Insolvency Act (III of 1909), sec. 90—Civil Procedure Code (Act V of 1908), sec. 24—Transfer of petition for insolvency to mufassal District Court for disposal—No jurisdiction.

As the jurisdictions conferred by the Presidency Towns Insolvency Act on the High Court, and by the Provincial Insolvency Act on the mufassal Courts are distinct, and the provisions of the two Acts differ in such important respects, it is not competent for the High Court to transfer under section 90 of the Presidency Towns Insolvency Act and under section 24, Civil Procedure Code, an insolvency petition pending before it, under the Presidency Towns Insolvency Act for disposal by a mufassal District Court, under the Provincial Insolvency Act

APPEAL from the order of BAKEWELL, J., in the insolvency jurisdiction in the High Court in Insolvency Petition No. 291 of 1912—*in the matter of U. A. Srinivasa Ayyangar* (insolvent).

The facts of this case appear from the judgment of WHITE, C.J.

D Chamier for the appellant.

The Official Assignee appeared in person

WHITE, C.J.

WHITE, C.J.—This is an appeal from an order made by BAKEWELL, J., transferring an insolvency petition pending before him to the District Court of Tanjore. The learned Judge, as appears from the terms of the order, purported to make it under the powers conferred by section 90 of the Presidency Towns Insolvency Act and section 24 of the Civil Procedure Code. The question as to whether the learned Judge had jurisdiction to make the order does not appear to have been raised before him. But Mr. Chamier, who appears for the appellant (the insolvent), has taken the point here that the Judge had no jurisdiction to make the order.

Section 90 of the Presidency Towns Insolvency Act states, "In proceedings under this Act the Court shall have the like

* Original Side Appeal No. 105 of 1912

powers and follow the like procedure as it has and follows in the exercise of its ordinary original civil jurisdiction." In section 2 of the Act "the Court" is defined as meaning "the Court exercising jurisdiction under this Act," and by the section 3, the Court having jurisdiction under the Act for the purposes of this case is the "High Court of Judicature at Madras." This order was therefore made by the High Court of Judicature at Madras exercising jurisdiction in insolvency. Under the Provincial Insolvency Act, 1907, "the Court" is defined as meaning "the Court exercising jurisdiction under this Act." The jurisdictions conferred by the two Acts are distinct, and the provisions of the two Acts differ in several important respects.

Section 24 of Civil Procedure Code states "on the application of any of the parties . . . the High Court . . . may at any stage transfer any suit, appeal or other proceeding pending before it for trial or disposal to any Court subordinate to it and competent to try or dispose of the same." It is not necessary for me to express any opinion as to whether this Court in the exercise of its ordinary original civil jurisdiction can make an order under section 24 of the Code. For the purposes of this appeal we assume that it can. The question then remains, "Is the Court to which this petition has been transferred competent to try or dispose of the same." It seems to me to be clear that it is not, for the reason which has already been stated, viz., that the two jurisdictions are distinct.

It has been suggested that there are sometimes "collusive" arrests within the jurisdiction of the High Court exercising jurisdiction in insolvency under the Presidency Towns Insolvency Act in cases where it would be convenient for the estate to be administered where the estate is situate under the Provincial Act. That may be so. If it is, it is a matter for the legislature to deal with.

I may add that this point came before WALLIS, J., and in dealing with it he said that he was not prepared to make an order of the kind asked for.

We must therefore set aside the order and allow the appeal.

OLDFIELD, J.—I agree. OLDFIELD, J.

Solicitors for the appellant—Messrs. *Grant and Greatorex.*

APPELLATE CIVIL.

Before Sir Charles Arnold White, Kt., Chief Justice and Mr. Justice Oldfield.

1913. July 17 and 18 and August 1, 4 and 12.

V. LAKSHMAMMA (APPELLANT),

v.

V. RATNAMMA (RESPONDENT).*

Indian Succession Act (X of 1865), sec. 187, scope of—Establishment without probate, of legatee's right as jus tertii—*Section* 91—*Legacy, vesting of—Executor's assent—Acceptance by legatee, necessity of—Disclaimer by legatee.*

Where, on appeal in a partition suit it was contended by the first defendant that the first plaintiff had no title to sue in ejectment as under a will of her mother which was not proved up to the date of the trial, such property vested in the second and third plaintiffs,

Held that section 187 not only affects the establishment of the right to a legacy by legatee himself or some person claiming under him, but also debars a person who desires to establish the legatee's right merely as a *jus tertii* for the purpose of his defence.

The estate vested in a legatee under section 91 of the Act is not full or absolute; the section refers only to an interest in the legacy and not the legacy itself.

Until the executor has given his assent to the legacy, the legatee has only an inchoate right to it

Bachman v. *Bachman* (1884) I.L.R., 6 All., 583 and *Doe* v. *Guy* (1802) 3 East, 120, s.c., 102 E.R., 543, followed.

A legacy vested in the legatee under section 91 of the Act is divested by his disclaimer

The rule of English law that no legacy can vest in the legatee against his will, may legitimately be adopted in deciding questions under the Indian law.

In re *Hotsley Freke* v *Calmady* (1886) 32 Ch., 408, referred to

APPEAL from the decree of WALLIS, J., in the exercise of the Ordinary Original Civil Jurisdiction of the High Court and made in Civil Suit No. 77 of 1911.

Suit for a declaration and partition.

One Rathnammal, a dancing woman, and her two daughters who had not adopted the profession of dancing women sued her sister, Lakshmammal and Rajagopal Nayudu, her natural brother, and one Seshadri Ayyangar a mortgagee from Lakshmammal under a mortgage of the year 1909 for a partition of the joint family properties. The first plaintiff and the first and the second

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* Original Side Appeal No. 108 of 1912.

defendants were the children of one Seethammal who was herself a dancing woman. The first plaintiff also followed the same profession though her daughters did not do so. Ramammal, another daughter of Seethammal and Lakshmammal were both kept as concubines by one Kuppuswami Nayudu who acquired house No. 22, Chandrappa Mudali Street. After his death they came under the protection of one Balakrishna Nayudu and the house was sold in satisfaction of a mortgage debt due by Kuppuswami Nayudu and was purchased by Balakrishna Nayudu in the names of Ramammal and Lakshmammal who appear to have lived under his protection.

The plaintiffs prayed for an account of the joint family properties; for a declaration that the properties specified in the schedule to the plaint were joint family properties which Seethammal had no power to deal with by will and that the plaintiffs are entitled to a half share therein or in any event to a one-fourth share as stated in paragraph 15 of the plaint herein; for a declaration that the mortgages by the first defendant in favour of the second and third defendants were not binding on the plaintiffs, for a partition of the said properties, for delivery of plaintiffs' share and if necessary for the appointment of a Commissioner to divide the said properties by metes and bounds; and for payment of costs by the first defendant.

WALLIS, J., granted the declaration and directed partition as stated in the decree.

The first defendant appealed.

M. O. Parthasarathi Ayyangar and *R. Kuppuswami Ayyar* for the appellant.

C. P. Ramaswami Ayyar for the respondent.

WHITE, C.J. AND OLDFIELD, J.

JUDGMENT.—The relationship between the persons concerned is given in the geneological tree attached to the plaint and is not disputed. There is no reason for doubting the correctness of the learned Judge's conclusions that the suit house was the separate acquisition of the deceased Ramamma and the first defendant and that the suit land was the separate acquisition of the former. It is argued with reference to *Sudarsanam Maistri* v. *Narasimhulu Maistri*(1), that those two members of the family, one of dancing girls, comprised all the members of a sub-branch

(1) (1902) I.L.R., 25 Mad., 149 at p. 155.

LAKSHMAMMA v. RATNAMMA. — WHITE, C.J. AND OLDFIELD, J.

and could hold property jointly as a distinct corporate unit within the larger corporate unit. There is no foundation for that argument, since there is no reason for regarding these two members as a sub-branch to the exclusion of the first plaintiff, their sister. The learned Judge was therefore right in holding that the house was the common property of Ramamma and the first defendant and that the former's half-share in it and the suit land passed to her mother, Seethamma, by inheritance on her death.

The learned Judge's decision as to the suit jewels follows that regarding the house. The first plaintiff claimed both on the same basis. The first defendant who was alone concerned with the former, no doubt claimed some of them as her separate acquisition in her written statement. But there was no distinct issue regarding them. The learned Judge refers in his judgment to her case as being that they were acquired jointly. It is alleged and it is to be presumed in these circumstances that this was the case actually put forward at the trial. That it was so is consistent with the first defendant's failure to give evidence and with the evidence of defendant's first witness, who alone was examined by her on the point. The claims to the jewels and the house were therefore dealt with rightly on the same footing.

Those conclusions of the learned Judge did not correspond either with the plaintiff's case that the house, land and jewels were the joint property of the whole family, or with the first defendant's that the two first were the joint property of Ramamma and herself and that some of the jewels were her own separate acquisitions.

The argument to be dealt with next arises from those conclusions and therefore has been attempted first in this Court. In plaint paragraphs 7 and 8 there is a reference to a will executed by Seethammal, mother of the first plaintiff, and the first defendant, whereby she bequeathed all property, to which she was entitled, to the second and third plaintiffs and nominated them executrixes. The plaintiffs submitted that Seethamma had no power to deal with the property by will, since (in accordance with their case) it belonged to the joint family; and the second and third plaintiffs therefore did not claim under the will. The first defendant has however argued here that this reference to a will must have effect, that the property must be taken to have

vested in accordance with its terms in the second and third plaintiffs and that, in the absence of a conveyance by them to the first plaintiff, the latter has no title, on which she can sue in ejectment, as she in effect is doing.

It has been pointed out that the defendant's contention could not have been raised in their pleadings since it arises from findings by the learned Judge, which are not in accordance with either party's case. The plaintiffs no doubt must not be prejudiced by the stage, at which that contention has been advanced; and it might have been necessary to grant a remand for a further trial after amendment of the plaint with reference to the will and filing of an additional written statement, but that the first defendant's argument must be held untenable for two reasons.

Firstly it is admitted that up to the date of the learned Judge's decision the will had not been proved. It was made in Madras and under section 2, Hindu Wills Act, is subject to section 187, Succession Act. No right therefore as legatee can be established under it. It has been urged that section 187 affects only the establishment of right by the legatee himself or some person claiming under him and does not debar the first defendant who desires to establish the legatee's right merely as a *jus tertii* for the purpose of her defence. No authority has been cited and no reason suggested for such a distinction. It is said further that section 187 is irrelevant, when the plaintiffs have admitted the existence of the will and its terms. The answer is that, though they admitted the existence of the document, they denied its validity and the validity of rights under it; and the fact that their denial was based on one ground, which has been held to be mistaken, cannot alter the scope of their admissson or disable them from taking other available objections.

Then as to the merits of the first defendant's argument. They depend on the assumption that Seethammal's will is effective. The first defendant's case is that the property bequeathed to the second and third plaintiffs vested in them; and in our opinion that is not sustainable. Section 91, Succession Act, no doubt, provides for the vesting of the estate in the legatee from the date of the testator's death. But the estate thus vested is not full or absolute; the reference is only to an interest in the

LAKSHMAMMA v. RATNAMMA. — WHITE, C J. AND OLDFIELD, J.

legacy not the legacy itself; and the distinction between a vesting in interest and in possession is implied in section 106 and the illustrations to section 292, in which the effect of the executor's assent is dealt with—*vide* also *Bachman* v. *Bachman*(1) and *Doe* v. *Guy*(2). Until that assent has been given the legatee has in any case only an inchoate right to the legacy; Williams on Executors, tenth edition, page 1101. So far no account has been taken of the effect of the legatee's disclaimer. There is very little English and no Indian authority regarding it. But in In re *Hotchys Freke* v. *Calmady*(3), there are references to acceptance of the legacy as essential which are inconsistent with its vesting in the legatee against his will. And at page 84, Williams' Law of Real Property, twentieth edition, *Nicolson* v. *Wordsworth*(4), is referred to and it is said "an heir at law is the only person in whom the law of England vested property, whether he would or not. If I make a conveyance of land to a person in my lifetime, or leave him any property by my will, he may, if he pleases, disclaim taking it, and in such case it will not vest in him against his will." Though this principle is not formally stated in the Indian Law, it is reasonable and there is nothing repugnant to it therein or in Indian decisions. It may therefore legitimately be adopted. The result is that the second and third plaintiffs' legacy did not vest in them completely or indefeasibly and that, so far as it vested at all, it would be divested by their disclaimer. Being undisposed of, Seethamma's interest must go, as the plaintiffs contend that it should, to the first plaintiff and the first defendant in equal shares. *Morarji Cullianji* v. *Nenbai*(5).

The first defendant objects to the application of the Partition Act, for which the decree provides. The first plaintiff consents to its amendment by the removal of this provision. The appeal is therefore allowed to this extent. It is dismissed in other respects. The first defendant will pay the first plaintiff's costs.

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(1) (1884) I.L.R., 6 All., 583. (2) (1802) 3 East, 120; s.c., 102 E.R., 543.
(3) (1880) 32 Ch., 408 (4) (1818) 2 Swan, 365.
(5) (1893) I.L.R., 17 Bom., 351.

APPELLATE CRIMINAL.

Before Mr. Justice Ayling and Mr. Justice Tyabji.

Re MANDRU GADABA (PRISONER), APPELLANT.*

1914. August 17.

Indian Penal Code (Act XLV of 1860), sec 86, interpretation of—Drunkenness—Knowledge and intent.

Per AYLING, J.—Ordinary drunkenness makes no difference to the knowledge with which a man is credited and if an accused knew what the natural consequences of his act were he must be presumed to have *intended* to cause them

Per TYABJI, J.—*Section 86, Indian Penal Code, must be construed strictly.* It provides that the intoxicated person shall be dealt with as if he had the same *knowledge* as he would have had if he had not been intoxicated, but it does not provide that he shall be dealt with as if he had the same *intent.*

APPEAL against the order of L T. HARRIS, the Agent to the Governor, Agency Division, Vizagapatam District, in Calendar Case No. 12 of 1914.

The facts of the case appear from the judgment of TYABJI, J.

K. Govinda Marar for the prisoner.

Nugent Grant for *the Public Prosecutor* for the Crown.

AYLING, J.—It is clearly proved that the accused in this case hacked the deceased Dinni to death with a *tangi.* The lower Court convicted him of culpable homicide not amounting to murder. Against this conviction he appeals and at the same time the case has been taken up by this Court in revision and the accused has been called on to show cause why the conviction should not be altered to one under section 302 of the Indian Penal Code and the sentence enhanced.

AYLING, J.

I have no hesitation whatever in rejecting the appeal as the evidence leaves no doubt that the deceased was killed by the accused and by no one else.

As regards the nature of the offence it seems to me that it certainly amounts to murder. The nature of the wounds and of the weapon used are such that a sober man would undoubtedly be presumed to know that the wounds were likely to prove fatal. Section 86 of the Indian Penal Code makes it clear that ordinary drunkenness (appellant is said to have been drunk) makes no difference to the knowledge with which a man is credited. If

* Criminal Appeal No. 286 of 1914 (Criminal Revision Case No. 369 of 1914).

Re MANDRU GADABA.

AYLING, J.

the accused knew what the natural consequences of his act were, he must be presumed to have intended to cause them. The offence therefore comes within the substantive portion of section 300 of the Indian Penal Code. It is pleaded on behalf of the accused that it also comes within exception 4 to the same section. This is for him to show. It may be conceded that the offence was committed "without *premeditation* in a sudden fight in the heat of passion upon a sudden quarrel," but the accused has also to show that he took no undue advantage and did not act in a cruel or unusual manner. The evidence makes it perfectly clear that the deceased had only a small stick like a cane, while the accused fell upon him with a *tangi*, a sort of battle axe ordinarily carried by these hill-men. To my mind it is clear that in so doing the accused did take an undue advantage and acted in a cruel and unusual manner, and that he is precluded from availing himself of this exception. My learned brother however takes a different view: and while I myself with great deference think that the accused should have been charged with and convicted of murder, I am not sure that the case is one in which the interests of justice imperatively require the interference of this Court in revision.

I would therefore simply confirm the conviction and the sentence passed by the Lower Court and dismiss the appeal.

TYABJI, J.

TYABJI, J.—The accused was charged under section 304 of the Indian Penal Code of having committed culpable homicide not amounting to murder, and sentenced to ten years' rigorous imprisonment.

The facts proved at the trial were that the accused and the deceased were drunk, and quarrelled. Then the accused struck the deceased eleven times with his *tangi* which severed the arteries, and caused the death of the deceased. The Sessions Judge found the accused guilty, and sentenced him to ten years' rigorous imprisonment.

I agree with my learned brother that the appeal should be dismissed for the reasons mentioned by him.

With reference to the revisional proceedings, the question is whether the accused was guilty not only of culpable homicide but of murder, and whether we ought to convict him under section 302 instead of section 304 of the Indian Penal Code enhancing the sentence.

It is true that section 86 of the Indian Penal Code lays down that in certain cases an intoxicated person shall be liable to be dealt with "as if he had the same knowledge as he would have had if he had not been intoxicated." But it does not provide that the intoxicated person shall be dealt with as if he had the same *intent*. It seems to me that the word "intent" was advisedly omitted as "knowledge" and "intent" are both referred to in the earlier portion of the section. On the other hand it must be noted that section 86 expressly deals with "cases where an act [is] done . . . with a particular knowledge or intent." It may therefore be (as was contended by the Public Prosecutor) that section 86 implies that intent should be inferred from knowledge though knowledge alone is expressly imputed to the intoxicated person. The section should in my opinion be construed strictly. But it is unnecessary to express any final opinion on this aspect of the case and on the effect of the necessary inferences to be drawn from the knowledge which section 86 imputes to an accused person. For even taking the restricted interpretation of section 86 that is contended for as being the correct one on behalf of the accused, he comes within the fourthly mentioned case in section 300.

The question then is whether the facts entitle the accused to the benefit of the fourth exception to section 300. It is clear on the facts as they appear from the evidence that the case does come within the exception unless it is shown that the offender took undue advantage or acted in a cruel or unusual manner. It is in this connection that the Public Prosecutor has not satisfied my doubts. The accused was not put to his trial under this section. He would therefore not be concerned with proving that which would make exception 4 to section 300 available to him. The question therefore of the onus of proof as laid down in section 105 of the Indian Evidence Act cannot in fairness be pressed against the accused. Apart from it, I am not satisfied on the facts as they now appear on the evidence, that the accused took any undue advantage, or acted in a cruel or unusual manner. For, in this connection, I do not think that section 86 requires us to disregard the fact that the accused was intoxicated; section 86 is a section which creates an artificial rule for the effect of evidence, and the significance of facts. The section must be read as it is. It does not provide that in all

Re MANDRU GADABA.

TYABJI, J.

criminal matters, and for deciding all questions under the Indian *Penal Code* "*a person who is intoxicated shall be dealt with in* the same way as if he had not been intoxicated, unless the thing which intoxicated him was administered to him without his knowledge or against his will." I therefore think that it is very doubtful, even if the charge had been under section 302, and the case had to be decided on the materials before us, whether the accused should not be considered to have come under exception 4 to section 300. But remembering that the trial was under section 304 and not under section 302, I feel no doubt in giving expression to the opinion that the conviction ought not now to be altered to one under section 302, and that the sentence ought not to be enhanced.

My learned brother's view is different from mine on the question involved in the revision case; and I need hardly say that I cannot feel entire confidence in the correctness of my opinion on learning of his views. But whether my views are right or wrong I feel no doubt as to them. I am clearly of opinion that we should not interfere in revision and that the sentence should be confirmed.

APPELLATE CIVIL.

Before Sir Charles Arnold White, Kt., Chief Justice, Mr. Justice Ayling and Mr. Justice Oldfield.

1913. July 28, 29 and 30 and August 19.

R. P. KONETI NAICKER AND TWO OTHERS (APPELLANTS IN SECOND APPEAL No. 103 OF 1911 ON THE FILE OF THE HIGH COURT—DEFENDANTS NOS. 3 TO 5), APPELLANTS,

v.

J. GOPALA AYYAR AND ANOTHER (RESPONDENTS IN THE ABOVE SAID SECOND APPEAL—PLAINTIFFS), RESPONDENTS.*

Negotiable Instruments Act (XVI of 1881), sec. 28—Promissory note by agent, without any indication of execution as agent—Personal liability of executant.

Unless an executant of a promissory note clearly indicates therein either by an addition to his signature or otherwise, that he executes it as agent of another or that he does not intend thereby to incur personal responsibility, he is liable personally on the promissory note according to section 28 of the Negotiable Instruments Act.

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* Letters Patent Appeal No 167 of 1912.

KONETTI NAICKER v. GOPALA AYYAR.

Merely describing oneself in the note as the holder of a power-of-attorney from another does not show that the power included a power to sign promissory notes or that the note was signed in pursuance of the power.

Applicability of English law on the subject considered.

APPEAL under article 15 of the Letters Patent against the judgment of SADASIVA AYYAR, J., who differed from SUNDARA AYYAR, J., on appeal against the decree of F. H. HAMNETT, the District Judge of Madura, in Appeal No. 50 of 1910, preferred against the decree of K. V. DESIKA ACHARIYAR, the District Munsif of Madura, in Original Suit No. 457 of 1908. For the judgments of SUNDARA AYYAR and SADASIVA AYYAR, JJ.: See *Konetti Naiker* v. *Gopalaiyar*(1).

This was a suit for Rs. 748 upon a promissory note executed by the third defendant in favour of the two plaintiffs who sued not only the third defendant and his sons, the fourth and fifth defendants, but also defendants Nos. 1 and 2 as whose agent, the plaintiff alleged that the third defendant executed the promissory note. The plaintiffs also alleged that they were dealing in cloths, that the mother of the first defendant, when the first defendant was a minor, bought cloths from the plaintiffs for the benefit and use of the first and second defendants, that after first defendant attained majority, the first defendant executed to the third defendant a power-of-attorney and that the third defendant acting under the power-of-attorney executed the suit promissory note for balance due in respect of the purchase made by the first defendant's mother. First and second defendants denied that the purchase was for their benefit or use and stated that the third defendant had no authority under the power-of-attorney to execute the note. The third defendant pleaded that he was not personally liable inasmuch as he executed the promissory note as agent of the first and second defendants. The fourth and fifth defendants adopted the third defendant's defence and added that since the cloths were not purchased for their benefit or use as admitted by the plaintiffs they were not liable in a suit on the note as sons of their father. The District Munsif raised the necessary issues and framed an additional issue in the following terms :—

"Is the third defendant liable as 'maker' of the note on the note standing as it is, it not purporting to be executed by third defendant as agent."

(1) (1912) 23 M.L.J., 417.

KONETTI NAICKER v. GOPALA AYYAR.

The District Munsif dismissed the suit as against defendants 1 and 2 but allowed it as against defendants 3 to 5. On appeal by defendants 3 to 5 against plaintiffs alone, the District Judge confirmed the Munsif's decree. In Second Appeal No. 103 of 1911 filed by defendants 3 to 5 against plaintiffs alone, SADASIVA AYYAR, J., confirmed the judgments and decrees of the lower Courts, while SUNDARA AYYAR, J. reversed the decrees against the third defendant as maker of the note and remanded the suit to the District Munsif for trial on the other issues: see *Konetti Naiker* v. *Gopalaiyar*(1). As the result of this difference of opinion, the Second Appeal was dismissed with costs under section 98 of the Code of Civil Procedure. Defendants 3 to 5 thereupon preferred this Letters Patent appeal against the plaintiffs only. The terms of the promissory note are fully given in the judgment of the learned CHIEF JUSTICE in the Letters Patent appeal.

S. Varadachariar for *S. Gopalaswami Ayyangar* for the appellants.

B. Sitarama Rao for the respondents.

WHITE C.J.

WHITE, C.J.—The main question we have to determine is whether the party who signed the promissory note in question as maker is personally liable thereon. The following is a translation of the note:—

"12th August 1907 corresponding to 28th Audi Plavanga. Promissory note executed to you both, (1) Gopalaiyar and (2) Nagasamier, sons of Soothi Seshaiyar, residing in No. 1 Police Station lane, Madura town, by R. P. Konati Nayudu Garu, son of Nanjundappa Nayudu Garu, agent, holding power-of-attorney from the Zamindar Dorai Rajah Avargal and residing in Vellikurichi village, Mana Madura taluk, Madura district.

"Amount due to you including principal and interest up to date upon settlement of account of dealings which was standing against the name of Rani Chakkani Ammal on cloths, etc., having been purchased ere this for the Vellikurichi palace, is Rs. 694-6-0. On demand, I promise to pay this sum of Rupees six hundred and ninety-four and annas six with interest at Rs. 5-8-0 per cent. per mensem from this date either

(1) (1912) 23 M.L.J., 417.

to you or order and shall take this back with the endorsement of payment thereon.

(Signed) R. P. KONATTI NAYUDU."
(in Telugu).

The contention for the appellant was that the Zamindar was liable on the note and not the party who signed it.

Section 28 of the Indian Act (Negotiable Instruments Act, 1881) makes the party who signs liable unless there is, on the note, an indication that he signs as agent, or that he does not intend to incur personal responsibility.

The words in the instrument before us which are relied on as affording the required indication are the words in the body of the note "agent holding power of attorney from the Zamindar." If I had to decide the question entirely on the words of the instrument, leaving out of consideration the English decisions I should be prepared to hold, as a matter of construction, that there is no indication on the note that the maker signed as agent or that he did not intend to incur personal responsibility. He is described as holding a power-of-attorney from the Zamindar. It is not stated that the power-of-attorney included a power to sign promissory notes, or that the note was signed in pursuance of the power. There are no words added to the signature indicating that the maker signed in the capacity of agent

It was suggested that the law as laid down in the English cases, before the English and Indian Acts, was not the same as the law under the Acts and that the English cases which supported the respondent's contention that the maker was personally liable could not be relied on I do not agree.

The Indian Negotiable Instruments Act was passed in 1881 one year before the English Bills of Exchange Act, 1882 The latter enactment was drafted by Sir M. D Chalmers and was based on his Digest of the law of Bills of Exchange published by him in 1878. In the preface to the third edition of his book on the Act he states that for the most part the propositions of the Act were taken word for word from the propositions of the Digest. He goes on to observe that, since the Act, the cases decided before the Act are only law in so far as they can be shown to be correct and logical deductions from the general propositions of the Act. This statement is consistent with the observations on the same subject, made by Lord HERSCHELL in

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WHITE, C J.

Vagliano v. *The Bank of England*(1), and seems to me to be equally applicable to the Indian Act.

Sir M. D. Chalmers states in his introduction to his first edition of the Indian Act that it reproduces in a statutory form the English Common law of negotiable instruments with scarcely any modifications. Elsewhere he observes that as the Indian Act, *in so far as it deals with any subject, adopts and enforces* English law almost in its entirety, it is conceived that in matters relating to negotiable instruments which are untouched by the Act (and which do not come within the scope of the Indian Contract or Evidence Acts) English law would be looked to and followed as a guide. The question of the liability of the maker of a note who disclaims personal responsibility on the ground that he signed as agent is, as *it* seems to me, not a *matter* "untouched by the Act." It is specifically dealt with in section 28.

The language of the section of the English Act (section 26) no doubt differs from that of the corresponding section of the Indian Act (section 28). It declares that a person who signs and adds words to his signature indicating that he signs for and on behalf of a principal, or in a representative character, is not personally liable, whilst section 28 of the Indian Act declares that an agent who signs is personally liable unless he indicates on the instrument that he signs as agent or that he does not intend to incur personal liability. It might be said that in view of this difference of language the onus on the party who seeks to avoid personal responsibility on the ground he signed as agent is heavier under the Indian than under the English enactment. I do not, however, attach importance to this variation of language because, I think the legislature intended in both enactments to reproduce the English Common law, though the language used for the purpose of carrying out their intention is different.

In dealing with this question we are, in my opinion, warranted in considering the English decisions before the Indian Act, bearing in mind that they are only law "in so far as they can be shown to be correct and logical deductions from the general propositions" in the Indian Act, in the same way as an

(1) (1891) A.C. 10 at p 144.

English Court would be warranted in considering the English decisions in an English case.

Perhaps the strongest case in the appellant's favour is one since the Act, the decision of the Court of Appeal, overruling, CHANNELL, J., in *Chapman* v. *Smethurst*(1). The Court held that the man who signed was not personally liable but in that case the facts were very different from those in the present case. There, at the foot of the note was the rubber stamp of the Company and under those words the defendant wrote the words J. H. Smethurst, Managing Director. There, it was admitted the defendant had the Company's authority to sign the note. The note was made in the name of the Company by a person acting under the authority of the Company, as allowed by section 47 of the Companies Act, 1872. In *Alexander* v. *Sizer*(2), where it was held that the man who signed the note was not personally liable, it was signed "For (certain parties) John Sizer, Secretary." *Lindus* v. *Melrose*(3), was again a very different case from this. There the note was signed by certain persons who described themselves as directors, and it was held that the note was binding on the Company and that the directors were not personally liable. In *Aggs* v. *Nicholson*(4), the two directors who signed the note, without additional words, described themselves in the body of the note as directors of the Society and they promised to pay by and on behalf of the society. They were held not personally liable. *Dutton* v. *Marsh*(5), was held to be on the other side of the line, and the parties who signed were held personally liable. In that case, though they described themselves as directors in the body of the note, they did not promise to pay *on behalf of the Company* and they signed the note without any addition to their signatures, though the Company's seal was affixed at the corner of the note with "witnessed by L L."

I do not propose to discuss further the numerous authorities cited in the able arguments which were addressed to us So far as the English cases go the weight of authority seems to me clearly on the side of the respondent.

(1) (1909) 1.K.B., 927
(2) (1869) L.R., 4 Ex., 102.
(3) (1857) 27 L.J., Ex., 326.
(4) (1856) 25 L.J., Ex., 348.
(5) (1871) 6 Q.B., 361.

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The question came before the late KRISHNASWAMI AYYAR, J., in *Aiyathurai Aiyar* v. *Dharmasiva Aiyar*(1). The learned Judge held that the man who signed the note was personally liable. In that case, the indications in that note that the man who signed it did not intend to make himself personally liable would seem to have been stronger than the indications in the case before us.

It seems to me that, reading the note in question as a whole, on the construction of the instrument, and on authority, the maker is personally liable.

As to the minor point that the Munsif was wrong in framing an additional issue which raised the question of the liability of the third defendant as maker of the note, I agree with SADASIVA AYYAR, J., that it was open to the Munsif to do this.

A further point was taken that there was no consideration for the note as between the maker and the payee, and that the only consideration for the transaction was a debt due to the payee by a third party. In the course which the case took before the Munsif this point did not arise and was not considered. I do not think we are called upon to consider it now.

I think the appeal should be dismissed with costs.

AYLING, J

AYLING, J.—I agree. The point is not free from doubt, but on a careful consideration of the terms of the promissory note I am of opinion that there is no indication therein that the maker signed as an agent or did not intend to incur personal liability.

OLDFIELD, J.

OLDFIELD, J.—I concur in the statement of the law contained in the judgment of the learned Chief Justice. With reference to the wording of the note it is material not only that its maker describes himself in a manner which does not imply any intention to incur personal responsibility, but also that his promise to pay is unqualified by any reference to his alleged principal. The appeal must be dismissed with costs.

(1) (1911) 1 M.W.N., 143.

APPELLATE CRIMINAL.

Before Mr. Justice Miller and Mr. Justice Sadasiva Ayyar.

GOVINDA CHETTI AND EIGHT OTHERS, PETITIONERS,

v.

PERUMAL CHETTI AND ANOTHER (COUNTER-PETITIONERS), RESPONDENTS.*

1913. September.

Criminal Procedure Code (Act V of 1898), sec. 144—Renewed orders under—Jurisdiction of Magistrate—High Court's power of interference under article 15, Charter Act (24 and 25 Vict., C. 104).

Where a renewed order passed under section 144, Criminal Procedure Code, did not state that there was again a temporary emergency and a continuing or existing insufficiency of the Police Force to protect the petitioners in their rights,

Held, that the Magistrate gave himself a more extended jurisdiction than is covered by section 144 and that the order was revisable by the High Court under article 15, Charter Act (24 and 25 Vict., C. 104).

Their Lordships declined to set aside the order as the two months during which the order would remain in force was almost expiring on the date of hearing.

PETITIONS under sections 435 and 439 of the Code of Criminal Procedure (Act V of 1898), praying the High Court to revise the order of J. P. BEDFORD, the District Magistrate of Salem, in Criminal Miscellaneous Petition No. 8 of 1913, presented against the proceedings, dated the 27th June 1913, on the file of the Sub-Magistrate of Salem.

The facts of this case are stated in the order of SADASIVA AYYAR, J.

L. A. Govindaraghava Ayyar for the petitioners.

The Public Prosecutor on behalf of Government.

R. Sadagopachariar and *C. Rajagopalachariar* for the second respondent.

SADASIVA AYYAR, J.—In the absence of the Police Sub-Inspector's report of the 22nd June 1913, on the basis of which the Salem Town Sub-Magistrate passed his order of the 27th June 1913, I cannot see my way to hold that the said order passed under section 144 of the Criminal Procedure Code was an order passed without jurisdiction. The said report of the Sub-Inspector of Police is not part of the record sent to us and

SADASIVA AYYAR, J.

* Criminal Revision Case No. 438 of 1913 (Criminal Revision Petition No. 369 of 1913).

GOVINDA CHETTI v. PERUMAL CHETTI. — SADASIVA AYYAR, J.

before (we could send for and obtain it) the two months during which the order is to remain in force would expire and there would be no use in revising the order after it is spent. I would, therefore, dismiss this petition, but I do not think it inappropriate to make some observations with reference to the proceedings of the Lower Courts.

The Sub-Magistrate's proceedings of the 15th July 1913, lend some justification to the argument addressed to us by the petitioners' learned Vakil that the Sub-Magistrate considered himself legally bound by the "District Magistrate's order which prohibits the procession," evidently in perpetuity. The Sub-Magistrate while he ought to give due and very great respect to the advice of the District Magistrate, ought to have used his own judicial mind on the Sub-Inspector's report and have come to his own conclusion whether a temporary and emergent order under section 144 ought to have been passed. The general "instructions" of the District Magistrate are not legally binding on the Sub-Magistrate in particular cases. Again there is some force in the petitioners' learned Vakil's contention that the Magistracy at Salem are, under the shelter of section 144 of the Criminal Procedure Code (which relates to the passing of provisional orders to tide over temporary emergencies and in cases where "immediate prevention or speedy remedy is desirable"), the Magistracy are under the shelter of that section trying to clutch at a much more extensive jurisdiction namely a jurisdiction to prohibit the petitioners by a permanent injunction from taking processions (throughout an indefinite future) period along the streets of Salem. I have no doubt that under section 15 of the Charter Act, we are entitled to prevent such indirect evasion by the Magistracy of the law as laid down in section 144 [see *Remjit Singh* v. *Luchman Prasad*(1), *Satish Chandra Roy* v. *The Emperor*(2), *Gopi Mohun Mullick* v. *Taramoni Chowdhrani*(3) and *Queen Empress* v. *Pratap Chunder Ghose*(4)], the observations in which cases indicate that the arm of the law is long enough to prevent such evasion of the Code by arbitrary and successive renewals of orders passed under section 144 and that the powers given to the High Court under

(1) (1902) 7 C.W.N., 110.
(2) (1906) 11 C.W.N., 70 at p. 80.
(3) (1880) I.L.R., 5 Calc., 7 at p. 19.
(4) (1898) I.L.R., 25 Calc., 852.

clause 15 of the Charter Act are sufficient to prevent such evasion).

The District Magistrate's order of the 23rd July 1913, refusing to set aside the Sub-Magistrate's order of the 22nd June 1913 does not state that there was again a temporary emergency and a continuing or existing insufficiency of the Police force to protect the petitioners in exercise of their rights. Unless such a ground is expressly mentioned and is *primâ facie* established in any future order passed in connection with this question, the presumption would, in my opinion, be very strong that the order was passed merely in order to evade the provisions of section 144 and that the Magistracy are attempting to give themselves a much more extended jurisdiction than is covered by section 144 of the Criminal Procedure Code.

With these observations I would dismiss this Revision Petition.

MILLER, J.—I agree in the order proposed, and entirely concur in my learned colleague's observations, as to the attempt which, there seems reason to fear, the District Magistrate of Salem is making, to obtain a jurisdiction wider than that given him by section 144 of the Code of Criminal Procedure. MILLER, J.

APPELLATE CIVIL.

Before Mr. Justice Sadasiva Ayyar and Mr. Justice Tyabji.

1913. July 22 and September 2.

PHATMABI (PLAINTIFF), APPELLANT IN BOTH CASES,

v.

HAJI A. MUSA SAHIB (DEFENDANT), RESPONDENT IN BOTH CASES.*

Muhammadan Law—Mutawalliship of property annexed to a mosque—Right to succeed by principle of heredity—Proof and validity of such right.

Held, on the facts of the case, that the plaintiff who claimed to be the *mutawalli* of the plaint mosque by right of heredity, had not established by clear proof that that was the method of succession to the office and that he was therefore the lawful *mutawalli*.

Held also as a valid appointment of a mutawalli could be made only in one of three modes, viz. (*a*) by the original author of the waqf or by some person expressly authorized by him, or (*b*) by the executor of the author, or

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* Second Appeal Nos. 1470 and 1471 of 1911.

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(c) lastly, by the Court, any person claiming to be a mutawalli by heredity, must show by strict proof of precedents that that mode of appointment was one which must be necessarily deemed to have been sanctioned by the author of the trust.

It is frequently provided that each *mutawalli* should have the power to appoint his successor; where there has been a long established practice for the *mutawalli* to nominate his successor, it is assumed (unless the contrary is proved) that power to do so was given by the founder of the *waqf*. But where from past practice, it is sought to be established that the *mutawalliship* is to devolve hereditarily, there must be something from which a rule of hereditary succession sufficiently precise or definite may be deduced, and the mere fact that for some time prior to 1874 three persons from the family of the plaintiff were successively mutawallis does not show that mutawalliship devolved by heredity in the absence of proof that they were not appointed or nominated by somebody.

Sayad Abdula Edrus v *Sayad Zain Sayad Hasan Edrus* (1889) I.L.R., 13 Bom., 555 at p. 562, referred to.

Per SADASIVA AYYAR, J.—Heredity as a principle of succession to any office is highly objectionable

SECOND APPEALS against the decrees of T. GOPALAKRISHNA PILLAI, the Subordinate Judge of Kistna at Ellore, in Appeals Nos. 227 and 300 of 1910, respectively, preferred against the decrees of S. RAGHAVA AYYANGAR, the District Munsif of Ellore, in Original Suits Nos. 448 of 1908 and 300 of 1905.

The plaintiff sued to recover certain monies alleged to have been illegally collected by the defendant as rent from certain properties belonging to a mosque to which the plaintiff alleged that she was the lawful mutawalli succeeding by right of heredity. The defendant contended that the plaintiff was not the lawful trustee, that the mutawalliship was not conferred on the plaintiff's family with hereditary rights and that he himself was the proper trustee. The Lower Courts dismissed the plaintiff's suit on the ground that she did not prove any usage or custom of hereditary succession.

The plaintiff preferred this Second Appeal.

P. Narayanamurthi for the appellant.

V. Ramadoss for the respondent.

TYABJI, J.

TYABJI, J.—The plaintiff claims mesne profits in respect of certain waqf properties The real questions involved in the suit and appeal were the subject of some discussion before us; but the issues settled by the District Munsif show that the contention of the plaintiff was that she succeeded to the office of mutawalli of the waqf properties by hereditary devolution, and that she claimed possession of them on that footing as against the

defendant; that the defendant on the other hand set up his own title as mutawalli on the strength of an appointment by a person calling himself the qazi, and also by the members of his community. The real question therefore to be decided by us is whether the plaintiff has made out that she was the actual and rightful mutawalli of the waqf properties for the three years succeeding 6th August 1905, and not whether the plaintiff has proved some circumstances which would entitle her claims to be considered, were the Court asked to appoint a mutawalli of the waqf properties. The relative qualifications of the plaintiff and the defendant to be appointed mutawalli need not be considered by us, notwithstanding that as a defence to the plaintiff's claim the defendant claims to be entitled to hold the office of mutawalli himself. It may be that the defendant is not the rightful mutawalli, but that would not necessarily entitle the plaintiff to succeed in her suit.

The modes in which a person may come to hold the office of mutawalli seem to be laid down in Baillie's Digest of Muhammadan Law (which, it need hardly be said, is a translation mainly of the Fatawa' Alamgiri) on page 593 of the edition of 1865 corresponding to pages 603-604 of the edition of 1875 It would seem that there are three sources from which a person may trace his right to be mutawalli .—

(1) Appointment by the waqf (that is the original author of the waqf), or by some person expressly authorised by the waqf to appoint; and in the absence of any person so authorised.

(2) Appointment by the executor of the waqf; and, in the absence of such an appointment,—

(3) Appointment by the Court.

If the statement given above correctly represents the effect of the Fatawa 'Alamgiri then, any title to be a mutawalli must be derived from one of two main sources, namely, either the waqf himself, or the Court.

The authority vested in the waqf to appoint the mutawalli may be exercised either by himself directly, or through another person; he may delegate his authority in any manner provided for by him at the time when the property is dedicated by way of waqf; in other words, at the time of the dedication he may lay down who shall have the power of appointing mutawallis in future, and in what way the power to appoint must be exercised.

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TYABJI, J.

The terms of the dedication, including the provisions relating to the objects of the waqf, and to the management of the property belonging to it need not be reduced to writing; so that there need not be a waqfnama containing the terms on which the dedication to waqf is made. Where however the terms of dedication are formally reduced to writing in the shape of a waqfnama, it is usual to include therein provisions relating to the appointment of successive mutawallis. Hence, it is generally assumed that there must be some such provisions laid down by the waqif even where the original dedication is not in writing, or at any rate no document containing the terms of the dedication is produced. As a consequence of these assumptions, where there has been a series of appointments of mutawallis, it is generally assumed that the appointments have been valid, which implies that such appointments have been made in accordance with the terms of the original dedication relating to the mode in which the successive appointments have to be made.

Thus from the history of previous appointments, the directions contained in the original dedication with reference to the mode in which the successive mutawallis are to be appointed may be inferred. This inference, it is obvious, is based on what in a great number of cases must be recognised to be mere fictions namely, that the original dedication even though it be oral and informal, contained specific provisions relating to the mode of appointment, and, secondly, that the appointments in the past have been valid and in strict accordance with the provisions so assumed to be laid down at the time of the original dedication. It must frequently happen that at the time when the dedication is made there are no provisions laid down with reference to the appointment of successive mutawallis. Again, it is quite in accordance with common knowledge that on the death of a person holding an office of such a character as the mutawalliship of a waqf his descendants or relations should slide into the office without any one being concerned to question their right to do so, and without any pretence on the part of the new office holder that his succession is in accordance with the terms of the original waqfnama, or the expressed or implied desires of the waqif. On such successive act of usurpation it is easy to found a claim that the office is hereditary—a claim which, however difficult it may be to resist in court, may be quite opposed to the real intentions

of the waqf. Similarly a claim to be mutawalli may be based on the fact that the last mutawalli purported to appoint the claimant as his successor. The recognition of a claim based on such an appointment equally proceeds on the assumption that in the terms of the dedication the waqf empowered each mutawalli to nominate his successor. The law does not directly empower the mutawalli of every waqf to appoint his successor, but if in regard to any particular waqf it is proved that the mutawallis have been in the practice of nominating their successors, it is assumed that the practice had a lawful origin, and was founded on some provisions contained in the waqifnama or some oral directions given by the waqf empowering the mutawallis to nominate their successors. Provisions in waqfnamas empowering the mutawallis to nominate their successors are so usual that it would perhaps be representing the present state of the authorities more nearly if it were said that the Courts assume the existence of such a provision in the dedication, unless the contrary is proved.

It will be seen therefore that a claim based on the allegation either that the office is hereditary or that the last mutawalli nominated the claimant as his successor must ultimately have reference to the actual or the presumed directions of the waqf at the time when the dedication was made.

The claim made by the plaintiff in this case must, if at all, be supported on considerations which must be brought under one of the various heads to which I have alluded.

Much reliance was placed by the pleader for the respondent on the observations in *Sayad Abdulla Edrus* v. *Sayad Zain Sayad Hasan Edrus*(1), where it was said that where a custom is alleged " that the eldest son succeeds by virtue of inheritance, that custom being opposed to the general law must be supported by strict proof". It may, no doubt, be conceded, on the other hand, that where the object of the waqf in question is not to support a public charity, but to provide for the maintenance of a family, the Courts might be satisfied with less strict proof in order to hold that the management of the property devolves hereditarily on members of the family of

(1) (1889) I.L.R., 13 Bom., 555 at p. 562.

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the beneficiaries. To this consideration must be added the fact [which was also alluded to in *Sayad Abdula Edrus* v. *Sayad Zain Sayad Hasan Edrus*(1)] that the law favours the claim of members of the waqfs family to be mutawallis, and "in the *Asul*, it is stated that the Judge cannot appoint a stranger to the office of administrator so long as there are any of the house of the appropriator fit for the office; and if he should not find *a fit person among them, and should nominate a stranger, but* should subsequently find one who is qualified, he ought to transfer the appointment to him". [See Baillie's Digest (1865), pages 593 to 594 (1875), page 604.]

The result of these rules of law so far as at present material, would seem to be that the question in a case like the present is not merely whether the succession to the office of mutawalli has for some time been devolving hereditarily, but whether there are sufficient grounds for holding that the original dedication by way of waqf, contained a provision to the effect that the office is to devolve hereditarily. I have already stated that in my opinion what may be considered sufficient grounds in the case of a waqf of one class may not be sufficient in the case of a waqf of another class

In the present case there is no allegation, still less any proof, that the waqf is of a nature which would in the ordinary course be expected to be administered by a succession of hereditary mutawallis, chosen from one family. Hence there is no reason to consider the evidence in this case from an attitude more favourable to the plaintiff than is implied in the decision to which I have referred, and it is not alleged or proved that the plaintiff has been nominated to be mutawalli by the last office bearer.

Under these circumstances the facts on which the plaintiff relies, namely, that there have been from some time previous to 1874 three successive mutawallis from the family to which the plaintiff belongs, seem to me to be totally insufficient for supporting the allegation that, in accordance with the terms of original dedication, the mutawalliship of the waqf ought to devolve hereditarily. I do not allude more fully to the various facts in this case on which the respondent relies as tending to throw doubt on the allegation that the three successive mutawallis in

(1) (1889) I.L.R., 13 Bom., 555 at p. 562.

question rightfully succeeded to that office; for it seems that for the purposes of the present appeal it may be conceded that they were rightful holders of the office, and yet there is nothing to show that they purported to succeed to the office not through some appointment or nomination, but as of right. Even if it were assumed that they purported to succeed by right of inheritance, there is nothing from which a rule of hereditary succession can be deduced sufficiently precise or definite for presuming that such a rule was contained in the waqfnama or terms of the dedication. Unless all these facts are alleged and proved, I am unable to see how the plaintiff can succeed in her claim, as it has been framed. These reasons for holding that the decision appealed from ought not to be disturbed seem to me to apply with greater force when it is borne in mind that we are sitting in Second Appeal, and that it is not easy to class some of the questions to which I have alluded as questions of a nature which can be the subject of Second Appeal.

I am therefore of opinion that this appeal should be dismissed with costs.

SADASIVA AYYAR, J.

SADASIVA AYYAR, J.—I entirely agree, and I shall only add that a claim to succeed by hereditary right to a trustee's office or to a religious office or to any other office should be looked upon with strong disfavour by Court whether the office was created by a Hindu or Mussalman or an adherent of any other creed. The holding of any office should depend on the necessary qualifications, and, which heredity might raise a feeble presumption of fitness to be considered by Courts in arriving at a decision on the question of the successorship to the office, it should not be raised to the dignity of a principle which creates a right of succession to any office, unless the terms of the original foundation of the office constrain the Courts to treat heredity as the factor to be considered in deciding on the right to the office or unless there has been such a precise and uniform course of descent by heredity almost irrespective of any consideration as to the person best fitted for the office as to raise an irresistible inference as to the intentions of the original creator of the office.

Re KAMAKSHAMMA.

SADASIVA AYYAR, J.

an inherent power in the case of loss or destruction of a judicial record to restore such record," and it was held in that case that execution might issue even before the reconstruction of the record. According to Black on Judgments (volume I, section 125). "The power of supplying a new record, where the original has been lost or destroyed, is one which pertains to courts of general jurisdiction independent of legislation."

Even if I am wrong in my opinion that the learned Additional Sessions Judge is entitled to replace the lost judgment by a new judgment and that the conviction and sentence passed by him without pronouncing the whole of the written judgment do not make them void, I think (as I said already) that it is more advisable to wait till an appeal is preferred against the conviction and the sentence by the accused in the case before the High Court takes any action.

Let the records be returned.

APPELLATE CIVIL.

Before Sir Charles Arnold White, Kt., Chief Justice, and Mr. Justice Oldfield.

1913 August 5, 6, and 26 and September 10, 11 and 12.

NAVAJEE AND ANOTHER (PLAINTIFFS), APPELLANTS,

v.

THE ADMINISTRATOR-GENERAL OF MADRAS AND EIGHT OTHERS (DEFENDANTS, NOS. 1 TO 6 AND LEGAL REPRESENTATIVE OF SEVENTH DEFENDANT), RESPONDENTS.*

Administrator-General's Act (II of 1874), ss 28, 34 and 35—Civil Procedure Code (Act V of 1908), O. XX, r. 13—Suit to recover assets improperly paid by the Administrator-General—Not a suit for administration by Court—Priority of creditors—Construction of instrument of agreement—Creditor to be paid out of cheques or monies received from a third party for work done by the creditor—Charge on such cheques or monies received after Letters of Administration granted—"Specific fund" meaning of—Equitable assignment—"Payment out of a fund" and "payment when a fund is received", difference between

Section 28 of the Administrator-General's Act (II of 1874) directs the Administrator-General to distribute the assets and contains a provision that

* Original Side Appeal No. 31 of 1910.

NAVAJEE v. THE ADMINISTRATOR-GENERAL OF MADRAS.

nothing contained in the section shall prejudice the right of any creditor or other claimant to follow the assets or any part thereof in the hands of the persons who may have received the same respectively.

When probate or letters of administration have been granted to the Administrator-General there is no machinery for the administration of the insolvent estate of a deceased debtor under the law of insolvency. The practice in Bombay and Calcutta is the same as in Madras.

Order XX, rule 13 of the Civil Procedure Code (Act V of 1908) does not apply to a suit brought by a creditor of a deceased debtor against the Administrator-General (to whom letters of administration had been granted) and some other creditors to recover assets alleged to have been improperly paid by the Administrator-General to such creditors in priority to the plaintiff.

When an agreement contained a clause, viz, "It is agreed that you should have a lien or charge over cheques or monies received for works done with your capital," the instrument operated to create a charge on cheques or monies payable for work done after the instrument, although the cheque was not given or payment made until after letters of administration had been granted to the Administrator-General.

Collyer v *Isaacs* (1881) 19 Ch.D., 342 and *Tailby* v. *Official Receiver* (1888) 13 A.C, 523, followed.

Bansidhar v *Sant Lal* (1887) I.L.R, 10 All., 133, referred to.

Ex parte *Nichols* In re *James* (1883) 22 Ch.D., 782 and Ex parte *Moss* In re *Toward* (1884) 14 Q.B D, 310, explained.

When an instrument refers to specific funds out of which the claims of a creditor are to be satisfied, the creditor has a charge on such fund.

When a creditor is to be paid "out of the fund," as distinguished from "when the assignor gets the fund," a valid equitable assignment is created provided the transaction is for value.

Fisher on Mortages, page 126; White and Tudor's Leading Cases, 8th volume, I edition, page 117.

Field v. *Megaw* (1869) L R, 4 C P., 660, distinguished.

Ramsidh Pande v. *Balgobind* (1887) I.L.R., 9 All., 158, referred to

APPEAL from the decree of WALLIS, J., in Civil Suit No. 163 of 1908 in the exercise of the ordinary original civil jurisdiction.

The necessary facts appear in the judgment of WHITE, C.J.

T. Prakasam and *A. E. Rencontre* for appellants.

T. R. Ramachandra Ayyar and *T. S. Natesa Sastri* for respondents Nos. 7 to 9.

P. Narayanamurti and *T. Arumainatham Pillai* for the respondents Nos. 2, 3, 5 and 6.

T. Ramachandra Rao for the fourth respondent.

WHITE, C.J.

WHITE, C.J.—In this case one J. S. Peters died intestate and letters of administration were granted to the Administrator-General. Thereupon it became his duty under section 28 of the Administrator-General's Act (II of 1874) to distribute the

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assets. Section 28 directs the Administrator-General to distribute the assets and contains a provision that nothing contained in the section shall prejudice the right of any creditor or other claimant to follow the assets or any part thereof in the hands of the persons who may have received the same respectively. Sections 34 and 35 contemplate suits by and against the Administrator-General. Section 35 deals with suits by creditors against the Administrator-General. The Administrator-General proceeded to administer the estate and in so doing held that defendants Nos. 2 to 6 were entitled to priority of payment by virtue of documents which they held which they contended amounted to charges given to them by J. S. Peters and entitled them to payment out of certain funds in priority to the general body of creditors. The plaintiff thereupon brought this suit making the Administrator-General the first defendant and the creditors whose claims to priority had been recognised by the Administrator-General, defendants Nos. 2 to 6.

It is admitted that Mr. Peters' estate was insolvent. The learned Judge said in his judgment: "This is a suit for the administration of the estate of the late J. S. Peters." The learned Judge's attention was not called to Order XX, rule 13 of the Code of Civil Procedure, which provides that "in the administration by the Court of the property of any deceased person, if such property proves to be insufficient for the payment in full of his debts and liabilities, the same rules shall be observed as to the respective rights of secured and unsecured creditors and as to debts and liabilities proveable, and as to the valuation of annuities and future and contingent liabilities, respectively, as may be in force for the time being, within the local limits of the Court in which the administration suit is pending with respect to the estates of persons adjudged or declared insolvent." I thought at one time in the course of the argument that a difficulty might arise in connection with the judgment of the learned Judge by reason of the fact that his attention had not been called to this rule and that he had not considered the question whether the rule was applicable to this suit. I was at one time disposed to think that Order XX, rule 13 of the Code of Civil Procedure did apply, but after hearing a full argument on the point I have come to the conclusion that it does not.

The policy of the law in connection with insolvent estates of deceased persons is indicated by sections 107 to 111 of the Presidency Towns Insolvency Act, 1909. Section 108 enables a creditor of the deceased debtor whose debt would have been sufficient to support an insolvency petition against the debtor, had he been alive to present to the Court a petition asking for an order for the administration of the estate in insolvency. There is a further provision that a petition for administration under this section shall not be presented to the Court after proceedings have been commenced in any Court of Justice; but that, in that case, the Court may, on its own motion, transfer the proceedings to the Insolvency Court. Section 111 provides that sections 108, 109 and 110 shall not apply to a case in which probate or letters of administration have been granted to an Administrator-General The result seems to be that when probate has been granted to the Administrator-General there is no machinery for the administration of the insolvent estate under the law of insolvency. We consulted the Administrator-General with regard to the practice and he has ascertained that the practice in Bombay and Calcutta is the same as here. I confess I do not quite understand the principle of the thing but this appears to be the law.

The words of Order XX, rule 13 of the Code of Civil Procedure, are almost, word for word, the same as section 10 of the Judicature Act of 1875. Before that Act the rule in bankruptcy was that a secured creditor must realize his security and prove for the balance. The rule in Chancery was that he could prove for his whole debt, but if, on the realization of the security there was a surplus, he must refund the surplus. The effect of the rule is not to apply all the principles of bankruptcy to insolvent estates but only to establish a uniformity of administration in respect of the four heads specifically mentioned in the section.

As regards the vesting of the estate about which we had a good deal of argument the rule says nothing with regard to vesting but merely deals with the heads specifically mentioned therein.

Mr. Prakasam who appeared for the appellants laid stress on the fact that under the Indian Succession Act, as he contended, this estate became vested in the Administrator-General. The nature of that vesting, as it seems to me, is different from the

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vesting in a trustee or in the Official Assignee by virtue of the operation of the law of insolvency. It gives the Administrator-General no higher title than the deceased had.

Is there anything to indicate that this suit is a suit for administration by the Court of the property of the deceased person to which the rule would apply except the fact that the learned Judge in general language describes it as "a suit for the administration of the estate of the late J. S. Peters"? Mr. Prakasam has pointed out that the plaint follows more or less closely the form of plaint which we find in the schedule to the Code as the form for an administration suit by a creditor. There is this difference. In the present suit there is the statement that letters of administration were granted to the Administrator-General. No doubt one of the prayers is that the estate and effects of the deceased may be administered under the direction of this Court. But the decree is not in the form of a decree which is made in an administration suit. The learned Judge only purported to deal with the specific question as to whether defendants Nos. 2 to 6 were entitled to priority of payment and did not deal generally with the question of administration.

If Order XX, rule 13 of the Code of Civil Procedure, does not apply, the question whether we should, in dealing with this appeal, apply the principles of law upon which the decisions in Ex parte *Nichols*, In re *James*(1) and Ex parte *Moss*, In re *Toward*(2) are based, does not arise.

It remains for us to decide whether we agree with the learned Judge as to the construction of the documents which are relied upon by defendants Nos. 2 to 6 as giving them rights in priority in the administration of the estate. I think in construing the instruments we are entitled to take into consideration the course of business between the parties.

The plaintiff at one time—I am stating the facts quite generally—financed the late Mr. Peters for the purpose of enabling him to carry out his contracts with the Madras Railway Company. After a time they ceased to do business with Mr. Peters and closed their accounts They were paid a small sum on account. Then the defendants undertook to finance the deceased and the course of business was—again I am stating the facts generally—

(1) (1883) 22 Ch.D., 782 (2) (1884) 14 Q B.D., 310.

they did the work and provided the materials. Mr. Peters charged the Company for the work done and for the goods supplied according to his contracts with the Railway Company paying the defendants according to his agreements with them and retaining the difference between what he paid them and what the Company paid him as a commission for himself. The learned Judge finds, and we see no reason to differ from him, that defendants Nos. 2 to 6 did the work in respect of which they claimed a charge on payments received by Mr. Peters from the Railway Company.

The instrument about which there was most discussion is Exhibit XI. That is a document which is no doubt inartistically drawn. It is in these terms:

"Agreement written 3rd September by J. S. Peters, Government Pensioner, and 4th District, 10th section contractor of Madras Railway Company, now residing at Kovur, Kistna district, to Erra Govindiah Garu's son of Errah Jagiah Subadargar, Sudra, and Inamdar of Rajahmundry, under the following conditions:—

(1) I pay you soon after I receive cheques from the Madras Railway Company for works done by you investing money under me as a task-work deducting my commissions as noted below for the following works.—

(2) My late Bankers or other debtors have no claims on your invested capital for the works you are now doing and about to do as per my orders except to the commissions I have to receive from the cheques of your works under me. It is agreed that you should have a lien or charge over cheques or monies received for works done with your capital.

(3) In case if I fail to remit your monies soon after I receive from Madras Railway Company for works done by you as per my orders either verbal or written I am liable for breach of contract liabilities."

The learned Judge received this document with Exhibit X, which is a letter, dated 2nd July 1906, some two months earlier, written by Mr. Peters to the second defendant asking him to supply certain materials and carry out certain works and promising to pay him as soon as he gets the cheque from the Railway Company after deducting his commissions. Then, going back to Exhibit XI, we have this paragraph: "It is agreed that

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you (the second defendant) should have a lien or charge over cheques or monies received for works done with your capital." It was, I think, conceded that the work in question was done after the date of Exhibit XI and it was not disputed that payment was not made by the Railway Company until after the death of Mr. Peters and the grant of letters of administration to the Administrator-General. But it seems to me clear from the judgments in Ex parte *Nichols*, In re *James*(1) and Ex parte *Moss*, In re *Toward*(2) that the instrument might operate as a charge on cheques or monies payable for work done after Exhibit XI was given by Mr. Peters to the second defendant. The fact that payment was not made by the Railway Company until after letters of administration had been granted to the Administrator-General might be material if the principle of the decision in the two cases to which I have referred were applicable in this case. But, for the reasons I have stated, it seems to me that this fact is immaterial.

Mr. Prakasam contended that as the cheques did not come into existence until after the giving of the document they could not be the subject of an assignment. He relied on the decision in *Collyar* v. *Isaacs*(3). We find in that case the answer to Mr. Prakasam's contention. The Master of Rolls says :—"A man cannot in equity, any more than at law, assign what has no existence. A man can contract to assign property which is to come into existence in the future, and when it has come into existence, equity, treating as done that which ought to be done, fastens upon that property, and the contract to assign thus becomes a complete assignment." The question came before the House of Lords in *Tailby* v. *Official Receiver*(4), where the question was whether a man could assign future book debts. It was held that the assignment of future book debts was good if the subject-matter of the assignment could be identified.

Mr. Narayanamurthi who appeared for some of the defendants has called our attention to certain Indian cases. I will only refer to *Bansidhar* v. *Sant Lal*(5). This was a case of hypothecation of indigo produce when it should come into existence. It was held that the hypothecation was good.

(1) (1883) 22 Ch.D., 782. (2) (1884) 14 Q.B.D., 310.
(3) (1881) 19 Ch D., 342. (4) (1888) 13 A.C., 523.
(5) (1888) I.L.R., 10 All., 133.

A further objection which was taken by Mr. Prakasam was that the words of the instrument were not sufficiently specific to constitute a charge. Some authorities have been cited in reference to the question. There is a case—*Ramsidh Pande* v. *Balgobind*(1)—in which the words of the instrument were of a general character "Whatever property, etc., belonging to me." It was held that the bond created a charge on the properties in the circumstances of the case. This decision was doubted in a later Allahabad case and I do not express any opinion about it. It seems to me that the words of the instrument in the present case are of a much more precise and specific character. We have a reference to specific funds out of which the claims of the creditor are to be satisfied. They are to be satisfied out of cheques or monies received for work done by the defendants which was paid *for in the first instance by the defendants.* The rule is thus stated in Fisher on Mortgages, sixth edition, page 126, paragraph 230.—" If. however, there is a sufficient indication that the supposed assignee is to have the benefit of the fund or chose in action in question, in addition to relying on the credit of the assignor, or, as it is sometimes put, is to be paid 'out of the fund' as distinguished from 'when the assignor gets the fund,' a valid equitable assignment is created, provided that the transaction is for value. The intention must be that the property shall pass." Applying that test here, is it " when " or " out of." It seems to me that Exhibit XI may be fairly construed as being an instrument where a man gives a charge to be met out of a specific fund.

Mr. Prakasam referred us to a passage in *Ryall* v. *Rowles*(2): " A promise to pay money when the debtor receives a debt due to him from a third person does not constitute an equitable assignment, so as to charge the debt in the hands of such third person." In the notes, *Field* v. *Megaw*(3) is cited. The promise in that case was a promise to pay " when," not a promise to pay " out of."

Then as to the other documents which were relied on as creating a charge. Exhibit XIV is in these terms .—" I promise

(1) (1887) I.L.R., 9 All , 158

(2) Ves Sen , 348, s c., 1 White and Tudor's L.C., 8th Edn., at p. 117.

(3) (1869) L.R., 4 C.P., 660.

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to pay the amounts you paid to my agent N. Subba Rao Garu for *interest* up to *14th October 1906* amounting to Rs. *118-8-10* and Rs. 15 of to-day's total one hundred and thirty-three from the commissions due to me on your works from coming cheques."

That seems to me not a promise to pay "when I get cheques" but a promise to pay "from the commissions I should be entitled to retain out of the cheques I receive." I also think a charge was created by Exhibits V and VI. Then we have Exhibit XXI. This particular letter no doubt gives rise to a certain amount of difficulty. The words are "I will pay the amount for works you perform for timber, etc., soon after cheques for the same are received deducting the usual commission as paid by others." The course of business was, as I have said, that Mr. Peters should deduct a certain percentage for himself and pay *the balance to the men who did the work, i.e.,* the defendants. I think we are warranted in construing this as a promise by Mr. Peters to pay from a specific fund after he had deducted the commission to which he was entitled as arranged between him and the defendants.

We see no reason to differ from the learned Judge's findings of fact in this case, nor from his finding with regard to the suggestion of fraud on the part of the late Mr. Peters' agent.

There only remains the question of costs. The case is not free from difficulty and our order is the parties *may take* their costs, taxed as between party and party, out of the estate of Mr. Peters both here and before the learned Judge.

OLDFIELD, J.

OLDFIELD, J.—I agree.

APPELLATE CIVIL.

Before Mr. Justice Miller and Mr. Justice Sadasiva Ayyar.

N. VENKATARANGA ROW GARU (FIRST RESPONDENT IN APPEALS NOS. 133 AND 134 OF 1904 ON THE FILE OF THE HIGH COURT), PETITIONER IN BOTH,

1913, September 18.

v.

RAJA K. V. NARASIMHA RAO GARU *et al* (THE OTHER RESPONDENTS AND APPELLANTS IN BOTH), RESPONDENTS.*

Privy Council, appeal to, maintainability of—Civil Procedure Code (Act V of 1908), sec. 109—Orders remanding, not final orders, so as to be appealable to Privy Council—Civil Procedure Code (Act V of 1908), sec 105

Orders of the High Court reversing on appeal two decisions of the lower Court, and remanding the cases for trial, one of them on the ground that the lower Court was wrong in dismissing the suit for insufficiency of the pleadings, and the other on the ground that the lower Court was wrong in dismissing the suit on the plea of bar contained in section 43 of the old Civil Procedure Code, are purely preliminary or interlocutory orders, which do not decide, the respective rights of the parties, and are not *final* orders within the meaning of section 109, Civil Procedure Code, so as to be capable of being appealed against to the Privy Council.

Tirunarayana v. *Gopalasami* (1890) I.L.R., 13 Mad., 349, followed.

Saiyid Muzhar Hossein v. *Mussamat Bodha Bibi* (1895) I.L.R., 17 All., 1912, applied.

Forbes v. *Ameeroonissa Begum* (1865) 10 M I.A., 340 at p 359, referred to.

Section 105, Civil Procedure Code, does not apply to appeals to His Majesty in Council.

PETITIONS praying that the High Court will be pleased to grant leave to appeal to His Majesty in Council against the orders of MILLER and SADASIVA AYYAR, JJ. of the High Court, Madras, in Appeals Nos. 133 and 134 of 1904, presented against the decrees of M. D. BELL, the District Judge of Kistna at Masulipatam, in Original Suits Nos. 45 and 56 of 1895.

The necessary facts appear from the order.

T. Ranga Achariyar and *S. V. Padmanabha Ayyangar* for the petitioner.

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* Civil Miscellaneous Petitions Nos. 283 and 284 of 1910.

VENKATA-RANGA ROW v. NARASIMHA RAO.

MILLER AND SADASIVA AYYAR, JJ.

K. Srinivasa Ayyangar, *S. Gopalaswami Ayyangar*, *P. Somasundram* for *P. Narayanamurti* and *S. Varada Achariyar* for the respondents.

ORDER.—We find ourselves unable to give the certificate applied for, for the reason that the orders of this Court are not final orders within the meaning of section 109 of the Civil Procedure Code.

In these cases, no question between the parties in regard to their rights as against one another has been decided, one case has been remanded for trial on the ground that the District Judge was wrong in deciding that the pleadings were insufficient and the other on the ground that he was wrong in applying section 43 of the former Code of Civil Procedure in bar of the suit. These are clearly preliminary points having no connection with the merits of the suits. We are invited for the petitioners to hold that the orders of remand are final orders within the meaning of section 109 of the Civil Procedure Code; but we are unable to accept the invitation. In this Court the only authority cited, i.e., *Tirunarayana* v. *Gopalasami*(1) is against the petitioners. We have been referred to the decisions of the Privy Council in *Rahimbhoy Habibhoy* v. *C. A. Turner*(2), *Saiyid Muzhar Hossein* v. *Mussamat Bodha Bibi*(3), *Radha Krishnan* v. *The Collector of Jaunpur*(4), and *Chandra Kunwar* v. *Chaudhri Narpat Singh*(5). None of these cases, as we understand them, is an authority in favour of the petitioner. In *Rahimbhoy Habibhoy* v. *C. A. Turner*(2) and *Saiyid Muzhar Hossein* v. *Mussamat Bodha Bibi*(3), where appeals were held competent, issues on the merits on which the decision of the disputes depended had been decided, and in the latter case their Lordships distinguished the case before them from cases in which the decision reversed had proceeded upon a preliminary point, and observe with reference to such cases that the practice of the Allahabad High Court in treating orders of remand as interlocutory was probably quite correct. In *Chandra Kunwar* v. *Chaudhri Narpat Singh*(5), the appeal was heard by the Privy Council, but it is not clear to us that the decision reversed by the High Court had proceeded merely upon a preliminary point; there is no discussion of this question in the

(1) (1890) I.L.R., 13 Mad., 349. (2) (1891) I.L.R., 15 Bom., 155 (P.C.).
(3) (1895) I.L.R., 17 All., 112 (4) (1901) I.L.R., 23 All., 220.
(5) (1907) I.L.R., 29 All., 184 (P.C.)

report and it does not appear that objection was taken to the competency of the appeal.

In *Ahmed Husain* v. *Gobind Krishna Narain*(1), the High Court declined to grant a certificate in a case similar to the present cases and did not refer to *Chandra Kunwar* v. *Chaudhri Narpat Singh*(2). In *Forbes* v. *Ameeroonissa Begum*(3) an order of remand is described as an interlocutory order. There is thus no decision of the Privy Council to the effect that orders like those made in the cases before us are final orders within the meaning of the provision of law which we are considering, and the only authority in this Court points the other way.

We are asked to hold that under the present Code of Civil Procedure these orders must be deemed to be final, because under section 105 of that Code it is necessary to appeal against them without waiting for the final decision of the case. Section 105 of the Code does not apply to appeals to His Majesty in Council and does not, we think, operate to give a new meaning to the word "final" in section 109, or supply a guide to the interpretation of that section on this point. We agree with the observations in *Ahmed Husain* v. *Gobind Krishna Narain*(1). A different view was taken in *Sarasmani Debi* v. *Basa Krishna Banerjee*(4) where most of the decisions are considered and it may be that that case is distinguishable from *Krishna Chandra* v. *Ram Narain*(5), where the judgment does not give reasons at length. But we think that the observation in *Saiyid Muzhar Hossein* v. *Mussamut Bodha Bibi*(6) supports the authority of *Tirunarayana* v. *Gopalaswami*(7) and that we ought to follow that decision

We reject the petitions. The petitioner will pay to the first, second, third, fifth, sixth, seventh, ninth, eleventh, fifteenth, and sixteenth respondents in Civil Miscellaneous Petition No. 283 of 1910, Rs. 102 and to the first, second, fourth, seventh, to twelfth, eighteenth, and nineteenth respondents in Civil Miscellaneous Petition No. 284 of 1910, Rs. 102 for their costs of these petitions.

(1) (1911) I.L.R., 33 All., 391. (2) (1907) I.L.R., 29 All., 184
(3) (1865) 10 M.I.A., 340 at p. 359 (4) (1907) 10 C.L.J., 336.
(5) (1913) 18 C.L.J., 124. (6) (1895) I.L.R., 17 All., 112.
(7) (1890) I.L.R., 13 Mad., 349.

APPELLATE CRIMINAL.

Before Mr. Justice Oldfield.

1913. September 18 and 19.

GANGA REDDY (COMPLAINANT), PETITIONER,

v.

C. SAMARAPATHY MUDALY (ACCUSED), RESPONDENT.*

Criminal Procedure Code (Act V of 1898), sec. 203—What are "no sufficient grounds"—Jurisdiction of High Court under Charter Act 24 and 25 Vict., c. 104, art. 15.

Where a Magistrate without summoning the accused dismissed a complaint under section 203, Criminal Procedure Code, for the reasons that there was gross delay in filing it and that the charges seemed to be made for ulterior and improper motives,

Held, that such considerations were not relevant to the decision of the question as to whether there were no sufficient grounds for proceeding.

In the absence of a finding that the complaint was false or unsustainable on the evidence likely to be available, the order of dismissal is irregular and liable to be set aside by the High Court under article 15 of the Charter Act 24 and 25 Vict., c. 104

PETITION under sections 435 and 439 of the Code of Criminal Procedure (Act V of 1898) and article 15 of the Charter Act 24 and 25 Vict., c. 104, praying the High Court to revise the order, dated the 29th April 1913, passed by W. S. MARSHALL, the third Presidency Magistrate, Georgetown, in Application No. 4763 of 1913.

In this case the complainant charged the accused with offences under sections 498 and 497, Indian Penal Code (Act XLV of 1860). After notice to the accused, but before issuing summons, the Magistrate heard the vakils on both sides and held that as the complaint was lodged after five days and with the object of bringing the accused to terms he might be making himself a party to an attempt at extortion if he were to issue a summons and he therefore dismissed the complaint presumably under section 203, Indian Penal Code.

The accused petitioned to the High Court under section 439, Criminal Procedure Code, but for reasons which appear in the judgment the High Court permitted the petition to be amended by adding article 15 of the Charter Act.

V. Viswanatha Sastri for the petitioner.

J. Adam and *T. Pattabhirama Ayyar* for the respondent.

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* Criminal Revision Case No. 381 of 1913 (Criminal Revision Petition No. 307 of 1913).

GANGA REDDY v. SAMARAPATHY MUDALY.

OLDFIELD, J.

ORDER.—A preliminary objection has been taken that the petition will not lie under the Criminal Procedure Code with reference to *Debi Bux Shroff* v. *Jutmal Dungarwal*(1) and previous cases including *Charoobala Dabee* v. *Barendra Nath Mozumdar*(2). The course of authority in Calcutta has not been consistent. In this Presidency the point was raised in the case reported at II Weir 255, but was not decided. I have however allowed the petitioner to amend his petition by inserting a reference to section 15 of the Charter Act, and as I find that it can be supported on the merits with reference to that provision, it is not necessary to decide whether I have jurisdiction under the Criminal Procedure Code also.

The petitioner charged the accused with offences punishable under sections 498 and 497, Indian Penal Code. The Magistrate declined to grant summons, in effect dismissing the complaint under section 203 of the Criminal Procedure Code. His recorded reasons included nothing resembling a finding that the charges were false. They were only that gross delay had occurred and that the charges were made for ulterior and improper motives. Section 203 authorizes the Magistrate to dismiss a case if he finds no sufficient ground for proceeding. But the decision whether there is sufficient ground might be reached by the exercise of discretion based on judicial considerations. That the Magistrate considered the probable result of proceeding, undesirable or the motives and conduct of the complainant discreditable is not a relevant consideration; *In the matter of the petition of Ganesh Narayan Sathe*(3). In the absence of any finding that the complaint was false or unsustainable on the evidence likely to be available, the passing of the order of dismissal constituted an irregularity, with which this Court has under section 15 of the Charter Act jurisdiction to deal.

The order must be set aside and the complaint remanded to the Chief Presidency Magistrate for disposal according to law by him or such other Presidency Magistrate as he may direct.

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(1) (1906) I.L.R., 33 Calc., 1282. (2) (1900) I.L.R., 27 Calc., 126
(3) (1889) I.L.R., 13 Bom., 600

APPELLATE CIVIL.

Before Mr. Justice Ayling and Mr. Justice Tyabji.

1913. September 10 and 19.

ADITYAM IYER (FIRST DEFENDANT), APPELLANT,

v.

RAMA KRISHNA IYER AND THREE OTHERS (PLAINTIFF AND DEFENDANTS Nos. 2 TO 4), RESPONDENTS.*

Indian Evidence Act (I of 1872), sec. 92—Registered sale-deed—Price specified in the sale-deed—Recital as to amount of price, essential term of contract of sale—Oral agreement as to higher price in discharge of a mortgage—Evidence inadmissible.

The amount of the price agreed to be paid is an essential term of a contract of sale; and consequently no evidence of an oral agreement at variance with the provisions of a registered sale-deed as to the amount of the price fixed for the sale, is admissible under section 92 of the Indian Evidence Act

Cowasji Ruttonji Limboowalla v. *Burjorji Rustomji Limboowalla* (1888) I.L.R., 12 Bom , 335, followed.

Vasudeva v. *Narasamma* (1882) I.L.R., 5 Mad. 6 ; *Kumara* v. *Srinivasa* (1888) I.L.R , 11 Mad., 213, *Hukumchand* v. *Hiralal* (1879) I.L R., 3 Bom., 159 and *Gopal Singh* v. *Laloo Lall* (1909) 10 C.L J , 27, explained.

Ram Bakhsh v. *Durjan* (1887) I.L R., 9 All., 392, *Indarjit* v. *Lal Chand* (1896) I.L R., 18 All., 168, *Balkishen Das* v. *Legge* (1900) I.L.R , 22 All , 149 (P.C.), *Selamba Goundan* v. *Palani Goundan* (1913) M.W.N., 650 and *Probat Chandra Gangapadhya* v. *Chirag Ali* (1906) I.L.R., 33 Calc., 607, referred to.

SECOND APPEAL against the decree of E. L. THORNTON, the District Judge of Trichinopoly, in Appeal Suit No. 101 of 1911, preferred against the decree of A. RAMASWAMI SASTRIYAR, the Temporary Subordinate Judge of Trichinopoly, in Original Suit No. 37 of 1910.

The facts of the case appear from the judgment.

T. R. Ramachandra Ayyar and *T. R. Krishnaswami Ayyar* for the appellant.

The Honourable Mr. *T. V. Seshagiri Ayyar* and *T. V. Muthukrishna Ayyar* for the first respondent.

AYLING AND TYABJI, JJ.

JUDGMENT.—The suit out of which this Second Appeal arises was brought by the first respondent (plaintiff) on the hypothecation bond for Rs. 1,000 (Exhibit III) executed in his favour by the appellant (first defendant) on the 27th September 1905.

* Second Appeal No. 1385 of 1912.

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The defence set up was discharge. It was contended that the discharge of the suit bond was part consideration for the sale of certain other lands by the appellant to the first respondent on the 4th September 1907, which is evidenced by two registered sale-deeds (Exhibits I and II) for Rs. 29,000 and Rs. 6,000, respectively. The discharge of Exhibit III is not mentioned in Exhibits I and II, but it is stated that there was a contemporaneous oral agreement that the sale price was to be Rs. 36,000 and not Rs. 35,000 as stated therein, the difference being found in the discharge of Exhibit III. This is how the first defendant *himself expresses it in his statement*:—

"The bond (Exhibit III) has been discharged. I have executed to this very plaintiff, a sale-deed for Rs. 36,000. On one and the same date, I executed a sale-deed for Rs. 29,000 and another sale-deed for Rs. 6,000. I executed on 4th September 1907. Without including the amount of the plaint bond, I executed for Rs. 35,000. In the aforesaid sale-deeds the plaint Rs. 1,000 debt was not included. Settling Rs. 36,000 (as price) the sale-deeds were executed for Rs. 35,000. Even at the time of the execution of these two sale-deeds, the understanding was that this amount of Rs. 1,000 should not be included, and that subsequent to his coming into possession of the lands sold, endorsement of payment of this sum of Rs. 1,000 should be made in the plaint bond—and (the bond) should be returned to me." Both the Lower Courts have held that evidence of this oral agreement regarding the discharge of Exhibit III is excluded by section 92 of the Indian Evidence Act. The only question for disposal is whether they are right.

In our opinion, the agreement set up cannot be brought under any of the provisos to section 92 of the Indian Evidence Act. At a late stage of the argument, the learned vakil for the appellant suggested that it might be covered by proviso 2. but a careful consideration of the appellant's own statement above quoted will show that this cannot be so. The appellant admits that the alleged agreement was one affecting the sale price of the lands. It provided that the price should be fixed at Rs. 36,000, although only Rs. 35,000 was to be shown in the sale-deeds. Therefore the separate oral agreement was not "as to a matter on which the document was silent," but as to the sale price which is specifically provided for in the document. It

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AYLING AND TYABJI, JJ.

is also clearly inconsistent with the provisions in the document regarding the sale price.

The main contention, however, which Mr. T. R. Ramachandra Ayyar argued at great length, is that the case does not fall within the scope of section 92 of the Indian Evidence Act. His argument really amounts to this—that the sale price is not one of the terms of a sale-deed, and that there is nothing in section 92 to exclude oral evidence to show that the price really agreed upon was higher or lower than is stated therein. This is a somewhat startling proposition and one which we should not accept without the strongest and most convincing authority. *Primâ facie*, it would seem that if anything is an essential term of a sale, it is the price agreed to be paid. We are, of course, not concerned with sales for a price not determined which stand on a different footing altogether.

The first case relied on in the appellant's favour is that of *Vasudeva* v. *Narasamma*(1). The plaintiff in that case sued on a sale-deed reciting cash consideration :—The defendants pleaded that no cash was paid, but that the document was originally executed in consideration of the plaintiff's acting as guardian to his minor son (defendant's grandson). This boy died, the defendant subsequently registered the document on the plaintiff's promise to marry another daughter of the defendant—which promise he apparently failed to keep The defendant's plea in effect was "want or failure of consideration," though the learned Judges speak of it as a plea "that the consideration was of a kind other than that stated in the deed of sale." The first proviso to the section specifically enacts that "want or failure of consideration" may be proved. It is doubtful, therefore, whether their Lordships intended to lay down any rule of law other than that contained in the proviso, although the appellant's vakil is no doubt entitled to lay stress on the passage in which they say :—

"The provisions of the Evidence Act, section 92, to which the District Judge refers, do not prohibit the disproof of a recital in a contract as to the consideration that has passed by showing that the actual consideration was something different to that alleged."

(1) (1882) I.L.R., 5 Mad., 6.

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The ruling that the vendor may prove not only failure of consideration, but also that the consideration was of a kind other than (or something different to) that alleged in the sale-deed has no doubt been followed in a later case of this Court, *Kumara* v. *Srinivasa*(1), and a similar view is expressed in *Hukumchand* v. *Hiralal*(2), and *Gopal Singh* v. *Laloo Lall*(3). In neither of the latter two cases was there any attempt to vary the amount of the consideration set forth in the document. In the Bombay case the learned Judges distinctly stated that they found no real variance between the statement in the deed and the statement of the plaintiff. It was merely sought to prove that, as is customary in this country, the statement in the deed that the full consideration passed in cash was incorrect and that part of the consideration was the discharge of an antecedent debt. In the Calcutta case, the only variance was as to whether a portion of the sale price was left with the vendor as recited in the conveyance deed, or was taken by a creditor.

None of these cases is any authority for the proposition that evidence may be admitted to vary the provisions of a sale-deed as to the amount of consideration fixed for the sale. Nor can it be said in the present case that the addition of Rs. 1,000 in the shape of discharge of another antecedent debt constitutes the consideration of another kind from, or something different to, that set forth in the deed within the meaning of the learned Judges in the first Madras case. Two other cases quoted [*Ram Bakhsh* v. *Durjan*(4), and *Indarjit* v. *Lal Chand*(5)], have no bearing whatever, inasmuch as they deal simply with arrangements as to mode of payment, without any attempt to vary the terms of the contract as to the consideration itself.

The only Indian case to which we need refer is that of *Probat Chandra Gangapadhya* v. *Chirag Ali*(6), which is relied on by the appellant's vakil in consequence of the single passage in the judgment—" The consideration of the contract is different from the terms of the contract itself " That was a case of a kabuliyat executed by a tenant agreeing to pay an enhanced rent; and it was simply held that the consideration for enhancement was not a term of the kabuliyat. It is a very different

(1) (1882) I.L.R., 11 Mad., 213. (2) (1879) I.L.R., 3 Bom., 159.
(3) (1909) 10 C.L.J., 27. (4) (1887) I.L.R., 9 All., 3 2.
(5) (1896) I.L.R., 18 All., 168. (6) (1906) I.L.R., 33 Calc., 607 at p. 611.

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case from that of a sale-deed and the sale price; and we see no reason to suppose that the learned Judges would have taken the same view in the latter. That the recital in a sale-deed as to the amount of the sale price is a *term* of the *contract* is *clearly* laid down in one of the very cases relied on in the appellant's favour [*Indarjit* v. *Lal Chand*(1)]; and we may add that to hold otherwise would go far to nullify the provisions of section 92 altogether.

We need not refer to the English cases quoted by the learned vakil for the appellant in view of the opinion expressed by their Lordships of the Privy Council as to their inapplicability in *Balkrishen Das* v. *Legge*(2).

In support of our view we may refer to the judgment of SCOTT, J., in *Cowasji Ruttonji Limboowalla* v. *Burjorji Rustomji Limboowalla*(3), and for a general view of the scope of section 92 of the Indian Evidence Act to a recent judgment of this Court in *Selamba Goundan* v. *Palani Goundan*(4).

We are of opinion that the evidence of the oral contract was rightly excluded; and we dismiss this appeal with costs.

(1) (1896) I.L.R., 18 All., 168 at p. 171.
(2) (1900) I.L.R., 22 All., 149.
(3) (1888) I.L.R., 12 Bom., 335.
(4) (1913) M.W.N., 650.

APPELLATE CIVIL.

Before Mr. Justice Sadasiva Ayyar and Mr. Justice Spencer.

1913.
September 22
and 24

CHIDAMBARA CHETTIAR BY HIS AUTHORISED AGENT RAMASAMI IYER (PLAINTIFF), APPELLANT,

v

VAIDILINGA PADAYACHI AND FIVE OTHERS (DEFENDANTS NOS. 1 TO 6), RESPONDENTS.*

Transfer of Property Act (IV of 1882), ss. 118, 119, 120, 54 and 55, cl 6 (b)—Exchange of lands of the value of one hundred rupees and upwards—No registered instrument—Oral transfer, invalid—Parties placed in possession of the lands—Sale by one of the parties of lands obtained on exchange—No estoppel against the transferor or his creditor—No estoppel against statute—No charge for the value or price of the lands at the date of the transactions

An exchange of immoveable property of the value of one hundred rupees and upwards can be made only by a registered instrument under sections 118 and 54 of the Transfer of Property Act.

No estoppel can be pleaded against the directions and the prohibitions enacted by the statute law and against the rights accruing to any party by reason of such directions and prohibitions

A party to an exchange which is not valid in law, is not entitled to a charge on the property obtained by him in exchange, for the price of such property on the date of the exchange under sections 120 and 55, clause 6 (*b*) of the Transfer of Property Act.

Kurri Veerareddi v. *Kurri Bapireddi* (1906) I.L.R., 29 Mad 336 (F.B.), followed.

Ram Bakhsh v. *Mughlani Khanam* (1904) I.L.R., 26 All, 266 dissented from.

Karalia Nanubhai v. *Mansukhram* (1900) I.L.R., 24 Bom, 400, distinguished

Muthe Venkatachellapathy v. *Pyinda Venkatachellapathy* (1912) 23 M.L.J., 652, referred to.

SECOND APPEAL against the decree of T. A. RAMAKRISHNA AYYAR, Subordinate Judge of Mayavaram, in Appeal No. 17 of 1912 presented against the decree of S. C. RAMASWAMI AYYAR, District Munsif of Shiyali, in Original Suit No. 304 of 1910.

The material facts appear from the judgment of SADASIVA AYYAR, J.

T. R. Venkatarama Sastriar for the appellant.

S. Muthia Mudaliyar for the respondent.

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* Second Appeal No. 1522 of 1912.

CHIDAMBARA CHETTIAR v. VAIDILINGA PADAYACHI.

SADASIVA AYYAR, J.

SADASIVA AYYAR, J.—The plaintiff is the appellant before us. He sued for a declaration that the judgment-debtor, the sixth defendant, was the owner of the plaint property and that the plaint property was therefore liable to be attached and sold in execution of the decree which the plaintiff has obtained against the sixth defendant. The defendants 1 to 5 plead that the sixth defendant had lost his title to the plaint property by reason of the sixth defendant having orally transferred the plaint land worth much more than Rs. 100 to one Arumuga Padayachi in 1900 the sixth defendant having obtained from the said Arumuga Padayachi Arumuga Padayachi's own land by way of exchange. The land which the sixth defendant so obtained in exchange has been conveyed by him to strangers in 1901 (see Exhibits I and III). The present suit was brought about ten years after the exchange transaction of 1900. The plaintiff contended that the oral exchange by which the sixth defendant is alleged to have lost title to the plaint lands in favour of Arumuga Padayachi did not validly transfer the sixth defendant's title to Arumuga Padayachi (whose brother's nephew and sons are the defendants Nos. 1 to 5). The plaintiff relied upon section 118 of the Transfer of Property Act, which provides that a transfer of a property by way of exchange can be made only in the manner provided for the transfer of such property by sale in section 54 which section requires a registered instrument for sale of immoveable property of the value of Rs. 100 and upwards. The defendants Nos. 1 to 5 tried to meet this objection of the plaintiff by contending that as the sixth defendant is unable now to give back the lands which he himself got by oral exchange from Arumuga Padayachi owing to the sixth defendant having conveyed them away to strangers under Exhibits I and III the sixth defendant is estopped from pleading that the oral exchange is invalid; as the sixth defendant is so estopped, his decree-holder (the plaintiff) is, it is contended, *similarly* estopped. The Munsif decreed the plaintiff's suit relying upon the Full Bench decision in *Kurri Veerareddi* v. *Kurri Bapireddi*(1). That case decided that the provisions of section 54 of the Transfer of Property Act are imperative and cannot be disregarded on grounds based upon mere equitable considerations. The Appellate Court (the Subordinate Judge of Mayavaram relying

(1) (1906) I.L.R., 29 Mad., 336 (F.B.)

CHIDAMBARA CHETTIAR v. VAIDILINGA PADAYACHI.

SADASIVA AYYAR, J.

upon *Ram Bakhsh* v. *Mughlani Khanam*(1), *Karalia Nanubhai* v. *Mansukhram*(2), on section 40 of the Transfer of Property Act, section 91 of the Trusts Act, section 120 of the Transfer of Property Act, and section 55, clause (*b*) of the Transfer of Property Act, held that the sixth defendant had no attachable interest in the property and dismissed the plaintiff's suit with costs.

The contention in second appeal is that the Subordinate Judge was wrong in his view of the law. I think that *Ram Bakhsh* v. *Mughlani Khanam*(1) and *Karalia Nanubhai* v. *Mansukhram*(2) cannot be treated as good law in the Madras Presidency having regard to the decision of the Full Bench case in *Kurri Veerareddi* v. *Kurri Bapireddi*(3). *Karalia Nanubhai* v. *Mansukhram*(2) might also be distinguished on the ground that in that case, the vendee, the person who had entered into a contract of purchase with the judgment-debtor, had not lost his right to enforce specific performance on the date of the attachment. The contract was then an existing contract in the words of section 91 of the Trusts Act.

As regards estoppel, no estoppel can be pleaded against the directions and prohibitions enacted by the Statute Law and against the rights accruing to any party by reason of such directions and prohibitions. As regards section 55, clause 6 (*b*) of the Transfer of Property Act, it no doubt gives a charge for the purchase money paid in favour of the purchaser under a contract of sale on the property contracted to be sold, if the sale goes off without default on the part of the purchaser. It is argued that as section 120 of the Transfer of Property Act gives to a party to an exchange transaction similar rights as if he was a seller or buyer in a sale transaction, the defendants Nos. 1 to 5 have a charge upon the plaint property to the extent of the price of that property at the time of the exchange transaction, and that if this suit is decreed in the plaintiff's favour, that is, if the plaintiff is declared to have the right to attach and bring the plaint property to sale in execution of the decree against the sixth defendant it should be further declared in favour of defendants Nos. 1 to 5 that they have got a charge upon the plaint property to the extent of the

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(1) (1904) I.L.R., 26 All., 266. (2) (1900) I.L.R., 24 Bom., 400.
(3) (1906) I.L.R., 29 Mad., 336 (F.B.).

CHIDAMBARA CHETTIAR v. VAIDILINGA PADAYACHI.

SADASIVA AYYAR, J.

price of such property on the date of the exchange transaction in 1900.

In the first place, it seems to me that, having regard to the definition of exchange in section 118 of the Transfer of Property Act, no question of money or purchase money is involved in a transaction of exchange and hence the charge created for purchase money under section 55, clause 6 (*b*) of the Transfer of Property Act cannot arise in the case of an exchange transaction.

In the next place, defendants Nos. 1 to 5 did not make any claim in their written statement to this alternative relief of a charge being declared in their favour if the exchange transaction be held invalid by the Courts, nor have they raised this point in the Memorandum of Appeal to the Subordinate Court.

In the third place it is very doubtful whether they could be allowed now to amend their pleadings so as to raise that question of charge as their right to enforce the said charge is probably now barred by limitation because if any legal charge which could be relied on was ever created it must have been created in 1900 and we are now in 1913.

Lastly, I am not sure that to a suit for ejectment the defendant could plead a mere charge and whether the defendant who has got a mere charge ought not to be relegated to his own suit to enforce the charge after paying proper Court fees on his plaint instead of being allowed as defendant to impose conditions on the plaintiff as a preliminary to the plaintiff's being given a decree in ejectment. As regards the last point, however, I must admit that there are observations in the case in *Muthe Venkatachellapathy* v. *Pyinda Venkatachellapathy*(1) which are in the defendant's favour. However, on the grounds Nos. 1 to 3 which I have enunciated above, the defendants 1 to 5 cannot obtain a declaration in their favour of a charge for any money, that is, for the probable price (unsatisfactorily and roughly ascertained by evidence after ten years) on the date of the exchange in 1900. In the result the Lower Appellate Court's decree will be set aside and the Munsif's decree restored. As this is a hard case for the defendants 1 to 5, I would make no order as to costs in the Lower Appellate Court and in this Court.

(1) (1912) 23 M.L.J., 652.

SPENCER, J.—I agree with the conclusions of my learned brother. I have only to add that the decisions on which the Lower Appellate Court relied can be distinguished from the present case. *Ram Bakhsh* v. *Mughlani Khanam*(1) was a case in which certain immoveable property was delivered in satisfaction of a Muhammadan widow's decree for dower. The Allahabad High Court has in several cases shown a reluctance to apply the provision of section 54 of the Transfer of Property Act strictly to sales between Muhammadans, knowing that under Sunni law payment of price accompanied by delivery of possession constituted a complete transfer without the execution of any document, *vide* section 820 of Gour's Law of Transfer in British India.

In Karalia Nanubhai v. *Mansukhram* (2) the Court treated the judgment-debtor as holding the property in trust for the person who had purchased from him. A conveyance was executed and registered under a decree for specific performance, thereby perfecting the purchaser's title before the suit for declaration of the judgment-creditor's right to attach was decided in the Court of First Instance.

Section 55 of the Indian Transfer of Property Act being founded mainly on the provisions of the English Conveyancing Act of 1881. I doubt if clause 6 (*b*), which deals with the buyer's lien, can properly be applied to an exchange of immoveable property notwithstanding sections 119 and 120. In *Volkart Brothers* v. *Vettivelu Nadan*(3) a claim based on an agreement to exchange goods in the shape of cotton was allowed on the ground of trade usage, but usages and custom of trade are specially excepted by section 1 of the Indian Contract Act, and the property in dispute in that case being moveable was governed by Chapter VII of the Indian Contract Act, which deals with the sale of goods and corresponds with the provisions of the Sale of Goods Act in England.

(1) (1906) I.L.R., 26 All., 266.

(2) (1900) I.L.R, 24 Bom, 400. (3) (1888) I.L.R., 11 Mad., 459.

APPELLATE CIVIL.

Before Mr. Justice Miller and Mr. Justice Sadasiva Ayyar

1913 September 19 and 26.

THE MANAGER TO THE LESSEES OF THE SIVAGANGA ZAMINDARY (PLAINTIFF), APPELLANT,

v.

CHIDAMBARAM CHETTI AND SIX OTHERS (DEFENDANTS AND LEGAL REPRESENTATIVE OF THE SECOND DEFENDANT), RESPONDENTS.*

Madras Estates Land Act (I of 1908), sec. 42, cl. 1(a) and (b), and 2—Enhancement or alteration of rent—Lease-deed—Provision as to payment of rent on excess of area of lands found on measurement—No enhancement or alteration of rent—Previous order of Collector not required—Bengal Tenancy Act (VIII of 1885), ss 52 and 188

The proviso found in clause 2 of section 42 of the Madras Estates Land Act (I of 1908), which requires the order of a Collector before an enhancement of rent can be allowed, does not apply to the claim of a land-holder who sues to recover arrears of *tirva* due under a lease-deed which contained a provision for payment of tirva at a specified rate on the excess lands found on measurement over the area specified in the lease-deed

It is only where the landlord wants to enhance the rent, basing his claim on the right granted and declared by section 42, clauses 1 (*a*) and (*b*), that he should obtain, under clause 2, the order of the Collector for such alteration of rent before he could claim the altered rent.

Dintarini Dasi v. *I. P.D Broughton* (1896) 3 C.W N., 225 and *Ram Chunder Chuckrabutty* v. *Giridhur Dutt* (1892) I.L R , 19 Calc , 755, *followed*.

SECOND APPEAL against the decree of F. B. EVANS, District Judge of Ramnad, in Appeal No 551 of 1911 presented against the decree of S V. KALLAPIRAN PILLAI, Special Deputy Collector of Ramnad, in Summary Suit No 1559 of 1910.

The facts appear from the judgment of High Court.

The Hon'ble Mr. *F H M. Corbett, Advocate-General* and *T. R. Venkatarama Sastriar* for the appellant.

V. Visvanadha Sastriar for the first respondent.

The judgment of the Court was delivered by

MILLER AND SADASIVA AYYAR, JJ.

SADASIVA AYYAR, J.—The plaintiffs are the lessees of the Sivaganga Zamindari and they are the appellants before us. They are the landlords under the Estates Land Act. In 1899, a

* Second Appeal No 163 of 1912.

registered rent deed was executed by the defendants in favour of the plaintiffs. The terms of that agreement were that the defendants should pay assessment on the area of a certain holding at the rate of Rs. 11 per sei in respect of ayan lands in three villages leased to the defendants. The term of the lease has not yet expired. Under that same registered deed, the defendants agreed to pay assessment at Rs. 8 per sei on the ayan lands in a fourth village also leased under the same deed. The area of the leased lands in the three former villages was given in the deed as 19-3-15 seis. The area of the land in the fourth village was given as 2-11-4. In paragraph 6 of the said lease deed, however a provision was inserted, viz., that in case the areas of the lands should, on measurement, be found to be more than the areas mentioned above, the defendants should be liable to pay tirva at the rate of Rs. 27-8-0 per sei on the excess so found from three years prior to the date on which such excess area was discovered. The plaintiff's allegations are that the plaintiff's Inspector discovered an excess of 2-3-15 seis in one of the first three villages and 0-0-4 sei in the fourth village in June 1909 and that on this total area of 2-4-3 the defendants are liable to pay excess assessment at Rs. 27-8-0 per sei from fasli 1315, including the current fasli of the plaint, namely fasli 1319. The suit was brought on the 27th May 1910

THE MANAGER TO THE LESSEES OF THE SIVAGANGA ZAMINDARY v. CHIDAMBARAM CHETTI.

MILLER AND SADASIVA AYYAR, JJ.

Several defences were raised by the defendants. It is necessary however, for the purposes of this Second Appeal to notice only one of them, viz., that contained in paragraph 4 of the written statement. The contention in that paragraph is that according to clause 2 of section 42 of the Estates Land Act the plaintiffs are not entitled to file a suit in respect of arrears for the excess measurement until the Collector had decided, on application by the plaintiffs, what such excess area was. The lower Courts accepted this contention and dismissed the suit without going into the other issues raised by the pleadings. We think that the decisions of the Lower Courts cannot be upheld. Section 42 of the Estates Land Act corresponds to section 52 of the Bengal Tenancy Act. Though section 52 of Bengal Tenancy Act does not contain the provision contained in the proviso to clause 2 of section 42 of the Madras Estates Land Act, section 188 of the Bengal Tenancy Act imposes another condition before a claim by a landlord under that Act

APPELLATE CIVIL.

Before Mr. Justice Miller and Mr. Justice Sadasiva Ayyar

1913, September 19 and 25.

THE MANAGER TO THE LESSEES OF THE SIVAGANGA ZAMINDARY (PLAINTIFF), APPELLANT,

v.

CHIDAMBARAM CHETTI AND SIX OTHERS (DEFENDANTS AND LEGAL REPRESENTATIVE OF THE SECOND DEFENDANT), RESPONDENTS.*

Madras Estates Land Act (I of 1908), sec. 42, cl 1(a) and (b), and 2—Enhancement or alteration of rent—Lease-deed—Provision as to payment of rent on excess of area of lands found on measurement—No enhancement or alteration of rent—Previous order of Collector not required—Bengal Tenancy Act (VIII of 1885), ss 52 and 188

The proviso found in clause 2 of section 42 of the Madras Estates Land Act (I of 1908), which requires the order of a Collector before an enhancement of rent can be allowed, does not apply to the claim of a land-holder who sues to recover arrears of *tirva* due under a lease-deed which contained a provision for payment of tirva at a specified rate on the excess lands found on measurement over the area specified in the lease-deed

It is only where the landlord wants to enhance the rent, basing his claim on the right granted and declared by section 42, clauses 1 (*a*) and (*b*), that he should obtain, under clause 2, the order of the Collector for such alteration of rent before he could claim the altered rent

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SECOND APPEAL against the decree of F. B. EVANS, District Judge of Ramnad, in Appeal No. 551 of 1911 presented against the decree of S V KALLAPIRAN PILLAI, Special Deputy Collector of Ramnad, in Summary Suit No 1559 of 1910.

The facts appear from the judgment of High Court.

The Hon'ble Mr. *F H M. Corbett, Advocate-General* and *T. R. Venkatarama Sastriar* for the appellant.

V. Visvanadha Sastriar for the first respondent.

The judgment of the Court was delivered by

MILLER AND SADASIVA AYYAR, JJ.

SADASIVA AYYAR, J.—The plaintiffs are the lessees of the Sivaganga Zamindari and they are the appellants before us. They are the landlords under the Estates Land Act. In 1899, a

* Second Appeal No. 163 of 1912.

registered rent deed was executed by the defendants in favour of the plaintiffs. The terms of that agreement were that the defendants should pay assessment on the area of a certain holding at the rate of Rs. 11 per sei in respect of ayan lands in three villages leased to the defendants. The term of the lease has not yet expired. Under that same registered deed, the defendants agreed to pay assessment at Rs. 8 per sei on the ayan lands in a fourth village also leased under the same deed. The area of the leased lands in the three former villages was given in the deed as 19-3-15 seis. The area of the land in the fourth village was given as 2-11-4. In paragraph 6 of the said lease deed, however a provision was inserted, viz., that in case the areas of the lands should, on measurement, be found to be more than the areas mentioned above, the defendants should be liable to pay tirva at the rate of Rs. 27-8-0 per sei on the excess so found from three years prior to the date on which such excess area was discovered. The plaintiff's allegations are that the plaintiff's Inspector discovered an excess of 2-3-15 seis in one of the first three villages and 0-0-4 sei in the fourth village in June 1909 and that on this total area of 2-4-3 the defendants are liable to pay excess assessment at Rs 27-8-0 per sei from fasli 1315, including the current fasli of the plaint, namely fasli 1319. The suit was brought on the 27th May 1910.

THE MANAGER TO THE LESSEES OF THE SIVAGANGA ZAMINDARY v. CHIDAMBARAM CHETTI.

MILLER AND SADASIVA AYYAR, JJ.

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THE MANAGER TO THE LESSEES OF THE SIVAGANGA ZAMINDARI v. CHIDAMBARAM CHETTI.

MILLER AND SADASIVA AYYAR, JJ

for an enhancement of rent can be recognised, *i.e.*, that in the case of joint landlords all must act together. In *Dintarini Dasi* v. *L. P. D. Broughton*(1) the learned Judges had to deal with a case similar to the present. The term of the lease there was "that the landlords were at liberty to measure the lands of the tenant and, if the area of the land be found greater in quantity than 150 bighas, its then estimated area, the tenant would pay rent at the rate of 10 annas per bigha on the area so found." The question was whether a suit brought by the landlord for enhancement on this contract was a suit brought in respect of a right granted or declared *by the Act* in the landlord's favour and it was decided in the negative. The same question had been similarly decided in *Ram Chunder Chuckrabutty* v. *Giridhur Dutt*(2). It was only where the landlord wants to enhance the rent, basing his claim on the right granted and declared by section 42, clauses 1 (*a*) and (*b*), that he should obtain under clause 2 the order of the Collector for such alteration of rent before he could claim the altered rent. As observed in *Dintarini Dasi* v. *L P.D. Broughton*(1). "The plaintiff does not seek in this suit under the provisions of section 52 of the (Bengal) Tenancy Act" (section 42 of the Madras Estates Land Act) "to alter the rent of the defendant. He says the rent has automatically been altered by the provisions of the defendant's lease on the land being measured and found to exceed 150 *bighas* in area." Applying this principle, it seems to us the proviso found in clause (2) of section 42, which requires the order of a Collector before enhancement of rent can be allowed, does not apply to the claim of the plaintiff in this case. On similar grounds the learned Judges in the Calcutta case held that the condition in section 188 of the Bengal Tenancy Act that all the landlords should act together did not apply to a suit brought for enhancement based on contract and not on section 52. The decree of the lower Courts will therefore be reversed and the suit remanded for decision on the other issues raised in the case. Costs will be costs in the cause.

(1) (1896) 3 C.W.N., 225, at p. 226 (2) (1892) I.L.R., 19 Calc., 755.

APPELLATE CIVIL

Before Mr. Justice Miller and Mr. Justice Sadasiva Ayyar.

KUNHU KUTTI AMMAH (PLAINTIFF), APPELLANT,

1913
September
19 and 25.

v.

MALLAPRATU *alias* N. M. KESAVAN NAMBUDRI,
KARNAVAN AND MANAGER OF THE ILLOM, AND EIGHT OTHERS
(DEFENDANTS NOS. 5 TO 13), RESPONDENTS *

Malabar Law—Nambudri Illom—No liability for sons to pay their father's debts

A Nambudri 'Illom' differs in many respects from an ordinary joint Hindu family on account of the impartibility of its property and its close resemblance to a Nair tarward The rule of Hindu Law which imposes the duty on a son to pay his father's personal debts, neither illegal nor immoral, is not applicable to Nambudris; and the mere fact that there are no other members in the 'Illom' besides the sons and grandsons of the Nambudri debtor, cannot affect the principle.

Nilakandan v. *Madhavan* (1887) I.L.R., 10 Mad, 9 and *Govinda* v *Krishnan* (1892) I.L R, 15 Mad., 333, followed.

Kunhichekkan v. *Lydia Arucanden* (1912) M.W N. 386, considered.

Muttayan v *Zemindar of Sivagiri* (1883) I L R, 6 Mad., 1 (P C), distinguished.

SECOND APPEAL against the decree of A. EDGINGTON, the Acting District Judge of South Malabar, in Appeal No. 927 of 1910 preferred against the decree of T. V. ANANTAN NAIR, the Subordinate Judge of South Malabar at Palghat, in Original Suit No. 36 of 1909.

The plaintiff in the case lent on a promissory note Rs. 4,000 to one Kesavan Nambudri deceased, who was the head and Manager of a Nambudri Illom which, at the time of the suit, consisted of his sons, grandsons, his widows and the widow of one of his sons. Both the lower Courts finding that the debt was borrowed by Kesavan Nambudri for his own personal use dismissed the suit as against the members of the Illom but gave a decree only against the separate assets of the Kesavan Nambudri in the hands of a third party. The Appellate Court also held that the members of the Illom, though they were mainly sons and grandsons by sons of the said Kesavan Nambudri, were not as such,

* Second Appeal No. 681 of 1912.

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bound to pay his personal debts. Plaintiff preferred this Second Appeal.

T. R. Ramachandra Ayyar for the appellant.

C. Madhavan Nair for J. L. Rosario for respondents Nos. 1 to 6.

SADASIVA AYYAR, J.

SADASIVA AYYAR, J.—As we understand the judgments of the two Lower Courts their concurrent finding on the facts is that no portion of the debt of Rs. 4,000 which Kesavan Nambudri, the father of the fifth defendant, incurred, was used for the benefit of Kesavan Nambudri's illom, and that that money used and intended by Kesavan Nambudri to be used, for the personal expenses of himself and his deceased son. This personal debt of Kesavan Nambudri, though it is not proved to be an illegal or immoral debt, cannot be binding on his illom, which now consists of defendants Nos. 5 to 13, unless the ordinary Hindu Law which makes sons liable for their father's personal debts be applied, the defendants Nos. 5 to 7, 11 and 12 being the sons of Kesavan Nambudri while the thirteenth defendant is Kesavan Nambudri's grandson by his deceased son (defendants Nos. 8 to 10 are widows of the illom).

The Lower Appellate Court held that the obligation of the sons in an ordinary Mitakshara Hindu family to pay their father's personal debts (not illegal or immoral) does not attach to the sons of a Nambudri father. The ground of the decision is that a joint family consisting of father and his sons in an ordinary Hindu family differs in many respect from a Nambudri illom, though the latter might consist only of a father and his sons. The learned District Judge relied upon the decisions in *Nilakandan* v. *Madhavan*(1), *Govinda* v. *Kishnan*(2). It has been contended before us that the obligation of the sons to pay their father's personal debts attaches also to the sons of a Nambudri father, and that the illom property is assets of the father in the hands of his Nambudri sons so as to be liable for the father's debts. In a very learned editorial article found in pages 171 to 184, twelfth volume of the Madras Law Journal, there are no doubt certain observations supporting the appellant's contention. The opinion of BRANDT and PARKER, JJ., in *Nilakandan* v. *Madhavan*(1), viz., that the rule of Hindu Law according to which the son is bound to pay the debts of the father is not

(1) (1887) I.L.R., 10 Mad., 9. (2) (1892) I.L.R., 15 Mad., 333.

applicable to the Nambudris is treated as *obiter dictum* in that article (see page 185). But *Govinda* v. *Krishnan* (1) decided by SUBRAMANIA AYYAR and BEST, JJ., approves of the decision in *Nilakandan* v. *Madhavan* (2) and adopts the principle enunciated therein that the rule of Hindu Law which imposes the duty on a son to pay his father's debt contracted for purposes neither illegal nor immoral is not applicable to Nambudris The reason for such non-applicability is stated thus: "As the property is joint and impartible and belongs to the whole family and the father has got no definite share that could be made available for his individual debt or which devolves on his death to the son to the exclusion of the other joint members of the family, there is no room for the application of the pious duty of the son to pay the father's debts." The writer of the learned article in the Madras Law Journal to which I have already referred (it seems to be an open secret that the writer is now one of the learned Judges of this Court) admits that, where the Nambudri family consists both of the deceased's debtor's sons and of other members "the rule of the son's liability to pay the father's debts *would be absolutely inapplicable.*" "The sons not being entitled to partition have no saleable interest in the property and the other members not being bound to pay the debt, according to the rule in question, *the whole of the properties* is unavailable for the debt in question." The learned writer however adds "But the question might be different where the family consists only of the father and the sons and their issue." With the greatest respect I do not think that the mere fact that, besides the sons and grandsons of the debtor, there were no other members in the illom could affect the principle by reason of which the applicability of the ordinary Hindu Law rule was negatived in *Nilakandan* v. *Madhavan*(2) and *Govinda* v. *Krishnan*(1) As I understand the principle, it is that a Nambudri illom though governed by the ordinary rules of Hindu Law is also governed by the rules relating to a Marumakkattayam Nair tarwad in some respects. Those matters in which the illom and the tarwad agree are. (*a*) that the head of the illom though the father of the other members of the illom has only the same rights in the properties

(1) (1892) I.L.R., 15 Mad., 333. (2) (1887) I.L.R., 10 Mad., 9.

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of the family as the karnavan of a Nair tarward has though the other members of the tarwad might happen to be only the karnavan's nephews and grand-nephews. (b) Just as the personal debts of a karnavan are not binding on his nephews, the personal debts of a Nambudri father are not binding upon his Nambudri sons (c) A Nambudri father cannot enforce partition among his sons just as a karnavan cannot, upon his nephews nor can a co-parcener in a Nambudri illom enforce compulsory partition by suit. (d) The alleged share of a Nambudri father or a Nambudri son cannot be attached and brought to sale by a creditor for the personal debt of the debtor just as the alleged share of the karnavan or of an anandravan cannot be attached and brought to sale for the debt due to a creditor by such karnavan. (e) The alleged share of a Nambudri father or son belonging to an illom cannot be alienated by him so as to give a right to the alienee to bring a suit for enforcement of partition among all the members of the illom any more than a member of a Malabar tarwad can alienate his alleged share so as to give such a right to the alienee.

I am prepared to follow the principle enunciated in the decisions of this Court in *Nilakandan* v. *Madhavan*(1), and *Govinda* v. *Krishnan*(2). The appellants' learned vakil argued that *Kunhichekkan* v. *Lydia Arucanden*(3), has destroyed most of the above incidents even of the Marumakkattayam law in the case of Nair families. In that case, it was held that the conversion of even one of the members of a Marumakkatayam tarwad dissolved the co-parcenary completely (with the incident of survivorship). Without offering any opinion as to the correctness of the decision in that particular case, I am not prepared to hold that all the differences which I pointed out above between an ordinary Hindu joint family on the one side and a Marumakkattayam joint family tarwad or a Nambudri illom on the other side have been obliterated by the above decision, even if by a process of logic, such a result could be deduced from some observations in that case. *Muttayan* v. *Zamindar of Sivagiri*(4), was relied upon by the appellants' vakil for the proposition that the fact that the incidents of

(1) (1887) I.L R, 10 Mad, 9.
(2) (1892) I.L R., 15 Mad., 333
(3) (1912) M.W.N., 386.
(4) (1883) I.L.R., 6 Mad., 1 (P.C.).

impartibility and inalienability attach to the property of a joint Hindu family will not prevent the operation of the rule of Hindu Law which makes the sons liable for a father's personal debts to the extent of an ancestral property. But that case has no relevancy because the non-liability of a Nambudri son is not based upon the absence of the incidence of partibility and alienability alone *but upon the illom and its members partaking of the nature of a Marumakkattayam tarwad as regards the rights of its members in the property*. In the result, the Second Appeal must be dismissed with costs.

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MILLER, J.—I agree.

MILLER, J.

APPELLATE CIVIL.

Before Mr. Justice Sadasiva Ayyar and Mr. Justice Spencer

K. J. V. V. VENKATAPATHI NAYANIVARU (PLAINTIFF), APPELLANT,

1913. September 24 and 26.

v.

MAHOMED SAHIB AND THREE OTHERS (DEFENDANTS), RESPONDENTS.*

Madras Civil Courts Act (III of 1873), sec. 17—Original suit tried partly by a District Munsif—Subsequent appointment as Subordinate Judge—Decree passed by successor in the Munsif's Court—Appeal from the decree—Competency of the Subordinate Judge to hear the appeal—Disqualification under the common law and statutory law, nature of—Objection when to be taken—Waiver—Mere bias or prejudice, ground of disqualification, when—Appropriate remedy

Where a District Munsif tried an original suit in part and was promoted to be a Subordinate Judge and his successor in office as a District Munsif completed the trial of the suit and passed a decree therein, and an appeal preferred against the decree was heard and disposed of without objection, by the Subordinate Judge who had tried the original suit in part,

Held, that the disposal of the appeal by the Subordinate Judge was not legally invalid and ought not to be set aside by the Appellate Court.

Section 17 of the Madras Civil Courts Act introduces a statutory disqualification as regards District and Subordinate Judges but is confined to the case

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* Second Appeal No. 802 of 1912

VENKATA-PATHI NAYANIVARU v. MAHOMED SAHIB.

where the appeal to be heard in the Appellate Court is against the decree or order passed by the District or Subordinate Judge himself in another capacity

Section 17 of the Madras Civil Courts Act does not make any distinction between the Judge being a nominal party or a really interested party.

The interest which disqualifies a Judge must be pecuniary interest or one which involves some individual right or privilege or it must be an interest arising out of the near relationship of the Judge to a party to the cause.

Mere bias or prejudice on the part of a Judge does not disqualify him in the absence of a statutory provision.

Even as regards relationship to a party to the cause, a Judge was not under the common law disqualified by such relationship and it is only by statute law such a disqualification could be imposed on a Judge.

Under the common law, there is no disqualification imposed on a Judge to sit in his own Court in review of his own decision (it is so under the statute law also) or even to review it on appeal in the Appellate Court, if he become an Appellate Judge having appellate jurisdiction over the tribunal in which he decided the cause as Original Judge.

Where there is no statutory or common law disqualification in the Judge of the Court below, an Appellate Court should not set aside the judgment of the Lower Court on the mere ground that it might have been swayed by bias or prejudice

Even in such a case unless objection was taken before the Judge of the Lower Court itself at or during the trial of the cause to his hearing the suit or appeal, the Appellate Court should not interfere except in a strong or clear case of failure of justice in the Lower Court through bias or prejudice

The appropriate remedy in such cases was for the party to have applied to the proper superior Court to have the case transferred to another Court

SECOND APPEAL against the decree of K. KRISHNAMA ACHARIYAR, Subordinate Judge of North Arcot, in Appeal No. 158 of 1911, preferred against the decree of the Court of P. C. LOBO, the District Munsif of Vellore, in Original Suit No. 350 of 1909.

The facts of the case are fully set out in the judgment.

P. Narayanamurti for the appellant.

Muhammad Ibrahim Sahib for respondents.

SADASIVA AYYAR AND SPENCER, JJ.

JUDGMENT.—In this case the legal point we have to decide arises on the following facts. The District Munsif handed over charge to a successor without completing the trial of the suit, having been promoted as a Subordinate Judge. His successor finished the remaining portion of the trial, heard arguments and delivered judgment. Against the said decision there was an appeal and the former Munsif who was promoted as Subordinate Judge heard the appeal without any objection on the part of the appellant or respondent and decided the appeal confirming the judgment of his successor.

On second appeal the only ground which was seriously argued was that the Subordinate Judge was disqualified to hear and dispose of the appeal because he had, as Munsif, taken cognizance of the suit and had presided over its trial though he had not heard the arguments or decided the case finally. Two other grounds Nos. 4 and 6 were feebly argued, but there is nothing in them as the slight mistake, probably a clerical mistake, as to the year of the alleged gift to the defendants is unimportant and no affidavit was filed in support of the sixth ground. We think that the legal contention is not valid. No case directly in point decided by any Indian High Court has been cited before us to support the appellant's contention. Section 17 of the Madras Civil Courts Act says "No District Judge, Subordinate Judge, or District Munsif shall try any suit to or in which he is a party or personally interested, or shall adjudicate upon any proceeding connected with, or arising out of such suit."

"No District Judge or Subordinate Judge shall try any appeal *against a decree or order passed by himself in another capacity.*"

As regards the first sentence quoted above, even without this statutory provision a judicial officer is under the common law, disqualified from trying a suit to or in which he is a party or personally interested. It is, however, not clear that under such general principles, the disqualification is absolute. The interest which disqualifies a Judge must be pecuniary interest or one which involves some individual right or privilege or it must be an interest arising out of the near relationship of the Judge to a party to the cause. It has been held in numerous cases in the American Courts that in the absence of a statute positively prohibiting a Judge from exercising jurisdiction over a cause to try which he is disqualified not by having had a pecuniary interest or by having been a party to or counsel in the suit but on account of some other cause such as bias or prejudice or relationship to a party, or by having presided over a former trial in the same suit, the general rule is that his decision in such a suit is only voidable and not void. That the interest must be a direct pecuniary interest or interest as a real party to the suit or interest by near relationship to a substantial party to the suit has been held in several cases. Simply because a legal question is involved in a suit which might affect the Judge's pecuniary interest

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in connection with some other matter, the Judge is not disqualified. If he was merely a nominal party to a suit it has been held in some American cases that he is not disqualified from trying that suit, though section 17 of the Civil Courts Act does not make any such distinction between the Judge being a nomina party or a really interested party. Mere bias or prejudice on the part of a Judge does not disqualify him in the absence of statutory provision. Even as regards relationship to a party to the cause a Judge was not under the common law, disqualified by such relationship and it is only by statute law such a disqualification by reason of near relationship could be imposed upon a Judge (see on this question of disqualification of Judges, Cyclopædia of Law and Procedure, volume 23, pages 575 to 601).

We shall now consider the disqualification of a Judge to sit in an Appellate Court, *over his own decision. Under the* Common Law, there is no disqualification imposed on a Judge to sit in his own Court in review of his own decision (it is so under the statute law also) or even to review it on appeal in the Appellate Court, if he becomes an Appellate Judge having appellate jurisdiction over the tribunal in which he decided the cause as original Judge (see page 588, clause H, Cyclopædia of Law and Procedure). Section 17 of the Civil Courts Act, however, does introduce such a statutory disqualification as regards District and Subordinate Judges but it is confined to the case where the appeal to be heard in the Appellate Court is *against the decree or order* passed by the District Judge or Subordinate Judge in another capacity. There is no such statutory disqualification where he has not himself passed the order or decree appealed against, though he might have partly tried the suit or proceeding in which the order or decree was afterwards passed by another Judge.

Where there is no statutory or common law disqualification in the Judge of the Court below, an Appellate Court should not set aside the Judgment of the lower Court on the mere ground that it might have been swayed by bias or prejudice. In other words, unless it is proved that circumstances existed which raised a reasonable presumption that the Judge of the lower Court was biassed, the Appellate Court should not interfere. Even in such a case unless objection was taken before the Judge of the lower Court itself at or during the trial of the cause to his hearing the

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suit or appeal (as the right to rely on the disqualification of a Judge by common law may be waived by consent in many cases) the Appellate Court should not interfere except in a strong or clear case of failure of justice in the lower Court through such bias or prejudice.

The appropriate course in such cases was for the party to have applied to the proper superior Court to have the case transferred to another Court. The unsuccessful litigant in the lower Court who took his chance should not be allowed to take the objection for the first time, in appeal.

In Halsbury's Laws of England, volume 19 at page 552, it is said:—"If, however, the fact that a justice is interested in the subject matter of a case is known to the parties, and objection to his acting is waived, the proceedings are not rendered void; and where the objection is thus waived at the hearing, it cannot afterwards be raised."

If this is so in the case of personal or pecuniary interest in the Judge, it must be much more so where the alleged disqualification is based merely on a probable bias in the Judge.

In the result the Second Appeal must be dismissed with costs.

APPELLATE CIVIL.

Before Mr. Justice Sadasiva Ayyar and Mr Justice Spencer.

1913 September 26, October 7 and 12.

KRISHNAPPA CHETTY (THIRD DEFENDANT), APPELLANT,

v.

ABDUL KHADER SAHIB AND SEVEN OTHERS (PLAINTIFF, SECOND DEFENDANT AND LEGAL REPESENTATIVE OF THE DECEASED FIRST DEFENDANT), RESPONDENTS.*

*Civil Procedure Code (Act V of 1908), O. XXI, r 63—Order in favour of the claimant—Alienation by the claimant subsequently—Suit by decree-holder subsequent to the alienation to set aside the order—*Lis Pendens*, doctrine of, if applicable—Pendency of proceedings—Suit, a form of appeal—Alienee, joined as party after one year from the date of order, not a necessary party—No bar of limitation—Limitation Act (IX of 1908), sec 22, cll. 1 and 2.*

A purchaser of property from a claimant, after an order has been passed in his (claimant's) favour but before a suit under Order XXI, rule 63 was instituted, is an alienee *pendente lite* and is therefore not a necessary party to

* Second Appeal No. 276 of 1910.

KRISHNAPPA CHETTY v. ABDUL KHADER SAHIB.

the suit; and if the necessary parties had been brought within one year, the alienee could not advance the plea of limitation as section 22, clause (2) of the Indian Limitation Act expressly excludes the operation of clause (1) in such cases.

A suit brought under Order XXI, rule 63 of the Code of Civil Procedure (Act V of 1908), is a mere continuation of the proceedings in a claim petition, and all alienations during the continuance of the proceedings originated by the claim petition till the disposal of the suit brought to set aside the order passed on the claim petition are affected by the doctrine of *lis pendens* formulated in section 52 of the Transfer of Property Act.

Suits of this class though called original suits, are not in their essence original actions but merely forms of appeal allowed by the Civil Procedure Code to be brought in the guise of original suits.

Phul Kumari v *Ghanshyam Misra* (1908) I.L.R., 35 Calc., 202 (P.C.), followed. *Veera Pannadi* v. *Karuppa Pannadi* (1909) 6 M.L.T., 154; *Harishankar Jebhai* v. *Naran Karsan* (1894) I.L.R , 18 Bom., 260, *Kishori Mohun Roy* v. *Hursook Dass* (1888) I.L R , 12 Calc , 696 and *Settappa Goundan* v. *Muthia Goundan* (1908) I.L R., 31 Mad., 268, referred to.

SECOND APPEAL against the decree of W. B. AYLING, District Judge of Salem, in Appeal No. 197 of 1905, preferred against the decree of P. NARAYANA ACHARIYAR, District Munsif of Tiruppattur, in Original Suit No. 927 of 1903.

This is a suit under section 283 of the old Code (Order XXI, rule 63 of the new Code of Civil Procedure (Act V of 1908) for a declaration that the suit properties are liable to attachment and sale in execution of the decree in Original Suit No 20 of 1897 on the file of the District Court. Plaintiff obtained the decree in the said Original Suit No. 20 of 1897 against the second defendant in the present suit for recovery of some immoveable property and cash to the extent of Rs. 7,000; as the decree holder in the said Original Suit No. 20 of 1897, he applied in execution of the decree to realise the amount by attachment and sale of the suit properties and other properties of the judgment-debtor who is the second defendant in the present suit. The first defendant herein put in a claim petition against the attachment of the suit properties and claimed the properties as his own. His claim was allowed and the properties were released from attachment by an order, dated the 18th December 1902.

The present suit was brought by the plaintiff (who was the decree-holder in Original Suit No. 20 of 1897) on the 21st October 1903 against the first defendant (the claimant) and the second defendant (the judgment-debtor) to establish his right to attach the plaint properties as the properties of his judgment-debtor

the present second defendant. Subsequent to the order on the claim petition but before the institution of the present suit the *first defendant sold the suit properties* on the 29th December 1902 to the third defendant who was not originally joined by the plaintiff as a party to the present suit, as the plaintiff was not aware of the sale to the third defendant. The third defendant applied by a petition in 1904 to be made a supplemental defendant in the suit, and an order was passed by the District Munsif on the 26th March 1904, adding the petitioner as the third defendant in the suit The third defendant contended that the suit was barred by limitation on the ground that more than one year had elapsed on the date when he was made a supplemental defendant in the suit from the date of the order on the claim petition in the first defendant's favour. Both the lower Courts decided against the third defendant both on the merits and on the question of limitation. The third defendant preferred a Second Appeal to the High Court.

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K. R. Subrahmaniya Sastri and *K. Yaganarayana Adiga* for the appellant.

T. V. Muthukrishna Ayyar for *V. Masilamani Pillai* for the respondents.

SADASIVA AYYAR, J.

JUDGMENT.—The third defendant is the appellant before us. When the plaintiff attached plaint properties in execution of the decree which he had obtained in Original Suit No. 20 of 1897 on the file of the District Court of Salem as the properties of his judgment-debtor (the present second defendant), the present first defendant put in a claim as the owner of the properties. His claim was allowed and the properties were released on the 18th December 1902. The present suit was brought on the 21st October 1903 (within the one year allowed by law) by the plaintiff to establish his right to attach the plaint properties as the property of his judgment-debtor, the present second defendant. The third defendant, the appellant before us, purchased the plaint properties from the claimant (namely, the first defendant) on the 29th December 1902, that is eleven days after the order on the claim petition in the first defendant's favour. He, however, never took actual possession of the lands and merely got a rent deed, Exhibit B, on the very same date from the first defendant. The plaintiff, who evidently did not know of this sale-deed to the third defendant by the first defendant brought this suit making

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defendants Nos. 1 and 2 alone parties to the suit; and when he brought the suit, the one year's period of limitation (as I said before) had not expired. The third defendant applied to be brought on the record a supplemental defendant and he was made supplemental defendant on the 26th March 1904. On the date when he was so made a supplemental defendant, more than a year had elapsed from the date of the order on the claim petition in the first defendant's favour. Both the lower Courts found all the facts in the plaintiff's favour and decreed the plaintiff's suit. Hence this Second Appeal by the third defendant. There are 16 grounds alleged in the memorandum of Second Appeal. Except the contention as to limitation which I shall presently consider, the other contentions are clearly unsustainable; one contention not put forward in the lower Courts was argued before us. That was based on the following facts:—One Narasinga Rao claimed a charge on the plaint properties on the basis of some transactions between himself and the first defendant. That claim he put forward when the properties were attached by the plaintiff. His claim was allowed in December 1902. The third defendant, out of the purchase money due by him to the first defendant, paid Rs. 400 to Narasinga Rao. The third defendant's contention based on these facts is that he is entitled to stand in the shoes of Narasinga Rao and, as plaintiff has not set aside the claim order in favour of Narasinga Rao by a suit against Narasinga Rao within one year of the date of that order, the defendant is at least entitled to a charge to the extent of Rs. 400 on the plaint lands. I think that this fresh contention cannot be allowed to be raised in Second Appeal especially as the order, Exhibit A, in Narasinga Rao's favour does not state what was the exact nature of the claim which was put forward by Narasinga Rao, that is, whether the claim he put forward was to a charge of Rs. 400 on these plaint properties. Fresh evidence would be required namely a copy of the claim petition filed by Narasinga Rao before we could safely find that the order, Exhibit A, gave him a charge to the extent of Rs. 400. Such fresh evidence should not ordinarily be allowed to be adduced in Second Appeal by a litigant who failed to raise in the lower Courts the contention in support of which the fresh evidence is required As I said, the only contention which requires serious consideration

is the contention as to limitation. This contention may be formulated thus :—

(a) The plaintiff's cause of action to bring the suit is the order passed in the first defendant's favour in December 1902. The cause of action was, no doubt, *on that date* to be prosecuted against the first defendant as *he* claimed then to be the owner of the property and the claim order was passed in *his* favour in respect of the property which the plaintiff attached in execution of the plaintiff's decree.

(b) When the third defendant afterwards purchased the property, the cause of action became directed and prosecutable against the alienee (the third defendant) and any suit brought by the plaintiff to set aside the order on the claim petition should be directed against the third defendant who had become a necessary party defendant to such a suit The first defendant's interest in contesting the plaintiff's alleged right to attach the properties as the properties of his judgment-debtor ceased with the first defendant's alienation of the properties to the third defendant, and hence the first defendant was no longer the proper party to be impleaded in the suit which the plaintiff had to bring under Order XXI, rule 63, corresponding to the old section 283 of the Civil Procedure Code. As the necessary party (the third defendant) was not brought on record till March 1904, that is, till after the expiry of the one year's period, the present suit is barred by limitation as against the third defendant who now represents the right in the lands, the validity of which rights was established as against the plaintiff by the order on the claim petition.

Mr. T. V. Muthukrishna Ayyar who appeared for the plaintiff respondent, advanced in a very able manner three sets of arguments in reply to the appellant's above contentions. One argument was founded on the consideration that the suit brought under Order XXI, rule 63, is of such a peculiar nature that it can be brought only against the successful claimant in the claim petition, and that the successful claimant's alienees ought not to be made defendants as the cause of action vested in the

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unsuccessful decree-holder against the successful claimant personally. I am, however, unable to accept this argument. The order on the claim petition is connected with rights in immovable property (the decree-holder claiming a right to attach it and the claimant putting forward a right in himself in the property which entitles him to have it released). Hence the suit is not concerned merely with personal rights and personal liabilities. Coming next to the second argument of Mr. T. V. Muthukrishna Ayyar, if I understood him aright, his contention might be stated thus:—Though by the order on the claim petition, the attached property was released in favour of the claimant, it was not a *final* release. The effect of the release might be nullified if the decree-holder's suit brought within one year after the release order was successful. Hence as regards the validity of alienation between the date of the claim petition order and the date of the suit brought to set aside that order, the attachment must be deemed to be subsisting. If the attachment is in essence subsisting, section 64 of the Civil Procedure Code, old section 276, enacts that alienations of property under a subsisting attachment shall be void as against all claims enforceable under the attachment. The alienation to the third defendant by the first defendant is therefore void. The third defendant is therefore not a necessary party.

I think that this argument also cannot be accepted, as section 64 clearly contemplates alienations by the judgment-debtor and not by a successful claimant as pointed out by the appellant's learned vakil, Mr. K. R. Subrahmanya Sastriyar. Mr. Muthukrishna Ayyar quoted before us passages from several decisions passed by the High Courts to support the above two contentions, viz., (1) that the suit brought under section 283 is a sort of personal suit and (2) that the release of the attached property in favour of a claimant is not a final release. I do not think it necessary to refer to the decisions in detail. The second contention is, though correct, irrelevant to this case. As regards the first contention, loose general expressions found in judgments ought to be read in the light of the facts and circumstances of the particular cases in which the decisions were given and, so reading the passages relied upon, I cannot hold that they support the contention that the order on a claim petition is merely an affair between the parties in their personal capacities unconnected with rights to or over property.

The third argument of Mr. T. V. Muthukrishna Ayyar might be thus stated:—The suit brought under Order 21, rule 63, is a mere continuation of the proceedings in the claim petition. As such, all alienations during the continuance of the proceedings originated by the claim petition till the disposal of the suit brought to set aside the claim petition order are alienations *pendente lite* and are affected by the doctrine of *lis pendens* formulated in section 52 of the Transfer of Property Act. If so, the alienation to the third defendant by the first defendant was an *alienation pendente lite* and the third defendant as such alienee was not a necessary party to the suit. He might be made a party defendant as an act of grace by the Court in order that he might be allowed to protect his interest; but as he is not a *necessary* party, he cannot raise the question of limitation based on the fact that he was made a party after the period of limitation had expired; in other words, he cannot take advantage of the provision contained in section 22, clause (1) of the Limitation Act. If, through the doctrine of *lis pendens*, a decree passed against the first defendant will be binding upon the third defendant, the third defendant is of course not a necessary party.

I think that this contention is a sound one. I am free to confess that it was only after a good deal of hesitation and consideration that I was able to come to the conclusion as to the soundness of this argument. In *K. I. Narainan* v. *K. I. Nilakandan Nambudri*(1), TURNER, C.J. and MUTHUSWAMI AYYAR, J., made the following observations: "The *Code of Civil Procedure* contains no provisions enabling a Court, other than a Court of Appeal or a High Court acting under Section 622, to discharge an order of attachment issued by another Court. Where a person deems himself aggrieved by the issue of an order of attachment, he should apply to the Court which issued the order to recall it; if he fails to obtain relief because his right is uncertain, he must go to a proper Court to establish that right. The Court to which he may have to resort for the establishment of his right may, as it is in the present case, be the same Court by which the order for attachment was issued; it may be a Court of inferior jurisdiction. It could not have been contemplated

(1) (1882) I.L.R., 4 Mad., 131 at pp. 132 and 133.

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High Court but to that of the appellant. Misled by the form of the action directed by Section 283, both parties have treated the action as if it were not simply a form of appeal, but as if it were unrelated to any decree forming the cause of action."

Then in another sentence at page 207 their Lordships say that it is a mistake to treat the action brought under section 283 as an "original action."

I think this decision of their Lordships which is binding upon us is almost conclusive to show that suits of this class though called original suits, are not *in their essence* original actions but merely forms of appeal allowed by the Civil Procedure Code to be brought in the guise of original suits. Though the Court in which this appellate action might be brought may be sometimes a Court which ordinarily is inferior to the Court by which the summary order was passed and though fresh evidence not adduced during the summary enquiry may be adduced by both sides in that appellate action, the suit is in essence, in the words of their Lordships of the Privy Council, "a form of appeal," and hence it is not unrelated to the original claim proceedings and it is therefore, in essence, an appeal. The legislature has allowed one year to file such an appeal suit which is, as I said just now, a continuation of the claim proceedings thus based on the right and liabilities forming the cause of action in the claim proceedings pending till the appellate suit is finally disposed of. Though in one sense the cause of action for the appellate suit is the order passed against the plaintiff, the cause of action in another and truer sense is the dispute about attachment which was the cause of action for the claim. The right to file an appeal by a defendant who was unsuccessful in the Court of First Instance arises out of the plaintiff's cause of action for the suit, though it also arises out of the decision of the first Court passed to the prejudice of the defendant. The right to bring an appeal is however not usually called a "cause of action" to bring an appeal.

The Privy Council Ruling in *Phul Kumari* v. *Ghanshyam Misra*(1) was followed by BENSON, OFFG. C.J., and BAKEWELL, J., in *Veera Pannadi* v. *Karuppa Pannadi*(2). That the suit under section 283 is a continuation of the claim proceedings

(1) (1908) I.L.R., 35 Calc., 202 (P.C.). (2) (1903) 6 M.L.T., 154.

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is clear also from *Harishankar Jebhai* v. *Naran Karsan*(1) which decided that the rights of the parties should be decided in the suit as they stood on the date of the claim petition and that the claimant cannot take advantage of the running of time between the date of the claim petition and the date of the suit. It seems to me that having regard to the observations of their Lordships in *Phul Kumari* v. *Ghanshyam Misra*(2) which practically adopted Mr. Woodroff's arguments in *Kishori Mohun Rai* v. *Hursook Dass*(3), the remarks in *K. I. Narainan* v. *K. I. Nilakandan Nambudri*(4) and other cases to the effect that the suit brought under Section 283 is unconnected with the claim proceedings and is not a suit to set aside the order in those petitions must be held to have been overruled. In the result, I am inclined to uphold this contention of the respondent, namely, that the third defendant must be deemed to be an alienee *pendente lite*; [see *Settappa Goundan* v. *Muthia Goundan*(5) and *Govindappa* v. *Hanumanthappa*(6) as to the invalidity of such alienations *pendente lite*;] and he was therefore not a necessary party to the appellate suit. If he was not a necessary party, and if the necessary parties were brought within a period of one year, it follows that he cannot advance the plea of limitation, as Section 22, clause (2), expressly excluded the operation of clause (1) in such cases.

Mr. Muthukrishna Ayyar argued at first that section 22 of the Limitation Act does not apply where a party is brought on the record by the Court under section 32 of the Civil Procedure Code [now Order I, rule 10, clause (2)], but he did not press the point having regard to the Full Bench decision in *Ram Kinkar Biswas* v. *Akhil Chandra Chaudhuri*(7) and to *Thekkian Rangacharilu Chettiar* v. *Muthukarnapam Kothan*(8). I have no doubt that the sweeping provision of section 22, clause (1) of the Limitation Act is likely to cause hardships in cases where the plaintiff did not know of an alienation which might have taken place a few days before he brought his suit and when he came to know of it after suit and made the alienee a party, the suit might become barred. The remedy, however, is for the

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(1) (1894) I.L.R., 18 Bom., 260
(2) (1908) I.L.R., 35 Calc., 202 (P.C.)
(3) (1886) I.L.R., 12 Calc., 696.
(4) (1882) I.L.R., 4 Mad., 131.
(5) (1908) I.L.R., 31 Mad., 268.
(6) (1915) I.L.R., 38 Mad., 83.
(7) (1908) I.L.R., 35 Calc., 519 (F.B.)
(8) (1913) M.W.N., 134.

APPELLATE CIVIL.

Before Mr. Justice Sankaran Nair and Mr. Justice Oldfield.

1913. November 23 and 24.

SAMINATHA PILLAI (THIRD DEFENDANT), APPELLANT,

v.

KRISHNA AYAR AND TWO OTHERS (PLAINTIFF AND DEFENDANTS NOS. 1 AND 2), RESPONDENTS *

Mortgage—Subrogation—Third mortgagee advancing money for discharge of first mortgage—Application of part only towards discharge—Priority over mesne mortgagee to that extent

A mortgagee who advances money towards the discharge of a first mortgage on a property is entitled to priority over an intermediate mortgagee to the extent to which the money advanced by him went towards discharging the first mortgage.

Rupabai v. Audimulam (1888) I.L.R., 11 Mad., 345, followed.

Hanumanthaiyan v. Meenatchi Naidu (1912) I.L.R., 35 Mad., 183, referred to.

SECOND APPEAL against the decree of D. VENKOBA RAO, the Subordinate Judge of Tanjore, in appeal No. 614 of 1910, preferred against the decree of P. G. RAMA AYYAR, the District Munsif of Tiruvadi, in Original Suit No. 65 of 1910.

The facts of the case appear from the Judgment.

T. R. Ramachandra Ayyar and *T. R. Krishnaswami Ayyar* for the appellant.

T. Rangachariyar and *M. K. Ramaswami Ayyar* for the first respondent.

SANKARAN NAIR AND OLDFIELD, JJ.

JUDGMENT.—The plaintiff sues to recover the money due under a mortgage instrument executed by the first defendant in 1905. The amount was advanced to discharge a mortgage debt of Rs. 400 due to one Sivasami Sivan under a mortgage dated November 1901. The finding is that the mortgagor discharged that mortgage by paying the creditor Rs. 300 out of the amount received from the plaintiff and by the execution of a promissory note for Rs. 50 the balance Rs. 50 having been given up by the mortgagee.

The appellant claims under a mortgage dated October 1903, and contends that the plaintiff is not entitled to any priority on account of his discharge of the prior mortgage. His contention has been disallowed by the Lower Courts.

* Second Appeal No. 426 of 1912.

SAMINATHA PILLAI v. KRISHNA IYER.

SANKARAN NAIR AND OLDFIELD, JJ.

It is argued before us in Second Appeal that though the entire mortgage debt has been discharged, as only Rs. 300 a portion of the mortgage debt was paid out of the money advanced by the plaintiff, and the balance Rs. 50 was paid by the mortgagor himself, he cannot claim a first charge to that extent It is contended that it is only when the person claiming subrogation discharges the entire debt that he is so entitled. Reliance is placed in support of this contention on *Hanumanthaiyan* v. *Meenatchi Naidu*(1) *Gurdeo Singh* v. *Chandrikah Singh*(2).

It appears to us that this contention cannot be supported and the question is concluded by authority. In *Rupabhai* v. *Audimulam*(3), the debt due to one Minakshi Naik the first mortgagee under a hypothecation deed (Exhibit XII) was discharged to the extent of Rs. 27,713 by the fourth defendant in that suit and the balance which came to over a lakh of rupees by the mortgagor himself, and it was argued that the fourth defendant had not therefore acquired any priority over an intermediate mortgagee. The learned Judges pointed out that if the whole amount lent by the fourth defendant has been applied to pay off the entire debt due under Exhibit XII he would have priority of that charge to the full amount. Then they said " but only Rs. 27,713 was so applied, and the question is does that fact prevent the application of the rule above stated," and they replied " we do not think it does." They pointed out that the hypothecation under Exhibit XII, *i.e.*, the whole charge was released and the mortgagee after that had no hypothecation on the villages. The case according to them was therefore governed by the Privy Council judgment in *Gokal Dass* v. *Puranmal*(4) and the defendant No. 4 in that case who had paid a part of the amount of the first charge ranked to that extent and interest in the priority of that first charge.

The decision is thus directly in point and is not overruled by *Hanumanthaiyan* v. *Meenatchi Naidu*(1).

We see no reason to doubt its soundness.

We accordingly dismiss the Second Appeal with costs.

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(1) (1912) I L R, 35 Mad., 183.
(2) (1909) I L.R, 36 Calc., 193
(3) (1888) I L R, 11 Mad., 345
(4) (1884) L.R, 11 I.A., 126.

APPELLATE CRIMINAL.

Before Mr. Justice Ayling and Mr. Justice Oldfield.

1913.
November 10.

Re G. CHINA VENKADU (PRISONER).*

Indian Oaths Act (III of 1873), ss. 5 and 13—Evidence, admissibility of, where witness not sworn.

The evidence of two children aged eight and six years was admitted against an accused person without the children having been sworn or affirmed,

Held, that in view of section 13, Indian Oaths Act, the failure to administer oath or affirmation did not render the evidence inadmissible.

Queen-Empress v. *Viraperumal* (1893) I.L.R., 16 Mad., 105 (PARKER, J.), followed.

Queen-Empress v. *Maru* (1888) I.L.R., 10 All., 207, dissented from.

Per Curiam: Section 5 of the Oaths Act is imperative and if a Court holds that a person may lawfully give evidence, it is the duty of the Court to administer oath or affirmation to that witness.

CASE referred by F. A. COLERIDGE, the Sessions Judge, Kistna Division at Masulipatam, for confirmation of the death sentence passed upon the said prisoner in Calendar Case No. 25 of 1913.

Also appeal by the prisoner against the said sentence.

The facts of the case are set out in the judgment.

A. Nilakanta Ayyar for the prisoner.

The Public Prosecutor for the Crown.

AYLING AND OLDFIELD, JJ.

JUDGMENT.—The appellant has been convicted of the murder of his wife on the night of July 25th. The direct evidence against him is that of two of his children, prosecution witnesses Nos. 4 and 5, who say they awoke in the middle of the night and saw the appellant cutting his wife's throat. These witnesses, who are aged eight and six years, were not affirmed or sworn by the Sessions Judge; and it is argued by the appellant's vakil that their evidence is on this account inadmissible and should be excluded from consideration. In reply to this the Public Prosecutor relies on section 13 of the Indian Oaths Act.

The authorities on the subject are not uniform; but it appears to be the view of both the Bombay and Calcutta High Courts that the failure by a Court to administer oath or affirmation to a witness does not render the evidence of that witness inadmissible. The same view was taken by PARKER, J., in the only reported case of this Court—*Queen Empress* v. *Viraperumal*(1)

* Referred Trial No. 41 of 1913 (Criminal Appeal No. 493 of 1913).
(1) (1893) I.L.R., 16 Mad., 105.

bearing on the point, although COLLINS, C.J., was of a different opinion. In an unreported case *Queen-Empress* v. *Perumal*(1) referred to therein WILKINSON, and MUTTUSWAMI AYYAR, JJ., took the same view as PARKER, J.

Re CHINA VENKADU.

AYLING AND OLDFIELD, JJ.

It is only in the Allahabad High Court that the opposite view has prevailed, *vide Queen-Empress* v. *Maru*(2). Both on a construction of section 13 and in view of the authorities above referred to, we are inclined to hold that section 13 applies to a case of this kind, and that the evidence is admissible.

We are, at the same time, constrained to point out that section 5 of the Oaths Act is imperative; and if a Court holds that a witness may lawfully be examined or give or be required to give evidence (in other words, is competent to testify) it is the duty of the Court to administer oath or affirmation to that person before recording his evidence. We see no reason for not acting on the evidence of the children.

Even if that evidence were left out of account there remains sufficient circumstantial evidence to warrant the inference that the appellant murdered his wife. [The Court then proceeded to deal with the facts.]

APPELLATE CRIMINAL.

Before Mr. Justice Miller.

Re ROSARIO QUADROS, ACCUSED IN CALENDAR CASE No. 210 OF 1913 ON THE FILE OF THE COURT OF THE SECOND-CLASS MAGISTRATE OF MANGALORE TOWN.*

1913. November 20.

Workman's Breach of Contract Act (XIII of 1859)—Bandsman not an artificer, labourer or workman

A bandsman is not an artificer, labourer or a workman within the meaning of those words in the Workman's Breach of Contract Act (XIII of 1859).

CASE referred for the orders of the High Court under section 438, Criminal Procedure Code, by M. E. COUCHMAN, the District Magistrate of South Canara, in his Reference 2nd of August, 1912.

The two counter-petitioners entered into a contract under the Workman's Breach of Contract Act (XIII of 1859) on the

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(1) (1893) I.L.R., 16 Mad., 105 at p. 111. (2) (1888) I.L.R., 10 All., 207.

* Referred Case No. 77 of 1913 (Criminal Revision Case No. 530 of 1913).

Re ROSARIO QUADROS

9th October 1912, to play in petitioner's band for one year. They received an advance of Rs. 15 and Rs. 10 and bound themselves to go with the petitioner to any place at which he might have an engagement, to play in his band.

The counter-petitioners admitted the contract and receipt of the money and agreed to perform the work in accordance with the contract and were accordingly ordered by the Second Class Magistrate "to perform the labour according to the terms of the contract from tomorrow." The contract would have terminated on the 8th October 1913.

The District Magistrate referred the case to the High Court.

None represented the accused.

The Public Prosecutor for the Crown.

MILLER, J.

ORDER.—A Musician in a band is clearly not an artificer or labourer, and is not, I think, a workman within the meaning of the Act (Act XIII of 1859). I agree with the District Magistrate and set aside the order of the Magistrate.

APPELLATE CRIMINAL.

Before Mr. Justice Miller.

1913. November 20.

Re K. SELLANDI, ACCUSED IN SESSIONS CASE NO. 54 OF 1913 ON THE FILE OF THE SESSIONS COURT OF SALEM (PUBLIC REPORTS CASE NO. 11 OF 1913 ON THE FILE OF THE STATIONARY SUB-MAGISTRATE OF SALEM).*

Criminal Procedure Code (Act V of 1898), sec 348—Indian Penal Code (Act XLV of 1860), chaps. XII and XVII—Procedure of Magistrate who cannot adequately punish.

In this case the accused who had been previously convicted of an offence under section 394, Indian Penal Code, was charged before a Sub-Magistrate with an offence under section 411, Indian Penal Code. The Sub-Magistrate tried and convicted him of the offence and ordered his commitment to the Court of Sessions for the purpose of awarding him enhanced punishment.

Held, that the conviction and commitment were illegal. The correct procedure to be followed in such a case is for the Magistrate either as a preliminary matter or before framing a charge to determine whether he has power to pass a sufficient sentence. If he thinks he has not such power he should frame a charge and commit the accused.

CASE referred for the orders of the High Court under section 438, Criminal Procedure Code (Act V of 1898), by J.T.

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* Referred Case No. 94 of 1913 (Criminal Revision Case No. 670 of 1913).

GILLESPIE, the Sessions Judge of Salem, in his letter, dated 13th October 1913, No. 5313. *Re SELLANDI.*

The facts of this case are stated in the order below.

The Public Prosecutor for the Crown.

The accused was not represented.

ORDER.—In this case the Magistrate has found the accused guilty, and then committed him to the Court of Sessions under section 348, Criminal Procedure Code. The effect of the conviction would seem to be that section 403, Criminal Procedure Code, would bar the trial by the Court of Sessions. MILLER, J.

It is not entirely easy to deal satisfactorily with cases under section 348. The Magistrate is bound to commit if there has been a previous conviction of one of the offences described unless he can adequately punish the accused; consequently he must either as a preliminary matter or at any rate before framing a charge determine whether there has been a previous conviction; having decided that point, he will have to consider whether in the circumstances of the case his powers enable him to pass sufficiently severe sentence. If he thinks they do so permit, he may either commit the accused for trial or try him himself. if they do not so permit, but the evidence does not warrant the discharge of the accused, he must frame a charge under section 210 of the Code and commit him for trial under chapter XVIII.

In the present case I set aside the conviction and direct the Magistrate to frame a charge under section 210 and commit the accused for trial before the Court of Sessions.

APPELLATE CIVIL.

Before Mr. Justice Miller.

ANNASAMI SASTRIAL AND FOUR OTHERS (DEFENDANTS), PETITIONERS,

1913. November 27.

v.

A. S. RAMASAMI SASTRIAL AND TWO OTHERS (PLAINTIFFS), RESPONDENTS.*

Provincial Small Cause Courts Act (IX of 1887), sch II, art 33—Suit for money for maintenance under an agreement, cognizable by a Small Cause Court.

A suit to recover from the defendant paddy expended by the plaintiff for the maintenance of their grand-mother, for which under the agreement of partition

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* Civil Revision Petition No. 824 of 1912.

ANNASAMI SASTRIAL v. RAMASAMI SASTRIAL.

between them the defendant was bound to give the paddy is a suit of a small cause nature; the basis of the suit being the agreement.

Ramaswamy Pantulu v. *Narayanamoorthy* (1904) 14 M.L.J., 480, applied.

PETITION under section 25 of the Provincial Small Cause Courts Act (IX of 1887) praying the High Court to revise the decree of T. A. RAMAKRISHNA AYYAR, the Subordinate Judge of Māyavaram, in Small Cause Suit No. 323 of 1912.

The facts of the case appear from the judgment.

G. S. Ramachandra Ayyar for the petitioners.

T. R. Venkatarama Sastriyar for the respondents.

MILLER, J.

JUDGMENT.—The plaintiffs' father and the defendants' father were bound to maintain their mother. By a partition deed between them the defendants' father undertook to pay a certain quantity of paddy to the plaintiffs' father: the consideration being, as I understand it (the petitioners have not chosen to have the deed translated and printed) that the plaintiffs' father was to maintain the lady. The Subordinate Judge finds that she was maintained by the plaintiffs' father and after him by the plaintiffs till her death; and though that finding is contested, there is evidence to support it, and I must accept it.

The question of law is whether the suit is cognizable by a Small Cause Court. It is contended that it is not cognizable as being a suit relating to maintenance.

It is no doubt a suit for what the defendants would have had to provide for the maintenance of their grand-mother if the plaintiffs had not done it; but the basis of the suit is the agreement between the plaintiffs' father and the defendants' father, neither of whom is the maintenance-holder, and the suit is to recover what cannot be described as maintenance in the hands of the plaintiffs. It is really payment for having provided maintenance for the lady. I have had some doubt on this question, but I think that *Ramaswamy Pantulu* v. *Narayanamoorthy*(1), though not exactly on all fours is analogous authority on the point. There the liability had been fixed by a decree: and here by an agreement, but the reasoning of the learned judges is applicable here, and on the strength of that decision I hold that this is not a suit relating to maintenance.

It is contended that it is a suit for specific performance of a contract, and a suit relating to a trust. Neither of these

(1) (1904) 14 M.L.J., 480.

contentions was raised in the lower Court. The latter is based on the partition deed which has not been translated and printed, and the former is, I think, untenable. The suit is, no doubt, for payment of money payable under a contract to pay it, but I do not think that is what is meant in the schedule to the Small Cause Courts Act by a suit for specific performance. I dismiss the petition with costs.

ANNASAMI SASTRIAL v. RAMASAMI SASTRIAL.

MILLER, J.

APPELLATE CRIMINAL.

Before Mr. Justice Sankaran Nair and Mr. Justice Ayling.

Re RANGASAMI PILLAI (ACCUSED IN MISCELLANEOUS CASE No. 10 OF 1913 ON THE FILE OF THE JOINT MAGISTRATE OF POLLACHI).*

1913. December 4.

Criminal Procedure Code (Act V of 1898), ss. 109 and 110—Binding over under both sections illegal.

A person cannot be bound over under both the sections 109 and 110, Criminal Procedure Code (Act V of 1898).

CASE referred for the orders of the High Court under section 438 of the Criminal Procedure Code (Act V of 1898), by F. R. HEMINGWAY, the District Magistrate of Coimbatore, in his letter, dated 1st September 1913 R O.C. No. 1467-M.

In this case J. C. STODART, the Joint Magistrate of Pollachi, passed an order directing one Rangasami Pillai to execute a bond of Rs. 300 with two sureties of like amount to be of good behaviour for one year. In his order the Joint Magistrate stated "He (Rangasami Pillai) is liable to be bound over under sections 109 (*a*) and 110 (*e*)."

The notice issued to him was with reference to section 110, clauses (*a*), (*e*) and (*f*).

The District Magistrate referred the case on the ground that it was illegal to bind over a person under both sections 109 and 110, Criminal Procedure Code (Act V of 1898).

The accused was not represented.

C. F. Napier, the Public Prosecutor, for the Crown.

ORDER.—We do not think that a person should be bound over under both the sections 109 and 110 of the Criminal Procedure

SANKARAN NAIR AND AYLING, JJ.

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* Criminal Revision Case No. 604 of 1913.

Re RANGASAMI PILLAI.

SANKARAN NAIR AND AYLING, JJ.

Code. See *Re Kosa Kumaran* [*vide* foot note *]. We accordingly set aside the order binding him under section 109. The evidence fully supports the order so far as section 110 is concerned. We leave the order therefore to stand as one made under section 110.

APPELLATE CIVIL.

Before Mr. Justice Sundara Ayyar and Mr. Justice Sadasiva Ayyar and before Mr. Justice Spencer (on reference).

1912. August 1 and 30. 1914. February 5, 10 and March 4.

D. SRINIVASA IYENGAR (DIED) AND ANOTHER (FIRST DEFENDANT AND HIS LEGAL REPRESENTATIVE), APPELLANTS,

v.

THIRUVENGADATHAIYANGAR AND ANOTHER (MINORS, THROUGH THEIR GUARDIANS PLAINTIFF AND DEFENDANT No. 6), RESPONDENTS.†

Hindu law—Suit for partition by a minor co-parcener—Right to mesne profits—No exclusion—Separate living of minor co-parcener—Same rule as in the case of major co-parceners—Suit for account—Principle different—Provision for expenses of Upanayanam and marriage of co-parceners in a partition suit—Setting apart of funds—Whether Upanayana and marriage of male co-parceners are obligatory ceremonies—Provision for marriage of unmarried sisters whether obligatory—Whether expenses of marriage of a male co-parcener is a reasonable expense—Right to maintenance of mother—Whether son's share only or share of step-sons also liable—Doctrine of Mitakshara as to right by birth examined—Civil Procedure Code (Act V of 1908), O. XLI, r. 3

In a suit for partition by a minor co-parcener against his step-brother who was a major, the plaintiff is not entitled to recover past mesne profits in the absence of proof of exclusion by the manager.

1904. August 23.

* CRIMINAL REVISION CASE No. 348 OF 1904.

Before Mr. Justice Davies and Mr. Justice Sankaran Nair.

Re KOSA KUMARAN (ACCUSED).

DAVIES AND SANKARAN NAIR, JJ.

ORDER.—We think that no person should be bound over to be of good behaviour under both sections 109 and 110 of the Code of Criminal Procedure. The sections contemplate different classes of cases and if a man is amenable under section 109 he can hardly be amenable under section 110 and *vice versa*. In this case evidence shows the prisoner was properly bound over under section 110, and we see no evidence to justify his being bound over under section 109. We therefore cancel the order binding him over under that section and leave the order to stand as one made under section 110.

† Second Appeal No. 325 of 1911.

SRINIVASA IYENGAR v. THIRU-VENGADA-THAIYANGAR.

The question of the right of a minor co-parcener to an account from the manager stands on a different principle and has no bearing in deciding whether a minor is entitled to claim mesne profits.

Krishna v. Subbanna (1884) I.L.R., 7 Mad., 564 and *Abhayachandra Roy Chowdhry v. Pyari Mohan Guho* (1870) 5 B L.R., 364, referred to and explained.

Where the mother of the plaintiff was joined as a defendant in the suit for partition, but a separate provision for maintenance was refused by the Court of First Instance on the ground that her maintenance should come out of the plaintiff's own share only, and she had appealed to the lower Appellate court but preferred no Second Appeal to the High Court but was made a respondent in the Second Appeal preferred by the first defendant, it was held that the plaintiff who was a respondent in the Second Appeal was competent to prefer a memorandum of objections in the High Court objecting to the lower Court's refusal to make a provision for her maintenance, as he is affected by the judgment and interested in disputing its correctness. The High Court has power under Order XLI, rule 33, of the Civil Procedure Code to pass such decree as it thinks proper dealing with the rights of all the parties before it.

Per SUNDARA AYYAR, J.—In a suit for partition, provision must be made in the decree for expenses of the Upanayanam and marriage of male co-parceners as well as for the expenses of the marriage of the unmarried sisters out of the family property whether it is ancestral or separate or self-acquired property of the father of the parties

Marriage is a proper ceremony for a Brahmin and an obligatory ceremony for all Hindus with extremely few exceptions.

Modern custom is undoubtedly in favour of allowing the provision In deciding what ceremonies are regarded as proper and necessary, regard should be had to the sentiments of the community, especially when there is a difference of opinion among the text writers.

A brother, who has had his own marriage performed at the family expense, is not entitled to object to a similar provision being made for the other brothers.

The mother of a co-parcener is entitled to have a provision made for her maintenance out of the entire family property including the share of her step-son as well as the share of her own son.

Zemindar of Oorcaud v. Meenakshi Ammal (1870) 5 M.H.C.R., 377, *Kumaravelu v. Virana Gowdan* (1882) I L.R., 5 Mad , 29, *Subbarayalu Chetti v. Kamalavalli Thayaramma* (1912) I.L.R., 35 Mad., 147, referred to and followed.

Hemangini Dasi v. Kedarnath Kundu Chowdhry (1889) I L.R , 16 Calc., 758 (P.C.), distinguished

Per SADASIVA AYYAR, J.—Initiated brothers must set apart from the paternal estate the expenses of the initiation of the uninitiated brothers and sisters before dividing the paternal property whether it is ancestral or self-acquired property of the father

Upanayana or the ceremony of investiture of thread, in the case of a male member of a co-parcenary, and marriage in the case of a female are obligatory *samskaras* which the initiated brothers are bound to perform for their uninitiated brothers and sisters, and the initiated brothers are bound to make a provision for the expenses of performing the same out of the paternal estate before it is divided.

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Marriage in the case of a male member of a co-parcenary is not an obligatory *samskara* for the performance of which the initiated brother is bound to make a provision out of the paternal property at the partition.

Kameswara Sastri v. *Veeracharlu* (1911) I.L.R., 34 Mad., 433 (F.B.), referred to

Per SPENCER, J. (on reference)—Marriage is an obligatory ceremony for Hindus who do not desire to adopt the life of a Sanyasi; and a fund for the expenses of the marriage of unmarried co-sharers should be set apart at the partition of the paternal estate.

SECOND APPEAL against the decree of A. RAMASWAMI SASTRIYAR, the Temporary Subordinate Judge of Trichinopoly, in Appeal No. 52 of 1910, preferred against the decree of V. R. KUPPUSWAMI AYYAR, the District Munsif of Kulitalai, in Original Suit No. 351 of 1907.

The plaintiff (a minor) sued his step-brother, the first defendant for one-half share of the family properties, impleading his own mother as the fifth defendant who was entitled to maintenance, his own sister as the sixth defendant as entitled to expenses of her marriage, etc., and other persons as being in possession of the family properties. The plaintiff (who sued by a next friend) alleged that he and his mother and sister were excluded from the enjoyment of the joint family property after his father's death. The plaintiff claimed mesne profits for the period of his exclusion and also claimed a provision for the expenses of Upanayanam and marriage of himself, as well as a provision for the marriage expenses of his sister the sixth defendant, and for the maintenance and residence of his mother (the fifth defendant) out of the family property. The District Munsif held that the plaintiff was entitled to a provision for expenses of his Upanayanam and not for his marriage, that the sixth defendant was entitled to a provision for her marriage, etc., that the fifth defendant was entitled to a provision for residence and that the plaintiff was not entitled to past mesne profits. The first defendant appealed and the plaintiff, the fifth and the sixth defendant each preferred a cross-appeal to the lower Appellate Court.

The Subordinate Judge on appeal awarded past mesne profits to the plaintiff on the authority of *Krishna* v. *Subbanna* (1) though according to him, "there was no evidence worth the name on

(1) (1884) I.L.R., 7 Mad., 564.

record as to whether the plaintiff and her mother were turned out of the house or left it themselves. The Subordinate Judge decreed also the provision as to the marriage expenses of the plaintiff; but with regard to the provision for maintenance of the fifth defendant (mother of the plaintiff), the Subordinate Judge held "that when a partition takes place among her husband's sons, the liability to maintain her and provide residence for her would pass to her own sons and the step-son is not under an obligation to provide for them, and modified the decree of the Lower Court accordingly. The first defendant preferred a Second Appeal to the High Court, and the plaintiff preferred a Memorandum of Objections objecting to the refusal of the Subordinate Judge to make a provision for the maintenance of the fifth defendant, the plaintiff's mother.

T. Natesa Ayyar for the appellants.

P. R. Ganapathy Ayyar for the respondents

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SUNDARA AYYAR, J.—The suit in this case is one for partition by a Hindu minor. The first defendant is the plaintiff's step-brother. The fifth defendant is the plaintiff's mother and the first defendant's step-mother. The sixth defendant is the plaintiff's elder sister. The fifth and sixth defendants were made parties on the ground that provision should be made for the maintenance of the former and for the maintenance and marriage and other expenses of the latter.

The first question raised in Second Appeal is whether the plaintiff is entitled to a share of the amount recovered from a Life Insurance Company on a policy of insurance taken out by Doraiswami Ayyangar, the father of the plaintiff, and the first defendant. The policy states that it was taken for the benefit of Doraiswami's wife and two sons of whom the wife and one of the sons died, and the first defendant alone was left; but both the Courts have found that the premia for the policy were paid out of funds belonging to the whole family This finding has been attacked in Second Appeal, but we are unable to interfere with it. It was argued that the finding of the Lower Appellate Court was based in part on the supposition that Doraiswami Ayyangar was the managing member of the family and that this was not the fact. But no objection was taken to the finding on this ground in the Memorandum of Second Appeal; nor does

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Doraiswami Ayyangar's management seem to have been denied in the Lower Appellate Court. The plaintiff was therefore rightly held entitled to a share of the insurance money.

The next question is whether the decree in plaintiff's favour for mesne profits for two years before the suit is right. It was alleged by the plaintiff that he and his mother were turned out of the family house and had to live elsewhere. The Subordinate Judge has found that the plaintiff has failed to prove that they were turned out of the house; but he allowed mesne profits, because he held that a minor plaintiff is entitled to recover mesne profits in a suit for partition. I am of opinion that there is no foundation for this view. The case relied on by the Subordinate Judge, *Krishna* v. *Subbanna*(1), does not support it. In that case it was observed: "If an adult member is not excluded but chooses to live apart from the manager, then, as he did not choose to enforce partition, it may be very reasonable that, apart from the consideration of fraud or misappropriation by the manager, the principle above stated should be applied to him;" (that is the principle that the manager is not bound to account for past transactions or past income) "But that principle cannot apply to the case of an infant member, who has been excluded by the manager from the family house and from enjoyment of the property. The infant is, by reason of infancy, incompetent to authorize the act of the manager, or, at all events, cannot be legally bound by any authorization in fact given during his infancy. Moreover, the infant being excluded, cannot be assumed in point of law or fact to have known of any act of the manager." The observations relate primarily to a suit for account including an account of past profits. An infant who has been excluded from commensality was held entitled to an account of past profits during the period of his exclusion. They do not support the view that the mere fact that the infant was living separately when it was not due to any fault on the part of the manager would entitle him to recover a share of the profits. The manager of a Hindu family is entitled to spend the income for the benefit of all the members of the family. It is unnecessary to consider whether a member living separately could make a claim

(1) (1884) I.L.R., 7 Mad., 564 at p. 569.

for the expenses of his maintenance; for that is not the question raised for decision before us. The manager after making all proper expenditure is expected to add any surplus that may be left to the family funds. No member is entitled to claim a share of past profits on the ground of his separate residence. If he is excluded by the act of the manager, he has, no doubt, been held to be entitled to call upon the manager to account for the profits received during the time of his exclusion. The manager would then be entitled to credit for all proper expenditure including any investments made in which of course the excluded member would be entitled to share. With respect to any profits for which the manager is unable to account, the excluded member would be entitled to his share of them. There is no reason why the same principle should not apply to a minor co-parcener. No authority has been cited in support of the application of a different principle. The question here is not one of the right to an account. No doubt one reason for refusing an account to an adult co-parcener suing for partition has been stated to be that "every adult member of an undivided joint family living in commensality with the Karta, must be taken, as between himself and the Karta, to be a participator in, and authoriser of, all that is from time to time done in the management of the joint property to this extent, namely, that he cannot without further cause call the Karta to account for it" *Abhayachandra Roy Chowdhry* v. *Pyari Mohan Guho*(1). This reason would not of course be applicable to the case of a minor member. But the point has no bearing in deciding whether a minor is entitled to claim mesne profits. The claim for mesne profits must therefore be disallowed. The Subordinate Judge's decree awarding Rs. 61½ on this account must be set aside.

The next question is whether the expenses of the plaintiff's upanayanam and marriage and the sixth defendant's marriage were rightly provided for in the decree for partition. *Jairam* v *Nathu*(2) and *Mahadeva Pandia* v. *Rama Narayana Pandya* (3), are clearly in support of the plaintiff's case Two contentions have been raised in this Court.

(1) that such provision can be made only out of the separate or self-acquired property of the father of the parties, and

(1) (1870) 5 B.L.R., 347 at p 354 (F.B). (2) (1907) I.L.R., 31 Bom., 54.
(3) (1903) 13 M.L.J., 75.

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cannot be made out of the ancestral property of the father derived from his father, and

(2) that the plaintiff is entitled to have a provision made only for his upanayanam and not for his marriage, the latter not being a necessary *samskara* according to Hindu Law.

The first contention is entirely without foundation. Mr. P. R. Ganapathi Ayyar, the learned vakil for the plaintiff who has argued the question very fully, relies on certain passages in the Mitakshara. Yagnavalkya's text, chapter 2, verse 124, does not expressly refer to the ceremonies to be performed for the brothers, the text being to the effect that "Uninitiated sisters should have their ceremonies performed by those brothers who have already been initiated, giving them a quarter of one's own share." But the text has been interpreted by commentators as including the ceremonies of brothers too. The Mitakshara in chapter 1, section 7, verse 3, expressly provides, "If any of the brothers be uninitiated when the father dies, who is competent to complete their initiation? Uninitiated brothers should be initiated by those for whom the ceremonies have been already completed." Verse 4 lays down. "By the brethren who make a partition after the decease of their father, the uninitiated brothers should be initiated at the charge of the whole estate." Reliance is placed on chapter 1, section 6, verses 14, 15 and 16. These verses deal with the power of the father to make gifts to one or another of the sons. The power to make gifts is now regarded as confined to the separate or self-acquired property of the father. The contention is that these verses show that section 3, verse 1, dealing with partition after the father's decease—"Let sons divide equally both the effects and the debts. after [the demise of] their two parents," relates only to the self-acquired property of the father. To a question put to the appellant's vakil from the Bench, which text, then, provides for the division of the father's ancestral property? his answer was that section 5, verse 1, does so. "But among grand-sons by different fathers the allotment of shares is according to the fathers." But this verse is intended merely to show that where the brothers have an unequal number of sons, the grand-sons take *per stirpes* and not *per capita*. Section 1 of chapter 1 was referred to as showing that the father and his sons have equal

rights in the property descending from the grand-father. But this does not help the contention that section 5, verse 1 of chapter 1 and section 3 taken together show that the provision in section 7 for the samskaras of the unimtiated brothers and sisters is intended to be made only out of the self-acquired property of the father.

Reference is also made to the Smrithi Chandrika, chapter 4, verses 36 and 37. Verse 36 cites a text of Vishnu which runs thus:—"The text of Vishnu that 'the initiations of unmarried daughters are to be defrayed in proportion to his own wealth' is applicable either to a case where no partition of heritage takes place from there being an only son, or to a case where brothers live in union." Verse 37 is in these terms:—"Hence Vyasa, brothers whose investiture and other ceremonies have not been performed are to be initiated in due time from the paternal wealth *alone* by brothers whose sacraments have already been completed. Unmarried sisters are also to be initiated by their elder brothers according to law." The word 'alone' is the translation of the Sanskrit word 'eva,' एव the meaning being that the paternal wealth *must* be used for the purpose indicated. The use of the word 'paternal' is relied on as showing that only the father's own wealth was intended. But this contention cannot be upheld The language is comprehensive and would take in all ancestral property. The same observation applies to similar texts of Brihaspathi and Narada in verses 38 to 41. There is nothing to show that the author of the *Smrithi Chandrika understood the expression* '*paternal wealth*' as meaning the self-acquired property of the father. The texts cited from the Madaviya, pages 17 and 18 of Burnell's edition, the Viramitrodaya, page 81 of Sitarama Sastri's 'Hindu Law Books' and the Vivadachintamani, page 49 of the same book do not carry the case any further. I must hold that the plaintiff is entitled to have funds set apart for his ceremonies out of the ancestral property which descended to plaintiff and the first defendant from Doraiswami Ayyangar

The second contention is that the ceremonies for which the plaintiff is entitled to have provision made do not include his marriage. It is argued that marriage is not a necessary ceremony in the case of a Brahman male and *Govindarazulu*

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Narasimham v. *Devarabhotla Venkatanarasayya*(1), is relied on. That case decided that a debt borrowed for the expenses of the marriage of a co-parcener could not be enforced against the other co-parceners. That position has been considerably shaken by the observations contained in *Kameswara Sastri* v. *Veeracharlu*(2). The learned Chief Justice who was a party to the judgment in the earlier case was subsequently prepared to reconsider his view. The question has been elaborately considered by KRISHNASWAMI AYYAR, J. in *Kameswara Sastri* v. *Veeracharlu*(2), and by CHANDAVARKAR, J in *Sundrabai* v. *Shivnarayana*(3). I have nothing to add to the reasons given by those learned Judges for holding that marriage is a proper ceremony for a Brahman and an obligatory ceremony for all with extremely few exceptions. See also West and Buhler, page 781, Strange's Hindu Law, volume 2, pages 286-288, Sircar's Hindu Law (third edition), page 245. It was decided very recently in *Gopalakrishnamraju* v. *Venkatanarasaraju*(4) by a Full Bench of this Court after the arguments in this case were heard that marriage is considered an obligatory ceremony for Hindus except in the case of one who is prepared to live the life of a perpetual Brahmachari or of a Sanyasi and that a debt borrowed for the marriage of one of the co-parceners is binding on all. This judgment in my opinion practically concludes the point raised in this case. The first defendant has no right to compel the plaintiff to abjure marriage and to become either a *naishtika brahmachari* नैष्ठिक ब्रह्मचारी or a sanyasi. The plaintiff has the right to become a grahasta and to live the life which is ordained for Brahmans in general; marriage is an indispensable ceremony (*avasyam kartavyam*) for all except the most spiritually advanced persons. The family property should provide the means for such an initiatory ceremony. But I do not think that it is necessary to rest the decision in this case on the ground that marriage is absolutely obligatory. There are no doubt texts in favour of the position that the initiatory ceremonies in the case of the three higher castes end with the upanayanam. See Smrithi Chandrika, chapter 4, verse 42 which is supported by the author of the Vivadachintamani. The Smrithi Chandrika text has been explained by CHANDAVARKAR, J.,

(1) (1904) I.L.R., 27 Mad., 206.
(2) (1911) I.L.R., 34 Mad., 422 (F.B.).
(3) (1908) I.L.R., 32 Bom., 81.
(4) (1912) M.W.N., 903.

in *Sundrabai* v. *Shivnarayana*(1). See Seetarama Sastri's edition, page 49. There can at any rate, be no doubt that marriage is regarded as a most proper ceremony for every Hindu. This is sufficient to justify the plaintiff's claim for a provision for his marriage. The first defendant has been married at the expense of the family. There is no reason for treating the brothers differently. Modern custom is undoubtedly in favour of allowing the provision. In deciding what ceremonies are regarded as proper and necessary, regard should be had in my opinion to the sentiments of the community especially when there is a difference of opinion amongst text writers. I am also prepared to hold that a brother who has had his own marriage performed at the family expense is not entitled to object to a similar provision being made for the other brothers The Subordinate Judge's view therefore must be upheld with respect to the allotment both for the plaintiff's Upanayanam and for his marriage. In the result the appeal must be allowed in so far as the award of mesne profits is concerned and dismissed in other respects.

MEMORANDUM OF OBJECTIONS.—The first respondent has put in a Memorandum of Objections objecting to the Lower Court's refusal to make a provision for the maintenance of the late fifth defendant, the plaintiff's mother. A preliminary objection was raised by Mr. Ganapathy Ayyar to the memorandum on the ground that the fifth defendant who appealed against the decree of the District Munsif disallowing a provision for her maintenance has not herself appealed to this Court against the disallowance and that it was not competent to the plaintiff to do so. The ground on which the Subordinate Judge refused to make an allotment for the fifth defendant's maintenance was that her maintenance should come out of the plaintiff's own half share of the property and cannot be enforced against the first defendant's half share. The first respondent (*i.e.*, the plaintiff) is therefore affected by the judgment and is interested in disputing its correctness. The fifth defendant is a party to the Second Appeal. This Court has power under Order XLI, rule 33 of the Civil Procedure Code, to pass such decree as it thinks

(1) (1908) I.L.R., 32 Bom., 81.

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proper dealing with the rights of all the parties before it. The preliminary objection must be disallowed.

On the merits the Memorandum is entitled to succeed. The question was decided so long ago as 1870 in the *Zemindar of Oorcaud* v. *Meenakshi Ammal*(1) by HOLLOWAY and INNES, JJ. The Smrithi Chandrika supports her claim. See Chapter 4, Verse 14. "The word mother includes a step-mother." In Verse 7, a text of Vyasa is quoted. "Even childless wives of the father are pronounced equal sharers and so also are all the paternal grandmothers: they are declared equal to mothers." See *Kumaravelu* v. *Virana Goundan*(2). The basis of the mother's right is, as pointed out by the author, the interest that she has by reason of her relationship to her husband. This reason is equally applicable to the stepmother. Mr. Ganapathy Ayyar's argument that the question was not really considered in the *Zemindar of Oorcaud* v. *Meenakshi Ammal*(1) cannot be accepted. The same view was apparently taken in *Subbarayalu Chetti* v. *Kamalavalli Thayaramma*(3) though the decision itself proceeded on another ground. The case relied on by the Subordinate Judge *Hemangini Dasi* v. *Kedarnath Kundu Chowdhry*(4), was based upon the express provisions of the Dayabhaga according to which the stepmother's right is only against the share of her sons.

The Subordinate Judge must be requested to return a finding on the seventh issue. He will also find whether the fifth defendant is in possession of any family jewels as distinguished from her own stridhanam jewels and if so what is their value. One month will be allowed for the findings and seven days for objections.

SADASIVA AYYAR, J.

SADASIVA AYYAR, J.—I have had the advantage of perusing the judgment of my learned brother in this case. I agree with him in all the conclusions formulated in that judgment except on one point which however is not unimportant. I am therefore obliged to write the following separate judgment and I shall notice in it only two points of Hindu Law,—one point on which I regret I have to differ from, and the other point on which I agree with, my learned brother.

(1) (1870) 5 M.H.C.R., 377 (2) (1882) I.L.R., 5 Mad., 29 at pp. 30 and 31
(3) (1912) I.L.R., 35 Mad., 147. (4) (1889) I.L.R., 16 Calc., 758 (P.C.)

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The distinction between the ancestral and the self-acquired property of a father was not known to the ancient Hindu Law. The expression 'paternal estate' when used in Hindu Law books does not mean the father's self-acquisition alone but merely means the estate which the son can inherit or obtain *through his relation as such son* to his father. In *Venkatarazu* v. *Kotayya*(1) I have attempted to show that according to the Shastras, sons had no right in the property which belonged to their father till both their father and mother were dead. Sankha and Likhita state (see Jagannatha, page 199) that even the properties acquired by the sons themselves independently of their father cannot be partitioned among them while the father lives since the sons are not their own masters in respect of any wealth so long as their father lives. Harita Smriti also says the same. Manu says that three persons including a son can have no wealth of their own so long as their superior is alive. Of course we cannot now wholly go back to the ancient Law of the Shastras and we have to accept the Mitakshara which, relying mainly on a supposed text of Gautama, gives to the sons by their mere birth, rights in the (self-acquired and ancestral) properties of the father. This supposed text of Gautama is not found in Gautama's Institutes now and is opposed to the undoubtedly genuine text of Gautama that property is acquired only in five modes, viz., inheritance, purchase, partition, seizure, or finding. Even if it is genuine, it can only mean that 'birth' gives the son an inchoate and contingent right to inherit to his father or mother on their death and not a right *in præsenti* in their property as soon as he is conceived. The text of Yagnavalkya in respect of ancestral immoveable property not being at the disposal of the father must be interpreted in the light of the moral obligation of a *grihasta* to provide for the support of his wife and children because not only those already born but even those thereafter to be born to him require maintenance and support according to Vyasa's text. There are passages in the Smritis to show that to pass the ownership in immoveable property, the consent of even neighbours and the whole of his village is requisite, the unrestricted private ownership and right of alienation in landed

(1) Second Appeal No. 360 of 1911.

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property having been greatly discouraged in some portions of the long past period of Hindu civilisation. In fact, the Mitakshara (Chapter I, section I, slokas 24 to 27) clearly says that the father is not master of the immoveable property acquired even by himself. The text of Yagnavalkya about the ownership of father and son being equal in wealth received from the grand-father was merely intended as a moral injunction prohibiting the unequal division of the grand-father's wealth between the father and sons. In fact, this text has been rightly interpreted as giving only a figurative ownership to the sons in order that the father might fulfil his moral obligation of not making an unequal division of such property between himself and his sons. It was not at all intended to give a legal right of present ownership in ancestral property to the son. Some other commentators explain the text by saying that it was intended that where the father died leaving a son and grandsons by a deceased son, the grand-sons by the deceased son should obtain a share equally with their uncle. In other words, it was intended that the surviving son alone as the nearest sapinda, should not take the whole of the estate to the exclusion of the grandsons by the deceased son. It was therefore stated that the right of inheritance after the *grandfather's death* is the same in the case of the son and the grandson (by a pre-deceased son). The son is never considered in the ancient text-books as the true owner of any property so long as his father or mother is alive. See Jagannatha's Digest, page 283. Yagnavalkya says that among those whose fathers are deceased the allotments of shares is according to the fathers. Katyayana similarly says, "should a brother die before partition, his share shall be alloted to his son provided he has received no fortune from his grandfather. The son's son shall receive his father's share from his uncle or from his uncle's son." As I have said already, it may be that to avoid the consequences of the logical effect of the dictum that the estate belongs to the nearest sapinda that the Smriti texts make the son, the grandson and the great-grandson of the deceased owner to equally partake (*per stirpes* in the case of the grandson and the great-grandson) the estate of the deceased owner instead of the son alone taking the whole as such nearest sapinda. But if a great-great-grandson is left, he cannot claim to inherit any share of his great-great-grandfather's property directly from the deceased owner. The

Mitakshara's having laid down the principle of present right by birth instead of a mere figurative right has led to a very large amount of anomalies in the Hindu Law. To adopt the language of BEAMAN, J., in a recent Bombay case, (that learned Judge was referring to the Muhammadan Law), "There seems now little hope of expecting from the vast entanglements of the Mitakshara Hindu Law, anything like consistent principles, or intelligible classifications, and every single rule seems to be open to innumerable exceptions, many of which appear to conflict in principle with the main rule." This modern main rule as to right by birth was in hopeless conflict with the son's undoubted legal liability under the ancient Hindu law to pay his father's debts and hence the Privy Council have been obliged to virtually destroy this rule by allowing the validity of alienations effected to discharge the father's debts provided they are not illegal or immoral. This alleged right by birth is also ignored when the father was given the right to alienate his self-acquisitions, even if they were immoveables. This same right by birth has led to the so-called right of survivorship unknown to the ancient Hindu Law. It has also virtually killed the numerous texts which show that the great-great-grandson has no right to inherit directly the property of his great-great-grandfather, if the great-great-grand-father at his death left nearer descendants. The clear texts (see Manu, slokas 186 and 187 of Chapter 9 and the texts of Katyayana) which deny the right of the great-great-grandson to inherit could not be explained away except by much involved ingenuity. Such misapplied ingenuity has been abundantly shown by the commentators who wrote the Viramitrodaya, the Smritichandrika, the Madhavya, the Vivada Chintamani, and the Vivada Ratnakara. These unsatisfactory commentaries, the Courts have been obliged to accept as making the rule as to the non-existence of succession and inheritance beyond the third descending line inapplicable to the cases governed by the Mitakshara Law. (See the elaborate judgment of my learned brother SUNDARA AYYAR, J., in *Tirumal Rao Sahib* v. *Rangadani Rao Sahib*(1). For myself, I am unable to interpret the texts of Manu and Katyayana as intended only to apply to cases where the property to be inherited

(1) (1912) 23 M.L.J., 79.

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was the acquisition of the great-great-grandfather because the *Mitakshara confers right by birth even in self-acquisitions* to the sons and through them, of course, to the grandsons and great-grandsons. I am clearly of opinion that the Mitakshara principle of right by birth utterly destroys the rule laid down in the texts of Katyayana and Manu that the great-great-grandson has no claim to inherit directly his great-great-grandfather's property.

When, *therefore, the Hindu Law books treat of partition* of the paternal estate—I would put it rather as the parental estate—*they did not* mean *to* confine *themselves to the partition of the* father's self-acquired estate because according to the ancient law, both his self-acquisition and his ancestral estate are his own and are parental estate so far as the sons are concerned. As my learned brother has pointed out, there are no separate chapters in the Smritis or even in the commentaries treating of the partition of self-acquired estate as apart from the ancestral estate of the father. The only difference made is between partition during the father's lifetime and partition after the father's death. Mr. *Ganapathi Ayyar has attempted to confine the* texts of Yagnavalkya and other Smriti writers (Vishnu, Vyasa, Brihaspati and Narada) which required initiated brothers to set apart from the paternal property the expenses of the initiation of uninitiated brothers and sisters before dividing the paternal property, to the father's *self-acquired* properties and this attempt to restrict these texts to the self-acquired property of the father has, in my opinion, wholly failed. In fact, Narada says that if no wealth of the father exists, the ceremonies of uninitiated brothers must, without fail, be defrayed by the brothers already initiated *contributing funds out of their own private wealth.* Thus when the initiated brothers are bound even in the absence of any property inherited by themselves to spend money for the samskaras *of their uninitiated brothers, it is impossible to* hold that they are not bound to meet those expenses out of the property *which they inherit from their father as ancestral estate.*

We now come to the question as to what are the samskaras of uninitiated brethren, the expenses of which have to be first set apart from the inheritance before it is divided among all the sons. (Formerly sisters also had shares in the inheritance along with their brothers and the texts about expenses of initiation

refer to both uninitiated brothers and sisters). Brihaspati's text clearly points to the samskaras in question, viz., those which the brothers initiated by their father had to perform for their brothers and sisters whose initiation had been left incomplete by the father at his death, such initiations which are morally obligatory on the father being rounded up by the upanayana ceremony. His text is as follows :—"For younger brothers, whose *thread investiture*, etc., ceremonies have not been performed, their elder brothers shall perform them out of the collected wealth of their father." If the expenses of the marriage samskara were also intended to be set apart before partition, that samskara would have been mentioned in preference to the thread investiture ceremony. The word "*dvijati-samskara*" as used in the Shrimad Bhagavatam and other sacred books, is intended to apply only to that important *samskara* which initiates the Hindu into his caste, viz , the upanayanam ceremony. It is well-known that females also, according to the shastras, had the *upanayana samskara* performed in former ages just like males though now the *vivaha samskara* has become practically the only *samskara* for females. But even now, at the time of the *vivaha samskara*, most of the previous samskaras are rapidly gone through for females The Smrithi Chandrika is clearly of opinion that the ceremonies contemplated by Narada's text commence with *Jatakarma* and end in *Upanayana*. Now the samskaras are variously numbered from 8 to 48 and even more (see also Jagannatha, Introduction, page 30). The Savitri or the ceremony of investiture is the seventh when numbered from Jatakarma according to the Samaskara Ratnamala and the eighth or tenth when numbered from Garbadanam according to the other works. Marriage or Vivaham comes as the fourteenth or sixteenth ceremony. That the marriage of males is not considered an indispensable samskara is clear to me after a perusal of several of the ancient shastric books. The late Diwan Bahadur Raghunatha Rao, a very learned, accurate, and unprejudiced Sanskrit scholar, has in my opinion, conclusively shown in his works that marriage both for males and females is optional and not obligatory. The late KRISHNASWAMI AYYAR, J., while inclined to attach great importance to the Vivaha ceremony [see *Kameswara Sastri* v. *Veeracharlu*(1)], admits that the Jabala

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Upanishad, Manu, Yagnavalkya and Mitakshara lay down that a Hindu can go straight from the Brahmacharya stage after *upanayana* to the *Sanyasashrama* stage without having been a *Grihastha* and having had the *Vivaha samskara* if he has conquered his animal passions during the *Brahmacharya* stage. (Yad Shareva Viramet Tad Shareva Pravrajet). See also Mitakshara, *Prayaschitta Kandam* on *Yati Dharma*. We have the well-known text of the Bhagavatham that animal sacrifices, intoxicating liquor sacrifices and marriage are not obligatory samskaras but are intended only for those who have not conquered their desires for flesh, spirituous liquors and sexual gratification:

> Loke Vyavayamishamadha Siva Nityastu Jantoh nahi tatrachodana
> Vyavasthitistasu Vivaha Yagna Sura Grahair Asu nivritti rishta

The texts which praise the Grihasthasramam as supreme are only what are known as arthavada and laudatory texts intended to encourage the married house-holder to perform his duty of maintaining the other three Ashramas and were clearly not intended to really lay down that the *Grihasthashrama* is superior to the other Ashramas. In fact, in the Bhagavatham and other religious works and also in the smrithis, the married stage is in several places despised as the Jaghanyasrama and it is clearly laid down that apart from the exceptional cases of Gnana Sanyasis like Janaka, a man who dies as an ordinary Grahasthashramee will be merely moving round and round in the three lower worlds, whereas the Naishtika Brahmacharya, the Vanaprastha and the Sanyasi alone can go to the higher four worlds, after passing to which there is no further *involuntary* return to the rounds of births in the three lower worlds. Marriage is only a *Vikalpa vidhi* and it is not a *Nitya* or *Apurva vidhi*. It is either a *Niyama vidhi* or is only a *Parisankhya vidhi*. Even CHANDAVARKAR, J., in *Sundarabai* v. *Shivnarayana*(1), does not state that marriage is always obligatory but only that it might "*become* obligatory" in the cases and for the reasons he has set forth (page 93, 1st line). As regards the texts quoted by KRISHNASWAMI AYYAR, J., which ordain that a man should discharge his three (or five) debts and that he should pro-create sons by marriage to discharge one of those debts, viz., the debt due to his Pitris, there are numerous passages in the shastras to show that when real Vairagya is obtained and real

(1) (1908) I.L.R., 32 Bom., 81.

undivided devotion to the Supreme Lord, the debts to Devas, Rishis, Bhootas, Aptas, Fellowmen and Pitris all become non-existent and completely discharged and that on the very day such Vairagya and devotion are obtained, that very day one should give up the wordly life. The learned Judge himself does not state that marriage is a compulsory samskara even for the man who is not fit to pass at once to the vanaprastha stage but that it is 'practically compulsory.' *Kamesvara Sastri* v. *Veeracharlu*(1). The Bhagavatham says:

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"*Devarshi Bhootapta Nrinam Pitrinam na Kinkaro nayam* "*rineecha Rajan Sarvatmana Yassaranam saranyam gato Mukun-* "*dam parihritya karmam.*"

Now according to the texts (see especially Narada quoted in the Smrithi Chandrika, page 59 of Mr. Krishnaswami Ayyar's translation) which require the initiated brothers to perform the ceremonies of their uninitiated brethren, it is clear that it is only those ceremonies which the deceased father was expected and bound to perform for his sons if he was alive that the initiated brothers had to perform in the place of their father for their uninitiated brothers. "What is left of the father's property after the father's obligations have been discharged, let the brothers divide." Now what are those ceremonies? Manu says · "Let the father himself perform the eight ceremonies *which perfect the second birth of a twice-born man* like the ceremony on conception." Thus, it is clear that the father is under an obligation to perform only up to the Upanayana ceremony the samskaras to be performed for his son. Vivaha is a ceremony which is performed after a man attains his majority and depends on his own will and option. It is, therefore, perfectly clear to me that the marriage samskara is not one of the samskaras which the initiated brothers have to perform for their uninitiated brothers and the expenses of the future marriage ceremony of the uninitiated brother is therefore not intended by the texts to be deducted out of the patrimony before it is divided. I am glad to have for the above view, the support of that very learned Judge, the late KRISHNASWAMI AYYAR, J., who has said in *Kamesvara Sastri* v. *Veeracharlu*(1), that "there is also another reason for separating marriage from the *Samskaras* that precede it, for, as pointed out at page 300 of the Digest it is

(1) (1911) I.L.R., 34 Mad., 422 at pp. 428 and 433 (F.B.).

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not a *Samskara* which a father does for the sons as he does in the case of the preceding *Samskaras* but one in which the son himself participates as the active agent." The learned Judge further on says "The marriage of an unmarried brother is certainly not a duty cast on the married brothers where there is no patrimony." The texts of Narada make the initiated brothers perform the samskaras of uninitiated brothers even out of their own acquisition if there is no patrimony and as the samskaras so made obligatory on the initiated brothers are the same whether there is patrimony or not, if such samskaras cannot include the marriage samskara in the one case, they cannot include it in the other case also. In the case of uninitiated sisters, as the marriage ceremony has now taken the place of their Upanayana, the marriage expenses must be met or set apart but in the case of uninitiated brothers, I think we must stop at the Upanayana ceremony as even the Smriti Chandrika does not venture to go beyond the expenses of the Upanayana ceremony as obligatory on the patrimony. If we go as far as the optional sacrament of marriage, why should we not go to the thirty and odd sacraments which follow the marriage sacraments and where are we to stop? In these days when it is deemed essential to postpone the marriages of boys till their education is completed, I am not prepared to allow any monies for the future marriage of a minor boy to be set apart several years before the marriage is likely to take place. The making of such provision will be the holding out of a temptation to the boy and his widowed mother to hasten the marriage before he completes his education and such early marriages are utterly opposed to the shastras. The question decided in *Kameswara Sastri* v. *Veeracharlu*(1), was that the expenses of the marriage of a male Hindu are expenses incurred on account of "family necessity" because they are reasonable and proper expenses. That question is quite a different question from that which we are now considering, viz., whether the expenses of such marriage ought to be set apart at a division among the brothers as the expenses of an obligatory samskara under the texts of Narada and other sages. The expressions "family necessity" and "family benefit" have always been liberally construed to include the expenses for purposes usually and reasonably incurred according to the status of the particular

(1) (1911) I.L.R., 34 Mad., 422 at pp. 428 and 433 (F.B.).

family and that question was recently decided in *Gopalakrishnaraju* v. *Venkatanarasaraju*(1) by a Full Bench of which I was a member but the present question as to the expenses of what samskaras have to be set apart at partition has no connection with the question decided by the Full Bench, the decision of the Full Bench merely affirming that where the marriage had taken place and where therefore the *vivaham* sacrament of a male was found to have been obligatory owing to the unfitness of that male member for the life of a Naishtika Brahmacharya or of a Sanyasin the reasonable expenses which had been incurred for his marriage were proper family expenses which would support the alienation of family property made for meeting such expenses. I wish to add that in these times when the giving of *varasulkam* is so rampant, it is very problematical that any expenses need at all be incurred for a boy's marriage when he comes of marriageable age and on that ground also I should hold that the allowance of Rs. 150 to the minor plaintiff for his marriage expenses is based on a remote speculative necessity. In this case, the plaintiff is only a boy five years old and to speculate about his marriage and his marriage expenses now seems to me to be a great deal premature. In the result, I would modify the Lower Court's decree by deleting the provision made in it to the extent of Rs. 150 for the plaintiff's marriage; plaintiff being a child five years old, his marriage, if it takes place at all in future, having to be postponed till he is 24 according to the shastras, it being problematical whether his marriage instead of entailing expense may not even be a source of pecuniary profit to him when it occurs and the Hindu Law comtemplating the expenses up to Upanayanam alone being set apart at the time of division for the benefit of uninitiated brothers. In other respects, I agree with the judgment of my learned brother and I agree in the order proposed by my learned brother to be passed in this case as regards the question of the fifth defendant's maintenance.

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SUNDARA AYYAR, J.—As my learned brother does not agree with my view on the question of the plaintiff's right to have provision made to defray the expenses of his marriage, we refer under section 98 of the Code of Civil Procedure for the decision of a third Judge the question whether, when one only of two

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(1) (1912) M.W.N., 903.

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co-parceners in a Hindu family has been married at the family expense, is the other co-parcener, a minor, entitled at a partition of the family property to have provision made for his marriage out of it?

This Second Appeal coming on for hearing on Thursday the 5th February 1914 under the provisions of section 98 of the Code of Civil Procedure as per order of SUNDARA AYYAR and SADASIVA AYYAR, JJ., who differed on a point of law, dated 30th August 1912, before SPENCER, J., for reference and the case having stood over for consideration the Court expressed the following

SPENCER, J.

OPINION.—The authorities for the proposition that marriage for Hindus is an obligatory *samskara* quoted in the judgment of SUNDARA AYYAR, J., namely, *Kameswara Sastri* v. *Veeracharlu*(1), *Sundrabai* v. *Shivnarayana*(2), *Gopalakrishnamraju* v. *Venkatanarasaraju*(3) and the books on Hindu Law by West and Buhler, page 781, Sarkar, page 245 and Strange, volume 2, page 286, are so weighty that I cannot usefully add anything in my own words to what is contained therein. I therefore take it that it is settled law that the reasonable expenses of performing the marriage of a male member of a co-parcenary, if already incurred out of family funds, are necessary expenses which must be treated as binding on the other co-parceners.

The further question to be decided is, supposing that the separation of a minor's estate takes place by partition from the family estate before his marriage has been performed, whether provision should be made for an expense that may never be actually incurred for some reason or other, such as, the minor remaining unmarried, dying young, or passing to the *sanyasi asramam* (ascetic stage) without passing through the *grihastha asramam* (married stage). This question arises out of modern conditions. In the ancient history of the Hindu joint family, I imagine that it must have been most unusual to have partitions effected before the parents died. In the event of a minor who has obtained partition of his share dying without issue, his estate will revert to his heirs according to the rules of Hindu succession, and this will include the unspent provision, if any, made for his marriage, so that the other members of the family will not lose unfairly by making provision for the minor's

(1) (1911) I.L.R., 34 Mad., 422 at p. 428 (F.B.) (2) (1908) I.L.R., 32 Bom., 81.
(3) (1912) M.W.N., 903.

marriage beforehand. Instances of a man becoming a *sanyasi* without passing through the stage of *grihasthasramam* appear to be so exceptional that it seems hardly necessary at partition to contemplate the possibility of the abnormal happening. In this connection, I may quote the words of KRISHNASWAMI AYYAR, J., in *Kameswara Sastri* v. *Veeracharlu*(1). He says: "Except for him who has thus qualified for entry direct into other *Asramas* than that of house-holder the stage of house-holder is practically compulsory;" and "Both the commentators of Manu and the commentators of Yagnavalkya have come to the conclusion after a full discussion of Sruti and Smriti texts that the stage of house-holder is obligatory on all the twice-born. But to those who have pursued the path of non-attachment, *Naishtika Brahmacharya* or perpetual studentship or entry from studentship into the stage of the hermit or ascetic direct is open." Moreover, when a Hindu renounces worldly affairs, it is usual for him to relinquish also his property in favour of other members of his family. The considerations of expediency which appear in the judgment of SADASIVA AYYAR, J., do not much appeal to me, unless they can be supported by the sacred texts or by established custom. For such considerations there is generally much to be said on the other side to balance or outweigh them. The learned Judge's observation that a provision for marriage will serve as a temptation to the boy and his widowed mother to hasten the marriage before he completes his education and that such early marriages are utterly opposed to the shastras does not seem to me to be a sufficient reason for altogether withholding such a contribution from family funds. Principles cannot be created out of particular cases in which unfortunate results have ensued. In some cases, if a minor's guardian is his mother, there may be a risk of the minor being pushed into an improvident early marriage. In other cases, there may be some security that marriage will be deferred to reasonable age. I doubt whether the evil of early marriages can be prevented by judicial pronouncements anticipating a change in popular opinion Again, the learned Judge remarks that the practice of *varasulkam* being on the increase may obviate any expenses being incurred on the boy's side. So long as the boy's parents have, as a general rule, to incur some

(1) (1911) I.L.R., 34 Mad., 422 at pp. 428 and 430 (F.B.)

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expenses at his marriage, I should hesitate to describe the allowance for marriage expenses as a 'remote speculative necessity'. In the family concerned in this case the first defendant has been married out of family funds; it is probable that the plaintiff will marry and it is equitable that, when he does, he should be treated like his brother.

Turning to the authorities, SADASIVA AYYYR, J., refers to the texts of Narada which make the initiated brothers perform the *Samskaras* of uninitiated brothers even out of their own acquisition, if there is no patrimony. He proceeds to argue that, as the *Samskaras* so made obligatory on the initiated brothers are the same whether there is patrimony or not, if the marriage *samskara* is not included in the one case it cannot be included in the other case also. He would set apart the marriage expenses of uninitiated sisters for the reason that the marriage ceremony has now taken the place of *Upanayanam*, but in thecase of uninitiated brothers he would stop at the *Upanayanam* ceremony. For this view he quotes the Smriti Chandrika. In Mr. Krishnaswami Ayyar's translation, Chapter 4, verse 40, Narada states, "For those whose initiatory ceremonies have not been regularly performed by the father, those ceremonies must be completed by the brethren out of the patrimony." Verse 41 goes on, "If no wealth of the father exists, the ceremonies of brethren must, without fail, be defrayed by the brothers already initiated contributing funds out of their own portion." Verse 42 says, "The ceremonies contemplated by this text commence in *Jatakarma* and end in *Upanayana*." In the next verse the learned author observes that marriage is not one of the ceremonies that must, without fail, be performed, as the law permits the life of a perpetual student (*Naishtika Brahmachari*). As regards this text, CHANDAVARKAR, J., in *Sundrabai* v. *Shivnarayana*(1), remarks, "it (this text) deals only with brothers. And, secondly, even as to them, it deals only with the case of brothers who have no joint estate, and therefore, are not bound by any mutual obligations incidental to a co-parcenary family;" and at page 87 he observes, "the word used for 'ceremonies,' whether as applied to brothers or to sisters, is *samskaras*. In the case of sisters, it can have no meaning if marriage be excluded from it. And if marriage be included in the use of the word with reference to sisters, it

(1) (1908) I.L.R., 32 Bom., 81 at p. 94.

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must be understood as having been used in the same sense with reference to brothers also, since both brothers and sisters are mentioned in the same connection and the same word is used as to both." KRISHNASWAMI AYYAR, J., in *Kameswara Sastri* v. *Veeracharlu*(1), states, "There can be no doubt that the Smriti Chandrika is no authority for the position that marriage is not an obligatory *samskara*." This is sufficient to show that the authority of the Smriti Chandrika upon which the appellant's pleader relies cannot be invoked for the purpose of showing *that the samskara of marriage creates no obligation upon brothers, who have ancestral property* to meet the cost of the marriages of the other members of the family.

In the judgment of SADASIVA AYYAR, J., *vivaha* is referred to as ceremony performed after the man has attained his majority and depends on his own will and option. It may be true that a man who has overcome his passions can attain salvation without marriage, but he does not necessarily become *Unasrami* or *Vratya* (out-caste) if he has, in due course, entered the other *asramas* in order and has remained unmarried.

Whether *omission to perform the samskara of marriage* would work forfeiture of caste or status is not in my opinion the true test to be applied for determining whether the expenses of marriage are or are not debts of family necessity which must be provided for. As observed by SUNDARA AYYAR, J., "There can, at any rate, be no doubt that marriage is regarded as a most proper ceremony for every Hindu. This is sufficient to justify *the plaintiff's claim for a provision for his marriage.*" *We may* safely be guided by what is considered normal and proper. I would, therefore, be inclined to take the view that marriage expenses may be 'necessary expenses,' although salvation can be obtained without marriage. It does not follow that, because a man, in exceptional circumstances, can attain salvation without passing through the stage of *grihasthasramam*, marriage which is the introduction to that stage is not a necessary ceremony for the ordinary man. The ceremonies for the performance of which immoveable properties can be alienated by the manager do not include only those for the non-performance of which forfeiture of caste is the penalty." *Kamesvara Sastri* v. *Veeracharlu*(1).

(1) (1911) I.L.R., 34 Mad., 422 at p. 433 (F.B.).

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This decision and that in *Gopalakrishnamraju* v. *Venkatanarasaraju* (1), and in *Sundrabai* v. *Shivnarayana*(2), while laying down that the marriage expenses already incurred are binding on the members of a Hindu family, incidentally decided also that marriage is obligatory on Hindus who do not desire to adopt the life of a *Sanyasi*.

The appellant's pleader contends that the above text of the Smriti Chandrika is in his client's favour and that there is nothing to the contrary in any other of the ancient writings. He has also called my attention to the decision in *Govindarazulu Narasimham* v. *Devara Bhotla Venkata Narasayya* (3). This decision appears to have been practically overruled by the later decision *Kameswara Sastri* v *Veeracharlu*(4), and *Gopalakrishnamaraju* v. *Venkatanarasaraju*(1), I have shown that the Smriti Chandrika is not really in his favour.

In Colebrooke's Digest of Hindu Law, Book V, Chapter 3, section 123, the saying of Yagnavalkya appears thus: "For any of the brothers, whose investiture and other ceremonies had not been performed by the father, those ceremonies shall be performed by brothers, of whom the sacraments have been completed" On referring to the text, the literal translation of the Sanskrit is, "samskaras are to be done for the uninitiated by those fully initiated. Thus no mention is made in the text of Upanayanam as distinct from other samskaras. Admittedly however marriage is a samskara, and there is nothing to show that it was intended to be excluded here. In Stokes' Hindu Law, Mitakshara, Chapter I, section 7, verses 3 and 4, I find, "If any of the brethren be uninitiated when the father dies, who is competent to complete their initiation? . . . Uninitiated brothers should be initiated by those for whom the ceremonies have been already completed. By the brethren, who make a partition after the decease of their father, the uninitiated brothers should be initiated at the charge of the whole estate." Under this, there is an annotation by which all the initiatory ceremonies are interpreted by Balambhatta as including marriage. But Balambhatta is not mentioned in Mr. Mayne's Hindu Law as an authority in the South of India, and in *Bhagwan* v. *Warubai* (5), CHANDAVARKAR, J.,

(1) (1912) M W N., 903
(2) (1908) I L R., 32 Bom, 81.
(3) (1904) I.L.R., 27 Mad, 206
(4) (1911) I.L.R., 34 Mad., 422 (F.B.)
(5) (1908) I.L R, 32 Bom, 300 at p. 312.

remarks that Balambhatta is not regarded by Hindus in the Bombay Presidency as an authority to be accepted without question in the interpretation of the Mitakshara. On the broad footing that marriage is a samskara, that it is not usual to omit it, and that it is necessary that samskaras should be performed out of family funds, when such exist, I would allow this charge.

Moreover, the decisions quoted by me at the outset are to the effect that marriage is an obligatory ceremony; and Sarkar, West and Buhler in their works on Hindu Law and Steele's Law and Customs of Hindu Castes, page 404, declare that the expenses for the marriage of unmarried co-sharers should be set apart at partition.

I consider that the opinion of SUNDARA AYYAR, J., in this Appeal is correct and supported by authority.

APPELLATE CRIMINAL.

Before Mr. Justice Ayling and Mr. Justice Seshagiri Ayyar.

1914
July 21, 22 and 28.

M. VIJIARAGHAVALU PILLAI (COUNTER-PETITIONER), PETITIONER

v

P. THEAGAROYA CHETTI AND ANOTHER (PETITIONERS), COUNTER-PETITIONERS *

The Madras City Municipal Act (III of 1904), Presidency Magistrate holding an inquiry under rules framed under, not a Court under Charter Act (24 & 25 Vict c. 104,), sec. 15—Jurisdiction—The Indian High Courts Act (24 & 25 Vict c. 104,), sec 15.

The High Court has no jurisdiction to revise an order passed by a Presidency Magistrate in an inquiry held by virtue of the rules framed by Government under the Madras City Municipal Act (III of 1904), whereby a magistrate may decide as to the competency or otherwise of a candidate for a Municipal election. The magistrate is not a Court subject to the appellate jurisdiction of the High Court within the meaning of that word in section 15 of the Charter Act (24 and 25 Vict., c. 104) He is in the position of a referee between the President of the Municipal Corporation and the candidate

PETITIONS under section 15 of the Charter Act (24 and 25 Vict., c. 104), and section 439, of the Code of Criminal Procedure

* Criminal Revision Cases Nos. 69 and 70 of 1914 (Criminal Revision Petitions Nos. 60 and 61 of 1914)

VIJIARAGHAVALU PILLAI v. THEAGAROYA CHETTI

(Act V of 1898), praying the High Court to revise the order of MUHAMMAD BAZLULLAH SAHIB, Bahadur, the Fourth Presidency Magistrate, Georgetown, Madras, in Applications Nos. 155 and 156 of 1914.

T. Ethiraja Mudaliyar for the petitioner.

J. C. Adam, Crown Prosecutor, for the Crown.

The counter-petitioners in both cases not appearing in person or by pleader.

AYLING AND SESHAGIRI AYYAR, JJ.

ORDER.—These are petitions to revise the order of the Presidency Magistrate, Georgetown. Two applications were made to him by the counter-petitioners to declare that the inclusion of the petitioner as a candidate for Municipal election by the President of the Corporation was illegal, under Rule 5 of the rules framed by the Government in pursuance of the powers given to them by section 413 of Act III of 1904. The Magistrate allowed the applications. Against that order these petitions have been filed. The learned Judge who admitted the petitions expressed doubts regarding the powers of the High Court to revise the order of the Magistrate. We therefore called upon the petitioner's vakil to argue that preliminary point. Mr. T. Ethiraja Mudaliyar, who appeared for the petitioner, conceded that the petition did not lie under section 439, Criminal Procedure Code. He however contended that under the Charter Act, the High Court was competent to revise the order. Section 15 says that the High Court shall have superintendence over all Courts which may be subject to its appellate jurisdiction. Is a Magistrate giving his decision under the rules framed by the Government in this behalf "a Court" subject to the appellate jurisdiction of the High Court? No procedure is prescribed by the rules; and although the Magistrate is competent to take evidence in the case, it is not suggested that this is in pursuance of any statutory obligation to do so. The contention of the learned vakil for the petitioner is that the Magistrate is ordinarily subject to the control of the High Court, and any power given to him by the Local Government must be considered to have been conferred on him in his capacity as a Magistrate subject to the supervising power of the High Court. It seems to us that this contention is untenable. It was held in *Minakshi* v. *Subramanya*(1), by the Judicial Committee, that the expression 'civil

(1) (1888) I.L.R., 11 Mad., 26 at p. 34 (P.C.).

court' in section 10 of Act XX of 1863 does not import that the presiding officer is subject to the appellate authority of the High Court. They say: "In the opinion of their Lordships the tenth section places the right of appointing a member of the committee in the Civil Court not as a matter of ordinary civil jurisdiction, but because the officer who constitutes the civil court is sure to be one of weight and authority, and with the best means of knowing the movements of local opinion and feeling, and one can hardly imagine a case in which it would be more desirable that the discretion should be exercised by a person acquainted with the district and with all the surroundings." We are of opinion that similar considerations are responsible for the local Government vesting in the Presidency Magistrate the discretion to pronounce an opinion on the competency or otherwise of a candidate for election. We may also, in this connection refer to rule 11 of the rules framed under the District Municipalities Act. The local Government has empowered Collectors to exercise the functions which the Presidency Magistrates in the town of Madras exercise under the rule in question. It has never been suggested that a Collector's decision can be revised by the High Court.

The learned vakil for petitioner draws our attention to *Vasudeva Aiyar* v. *The Devesthanam Committee of Negapatam*(1), which holds that the High Court has power to hear a revision petition under section 115 of the Code of Civil Procedure against an order passed under section 10 of Act XX of 1863. We are informed that that decision is under appeal to His Majesty in Council and apart from this we do not think the decision has any direct bearing upon the matter we have to decide. Mr. Ethiraju Mudaliar cited *Swami Chetti* v. *Corporation of Madras*(2), to show that the Magistrate acting under section 172 of the City Municipal Act is subject to the jurisdiction of the High Court. The reason of that decision, we take to be this. If the Magistrate had acted legally, he should have referred the matter to the High Court. By not so doing so, he has illegally exercised jurisdiction to decide the matter himself, and has prevented the High Court from exercising its jurisdiction in the matter. The learned Judge was therefore

(1) (1905) 25 M.L.J. 536. (2) (1912) 23 M.L.J., 591.

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and his successor (Mr. Stewart commenced the case *de novo* under section 350, Criminal Procedure Code, examined the complainant and discharged the accused. Thereupon the complainant petitioned the District Magistrate to order under section 437, Criminal Procedure Code, a further enquiry into the charge. The accused contended before him that the order of discharge of Mr. Stewart having been passed subsequently to the framing of charges by Mr. Bardswell amounted to an acquittal and that he was *autrefois acquit* and further enquiry was barred. The District Magistrate held that Mr. Stewart having recommenced the trial had full power to discharge the accused and ordered further enquiry. The accused petitioned the High Court.

J. L. Rosario, *T. Prakasam* and *B. Narasimha Rao* for the petitioners.

E. R. Osborne, *D. Appa Rao*, *N. S. Narasimhachariar* and *V. Ramadoss* for the respondent.

C. Sidney Smith for the Public Prosecutor for the Crown.

AYLING, J.

AYLING, J.—We are asked to revise an order of the District Magistrate of Godavari which directs, under section 437 of the Criminal Procedure Code further enquiry into a case of defamation in which the Joint Magistrate of Rajahmundry, Mr. Stewart, had passed what purports to be an order of discharge under section 253 of the Criminal Procedure Code. Mr. Rosario on behalf of petitioners argues that Mr. Stewart's order was, in effect, an order of acquittal under section 258 of the Criminal Procedure Code. If this is so, the District Magistrate undoubtedly had no power to order further enquiry under section 437 and his order must be set aside as *ultra vires*.

The facts are these. The case against petitioners was first heard by Mr. Bardswell, Mr. Stewart's predecessor in office. He heard the prosecution witnesses and framed a charge under section 254 of the Criminal Procedure Code, to which petitioners pleaded not guilty. He was then transferred. Mr. Stewart recommenced the enquiry under section 350 of the Criminal Procedure Code, examined the complainant as prosecution witness No. 1, and then passed an order of discharge under section 253 (2).

Mr. Rosario contends that a charge having once been framed, it is not cancelled by reason of the re-commencement of enquiry and the only course open to Mr. Stewart was either to record an order of acquittal or to convict (*vide* section 258 of the Criminal Procedure Code).

The only question is whether the re-commencement of a "trial" under section 350 of the Criminal Procedure Code implies the cancellation of a charge framed by the first Magistrate. There appears to be no direct authority of this or any other High Court on the point though the Punjab Chief Court has considered a precisely similar case and arrived at the conclusion that the charge remains in force and the subsequent order must be treated as one of acquittal and not of discharge [vide *The Crown* v. *Natthu*(1)].

The interpretation of section 350 is by no means free from doubt; but on the whole I am inclined to agree with the view taken by the learned Judges of the Punjab Chief Court. The only object of the substantive portion of clause (1) of section 350 seems to be to leave it to the discretion of the Magistrate to either act on evidence recorded by his predecessor or to hear it over again for himself. The discretion is somewhat restricted by proviso (*a*) and proviso (*b*) gives the superior Courts special powers of interference. Subject to these provisos the discretion is absolute. It is not clear why this should involve the cancellation of the charge or the transformation of the proceedings from a "trial" back into an "enquiry." As far as this Court is concerned, it is settled law that the proceedings before a Magistrate in a warrant case under chapter XXI of the Criminal Procedure Code are only an "enquiry" until a charge is framed, and on a charge being framed become a trial (vide *Palaniandy Goundan* v. *Emperor*(2) and *Narayanasawmy Naidu* v. *Emperor*(3). Bearing this distinction in mind it would seem to follow that where the proceedings re-commenced under section 350 are only an inquiry, they are re-commenced as an inquiry. Where they have developed into the trial stage they are re-commenced as a trial, *i.e.*, a proceeding in which a charge has been framed. The second Magistrate cannot ignore the charge framed by his predecessor and his position is practically the same as that of his predecessor would have been if, after framing a charge, he had heard further cross-examination of the prosecution witnesses under section 256 (1) and, on a consideration thereof, become satisfied that the charge was not well founded. It may not be altogether out of place to refer to

(1) (1903) 28 Punjab Records (Criminal), 35. (2) (1909) I.L.R., 32 Mad., 218.
(3) (1909) I.L.R., 32 Mad., 220.

SRIRAMULU v. VEERASALINGAM. AYLING, J.

Sadagopacharyar v. *Ragavacharyar*(1), where it was held that the re-commencement of an inquiry under section 350 did not cover a reference to the Police under section 202 of the Criminal Procedure Code. I do not press the analogy but it is consistent with this to hold that a Magistrate who re-commences an inquiry or trial does not thereby modify its nature or the stage at which it has arrived.

Mr. Stewart's order must in my opinion be viewed as order of acquittal and the District Magistrate's order for further inquiry must be set aside.

TYABJI, J.

TYABJI, J.—Section 350 (1) of the Criminal Procedure Code provides for the re-summoning and re-hearing of the witnesses and the re-commencement of the inquiry or trial by the Magistrate who succeeds after his predecesser has already heard the evidence The section is silent on the question whether or not on such re-hearing any charge that may have been already framed after the first hearing must subsist. In purporting to interpret section 350 therefore we have really to decide what would have been provided in the section had the point been explicitly dealt with It does not appear that the point can be considered to have been dealt with by some necessary implication in that which is expressly laid down. On the other hand, if it is assumed in this connection that the charge already framed should be considered to be wiped out, the assumption involves that the Legislature has also overlooked the point that the succeeding Magistrate ought in that case to be empowered to frame a fresh charge or to adopt the charge already framed with or without alterations.

I am not prepared to say therefore that the interpretation put upon the section by the Chief Court of the Punjab is not the most reasonable one.

The petitioners ought therefore to have been acquitted instead of being discharged and the District Magistrate had no power to order further inquiry. His order to that effect must consequently be set aside.

(1) (1885) I.L.R., 06 Mad., 282.

APPELLATE CIVIL—FULL BENCH.

Before Sir Charles Arnold White, Kt., Chief Justice, Mr. Justice Sankaran Nair and Mr. Justice Oldfield.

KOCHU RABIA (V. AHAMAD KUTTI HAJI'S DAUGHTER AND K. M. ASSANAR'S WIFE) (PLAINTIFF), APPELLANT,

1913. August 5 and October 23.

v.

ABDURAHMAN (V. T AHAMAD'S SON) AND EIGHT OTHERS (DEFENDANTS NOS. 11 TO 19), RESPONDENTS.*

Malabar Compensation for Tenants' Improvements Act (Madras Act I of 1900), ss. 5 and 19—Compensation, rate of, for tenants' improvement—Compensation, amount of, methods of fixing—Contract made before 1st January 1886—No express reference to tenants' right to make improvements—Contract less favourable to tenant than sections 5 and 6 of the Act—Contract not binding—Sections 5 and 6 applicable.

Where a contract, entered into between a landlord and a tenant in Malabar, before the 1st January 1886, regulated the rates of compensation claimable by the tenant for improvements, or provided for the methods of fixing the amount of compensation due to him but did not expressly refer to the tenant's right to make improvements

Held (by the Full Bench), that the contract is not binding on the tenant if it is less favourable to him than sections 5 and 6 of the Malabar Compensation for Tenants' Improvements Act (I of 1900), and that the tenant is entitled to claim compensation according to the provisions of the Act.

Held also, that there is no inconsistency between the judgment in *Randupurayil Kunhisore* v. *Neroth Kunhi Kannan* (1909) I L R, 32 Mad, 1 and the judgments in *Kozhikot Sreemana Vikraman* v. *Modathil Ananta Patter* (1911) I.L.R., 34 Mad., 61 and *Paru Amma* v. *Moothoran* (1912) 22 M.L.J., 221, and that the two last-mentioned cases were rightly decided.

SECOND APPEAL against the decree of A. EDGINGTON, the Acting District Judge of South Malabar, in Appeal No. 1115 of 1910 preferred against the decree of K IMBI CHUNNI NAIR, the Subordinate Judge of South Malabar at Calicut, in Original Suit No. 88 of 1909.

The facts of the case appear from the ORDER OF REFERENCE TO THE FULL BENCH

K. Govinda Marar for the appellant.

K. P. M. Menon for respondents Nos. 1 to 9.

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* Second Appeal No. 1414 of 1912.

KOCHU BABIA v. ABDURAHMAN.

SADASIVA AYYAR AND TYABJI, JJ.

ORDER OF REFERENCE TO THE FULL BENCH.—The question involved in this appeal is whether section 19 of the Malabar Compensation for Tenants' Improvements Act (Madras Act I of 1900) affects the validity of an agreement which was entered into prior to the 1st January 1836 and by which agreement the parties agreed that compensation for improvements should be paid to the tenant on a certain basis or method of calculation. The District Judge differing from the Subordinate Judge held that such an agreement though entered into before the 1st January 1886 was not binding on the tenant. The question turns upon the true construction of section 19 of the Act which provides that "nothing in any contract made after the 1st day of January 1886 shall take away or limit the right of a tenant to make improvements and to claim compensation for them in accordance with the provisions of this Act." The District Judge followed *Kozhikot Sreemana Vikraman* v. *Modathil Ananta Patter*(1) a decision of BENSON and KRISHNASWAMI AYYAR, JJ. That decision has been followed by BENSON and SUNDARA AYYAR, JJ., in *Paru Amma* v. *Moothoran*(2).

The reasoning of these two decisions (if we have understood it aright) is that section 19 contemplates only such agreements as limit the tenant's right to make improvements and to claim compensation therefor: that the section does not deal with a contract merely "regulating the rates of compensation" (see *Kozhikot Sreemana Vikraman* v. *Modathil Ananta Patter*(1), or "limiting the amount of compensation to which the tenant is entitled" (see *Paru Amma* v. *Moothoran*(2) in respect of improvements made by him and that the tenant may claim compensation either according to such a contract or under sections 5 and 6 of the Act, whichever is more favourable to him [*Kozhikot Sreemana Vikraman* v. *Modathil Ananta Patter*(1)].

It has been argued before us that these two decisions are inconsistent with the Full Bench decision in *Randupurayil Kunhisore* v. *Neroth Kunhi Kannan*(3) in which case the question was whether improvements made after 1887 were to be governed by a deed of 1881 as regards the rate of compensation due to the tenant, and the Court held (1) that the validity of contracts made prior to the 1st January 1886 is not affected by section 19 (whether the improvements were made before or after the 7th

(1) (1911) I.L.R., 34 Mad., 61. (2) (1912) 23 M.L.J., 221.
(3) (1909) I.L.R., 32 Mad., 1 (F.B.).

January 1887), and (2) that in the case of contracts made prior to the 1st January 1886, the rate of compensation is governed by the terms of the contract.

With the greatest respect to the learned Judges who decided *Kozhikot Sreemana Vikraman* v. *Modathil Ananta Patter*(1) and *Paru Amma* v. *Moothoran*(2) we have very serious doubts whether the decisions are in accordance with the true construction of section 19, or with the decision of the Full Bench in *Randupurayil Kunhisore* v. *Neroth Kunhi Kannan*(3).

Considering in the first place the language of section 19 itself, it seems somewhat hypercritical to hold that the words "the right of a tenant to make improvements and to claim compensation" do not include the right of the tenant to claim compensation under an agreement which does not expressly refer to his power to make improvements. It seems much more in accordance with the ordinary interpretation of words to construe the section as referring to contracts dealing with the rights of a tenant both to make improvements and to claim compensation, as well as with contracts having direct reference only to the claiming of compensation and being silent as to the right to make improvements; so that three classes of contracts dealt with in the section are contracts to make improvements, contracts to claim compensation for improvements made, and contracts to do both; there seems no reason to confine the applicability of the section to contracts which expressly mention both the right to make improvements and to claim compensation for them. It would seem that a right to claim compensation for improvements made implies a right to make the improvements for which compensation is to be claimed. In order that the Court may be justified in interpreting the section as rigidly as is done in the two decisions above referred to, it must be established that there is some very material distinction between contracts of the two kinds namely, (1) a contract which, as regards the rate of compensation to be allowed to the tenant or as regards the method in which his improvements ought to be valued, is less or more favourable to him than the rates and methods provided for in the Act, and (2) a contract which restricts or enlarges the right of the tenant to make improvements and to claim compensation for such improvements.

(1) (1911) I.L.R., 34 Mad., 61. (2) (1912) 22 M.L.J., 221.
(3) (1909) I.L.R., 32 Mad., 1 (F.B.).

KOCHU RABIAH v. ABDURAHMAN.

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SADASIVA AYYAR AND TYABJI, JJ.

But it seems to us that in the majority of cases there would be great difficulty in distinguishing between the two classes of contracts and in determining whether a particular contract would fall under the one head or the other. The difficulty had to be dealt with in *Paru Amma* v. *Moothoran*(1) and can be illustrated by the facts in both the other cases which have been referred to above. If no substantial distinction can be generally drawn between the two classes of contracts, then the facts on which the Full Bench decision in *Randupurayil Kunhisore* v. *Neroth Kunhi Kannan*(2) was arrived at, must also be taken to be indistinguishable from the facts in the two later cases above cited in respect of the applicability of the provisions of section 19, and it follows that the two later cases are inconsistent with the Full Bench decision.

The facts of the Full Bench case are set out in pages 1 and 2 of the report *Randupurayil Kunhisore* v. *Neroth Kunhi Kannan*(2) and the question referred to the Full Bench was worded quite generally thus:—"In the case of a contract made prior to 1st January 1886, is *the rate of compensation which a tenant is entitled to receive* governed by the terms of the contract or by the provisions of the Malabar Compensation for Tenants' Improvements Acts of 1887 and 1900?" The answer to the reference is found in page 3 of the same:—"Our answer to the question which has been referred to us is that in the case of a contract made prior to 1st January 1886, the rate of compensation is governed by the terms of the contract."

The observations in *Kozhikot Sreemana Vikraman* v. *Modathil Ananta Patter*(3) that the tenants is entitled to fall back upon section 5 of the Act, if that is more favourable to him, as also the decision in *Paru Amma* v. *Moothoran*(1) seem to us to be directly in conflict with the answer of the Full Bench cited above. We might add that the observations on the question in dispute in *Kozhikot Sreemana Vikraman* v. *Modathil Ananta Patter*(3) are *obiter*, as the case was really decided on the point that an agreement by the tenant "to accept compensation for improvements *according to local custom*" is not a special contract within the meaning of section 19.

(1) (1912) 22 M.L.J., 221 (2) (1909) I.L.R., 32 Mad., 1 (F.B.)
(3) (1911) I.L.R., 34 Mad., 61.

KOCHU RABIA v. ABDURAHMAN.

SADASIVA AYYAR AND TYABJI, JJ.

We feel, however, that, as there are two reported decisions in favour of the view which, we find ourselves, as at present advised, unable to accept, it is desirable that the following questions should be referred to a Full Bench of this Court:—

(1) "Whether a contract which is made prior to the 1st January 1886 and which regulates the rates of compensation claimable by the tenant for improvements or provides for methods of fixing the amount of compensation due to him (such rates or methods not being in accordance with the provisions in sections 5 and 6 of the said Malabar Compensation for Tenants' Improvements Act) but which does not expressly refer to the tenant's right to make improvements, is not binding on him if such a contract is less favourable to him than sections 5 and 6 of the Act, and whether the tenant is entitled to repudiate the contract and to claim compensation according to the provisions of the Act, and whether section 19 of the Act affects such contracts."

(2) "Whether *Kozhikot Sreemana Vikraman* v. *Modathil Ananta Patter*(1) and *Paru Amma* v. *Moothoran*(2) have correctly interpreted the Full Bench decision in *Randupurayil Kunhisore* v. *Neroth Kunhi Kannan*(3).

K. Govinda Marar for the appellant.

K. P. M. Menon for the respondents Nos. 1 to 9.

This Second Appeal coming on for hearing before the Full Bench, the Court expressed the following

WHITE, C.J. AND SANKARAN NAIR AND OLDFIELD, JJ.

OPINION.—We are of opinion that the contract mentioned in the first question which has been referred to us is not binding on the tenant if it is less favourable to him than sections 5 and 6 of the Act, and that the tenant is entitled to claim compensation according to the provisions of the Act.

As regards the second question, we are of opinion that, having regard to the question which the Court had to consider in *Randupurayil Kunhisore* v. *Neroth Kunhi Kannan*(3) there is no inconsistency between the judgment in that case and the judgments in *Kozhikot Sreemana Vikraman* v. *Modathil Ananta Patter*(1) and *Paru Amma* v *Moothoran*(2). We are not prepared to say that the two last mentioned cases were not rightly decided.

(1) (1911) I.L.R., 34 Mad., 61. (2) (1912) 22 M.L.J., 221
(3) (1909) I.L.R., 32 Mad., 1 (F.B.)

APPELLATE CIVIL.

Before Sir Charles Arnold White, Kt., Chief Justice, and Mr. Justice Oldfield.

1913. August 29 and September 8 and 23.

VASUDEVA AIYAR (PETITIONER), PETITIONER,

v.

THE NEGAPATAM DEVASTHANAM COMMITTEE AND ANOTHER (RESPONDENT AND PETITIONER), RESPONDENTS.*

*Religious Endowments Act (XX of 1863), sec. 10—Temple Committee—Vacancy—District Judge—Court—*Persona designata—*Civil Procedure Code (Act V of 1908), sec* 115.

An order made by a District Court under section 10 of the Religious Endowments Act is an order revisable by the High Court under section 115, Civil Procedure Code (Act V of 1908)

Meenakshi v. *Subramanya* (1888) I.L.R, 11 Mad., 26 (P.C.), distinguished

Gopala Ayyar v. *Arunachallam Chetty* (1903) I.L.R, 26 Mad., 85, referred to

When a temple committee does not do its duty, and arrange for an election, the Court can make the appointment without reference to the committee or direct the remaining members of the committee to fill up a vacancy. The power of the committee in such a case being derived from the Court, an appointment by election thereafter is bad.

Ramanuja Iyengar v *Anantaraman Iyer* (1896) 6 M.L.J., 1, dissented from

PETITION under section 115 of the Civil Procedure Code (Act V of 1908) praying the High Court to revise the order of C. G. SPENCER, the District Judge of Tanjore, in Original Petition No. 377 of 1913.

The facts sufficiently appear from the judgment of WHITE, C.J.

K. Srinivasa Ayyangar, G. S. Ramachandra Ayyar and *S. Visvanatha Ayyar* for the petitioner.

The Honourable Mr. *F. H. M. Corbet, the Advocate-General, R. N. Ayyangar, T Ranga Achariyar, S. Srinivasa Ayyar,* Messrs. *Grant & Greatorex* and *V. Varadaraja Mudaliyar* for the respondents.

WHITE, C.J

WHITE, C. J.—In this case, a preliminary objection has been taken by the learned Advocate-General that a Revision Petition does not lie.

* Civil Revision Petition No 568 of 1913.

VASUDEVA AIYAR v. THE NEGAPATAM DEVASTHANAM COMMITTEE.

WHITE, C.J.

The order against which the Revision Petition has been presented is an order made by the District Judge of Tanjore under the powers conferred by section 10 of the Religious Endowments Act of 1863. Section 10 provides: "Whenever any vacancy shall occur among the members of a committee, a new member shall be elected to fill the vacancy by the persons interested." It goes on to provide "the remaining members of the committee shall . . . fix a day . . . for an election of a new member by the persons interested." It then declares, "whoever shall be then elected, under the said rules, shall be a member of the committee to fill such vacancy." Then the section goes on, "if any vacancy shall not be filled up by such election as aforesaid (within the prescribed period) the Civil Court, on the application of any person whatever, may appoint a person to fill the vacancy, or may order that the vacancy be forthwith filled up by the remaining members of the committee" If that order is not complied with, the Civil Court, under the section, may appoint a member to fill the said vacancy. The circumstances in which the order against which the present Revision Petition has been presented for 'order' are these. An application was made to the District Judge of Tanjore with reference to a vacancy in a certain temple committee, more than three months having expired since the vacancy occurred, asking the Court to order the committee to hold an election or to make such order as the Court might deem fit. On that, the District Judge on the 6th January 1913, made an order in these terms: "It is clear to me that it is the duty of the committee to fill up the vacancy by election and that there is no obstacle preventing them from doing so. I therefore order that the vacancy be forthwith filled up by the remaining members of the committee." The remaining members of the committee then proceeded to hold an election, and on the 25th January 1913 the managing members of the committee wrote to the District Judge informing him that an election had been held and that one Balakrishna Odayar had been elected there being no other candidate.

On the 17th April, the District Judge made an order calling on the managing members to show cause why the election should not be treated as invalid, and restraining Balakrishna Odayar from taking any part in the proceedings of the committee. On the 19th July 1913 two applications were made to the

VASUDEVA AIYAR v. THE NEGAPATAM DEVASTHANAM COMMITTEE.

WHITE, C.J.

District Judge of Tanjore. One of them was by Balakrishna Odayar. He asked for a declaration that his election was legal and valid. The other application was by a person interested asking that the vacancy among the members of the committee should be filled by nomination by the Court. The order which the learned District Judge made on these two applications was, "I therefore consider the election of M.R.Ry. T. A. Balakrishna Odayar was regular and I accept him as a member of the committee.' It may be that these latter words "I accept him as a member of the committee" are surplusage. All that the learned Judge holds is that a good election had been held. It is obvious as it seems to me that the Judge did not intend to appoint Balakrishna Odayar. All he says is "I accept him." As I understand the order, the Judge accepted him, because in the view of the Judge, the election was good and the vacancy was duly filled up. It is sought to impeach this order on the ground that the procedure by election was bad, and that, if so, the Judge had no power either to accept him as a member of the committee in pursuance of the election or to appoint him The order of the learned Judge seems to me to be an adjudication on the question whether, the procedure having been by election, Balakrishna Odayar was legally appointed. The question we have to decide is: Does a Revision Petition lie against such an adjudication.

The learned Advocate-General relied on the decision of the Privy Council in *Meenakshi* v. *Subramanya*(1). There, a District Court made an order appointing a certain individual a member of a temple committee. There was an appeal to the High Court and the ground of appeal was that the person appointed was not a suitable person for the office. The Privy Council held that there was no right of appeal from that order from the District Court to the High Court. The first ground upon which they based their decision was that the Act itself conferred no right of appeal. The right of appeal, it is scarcely necessary to say, is a creature of Statute. Their Lordships of the Privy Council say: "There is nothing in the Act which would suggest it, unless it is to be found in section 10." Then their Lordships say: "In the opinion of their Lordships the 10th section places the right of

(1) (1888) I.L.R. 11 Mad., 26 (P.C.).

appointing a member of the committee in the Civil Court not as a matter of Ordinary Civil jurisdiction, but because the officer who constitutes the Civil Court is sure to be one of weight and authority, and with the best means of knowing the movements of local opinion and feeling, and one can hardly imagine a case in which it would be more desirable that the discretion should be exercised by a person acquainted with district and with all the surroundings." They declined to consider the question whether there might not be a serious mischief without a remedy by reason of the fact that there was no appeal. They say "there is force in this argument, but whether a person so improperly appointed could, as has been suggested, be removed by proceedings equivalent to proceedings by *quo warranto* in England, or whether, upon a full consideration of the merits, the appellant could be considered as a person improperly appointed, are questions upon which their Lordships are not called upon to express an opinion." They express no opinion on the question whether proceedings by way of revision would lie, although it would appear from the argument of Mr. Doyne, who contended that there was a right of appeal, that reference was made amongst other enactments to section 622, the revision section of the old Code of Civil Procedure. In the Privy Council case there was no question of jurisdiction or of the powers under the Act and no question of the construction of any section of the Act As I have said, the ground of appeal to the High Court was that the man whom the learned District Judge had appointed was unsuitable.

The question as to whether there was a right to proceed by way of revision from an order made under section 5 of the Religious Endowments Act, 1863, was raised in *Gopala Ayyar* v. *Arunachallam Chetty*(1), which came before me sitting alone. There the question arose under section 5 of the Religious Endowments Act, 1863. The Privy Council decision was with reference to section 10. But for the purpose of the point I had to determine no distinction can be drawn between the two sections. There was a revision petition to this Court against the order of the District Judge A preliminary objection was taken that no revision petition lay. My attention was called

(1) (1903) I.L.R., 26 Mad., 85

VASUDEVA AIYAR v. THE NEGAPATAM DEVASTHANAM COMMITTEE.

WHITE, C.J.

District Judge of Tanjore. One of them was by Balakrishna Odayar. He asked for a declaration that his election was legal and valid. The other application was by a person interested asking that the vacancy among the members of the committee should be filled by nomination by the Court. The order which the learned District Judge made on these two applications was, "I therefore consider the election of M.R.Ry. T. A. Balakrishna Odayar was regular and I accept him as a member of the committee.' It may be that these latter words "I accept him as a member of the committee" are surplusage. All that the learned Judge holds is that a good election had been held. It is obvious as it seems to me that the Judge did not intend to appoint Balakrishna Odayar. All he says is "I accept him." As I understand the order, the Judge accepted him, because in the view of the Judge, the election was good and the vacancy was duly filled up. It is sought to impeach this order on the ground that the procedure by election was bad, and that, if so, the Judge had no power either to accept him as a member of the committee in pursuance of the election or to appoint him The order of the learned Judge seems to me to be an adjudication on the question whether, the procedure having been by election, Balakrishna Odayar was legally appointed. The question we have to decide is: Does a Revision Petition lie against such an adjudication.

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(1) (1888) I.L.R. 11 Mad., 26 (P.C.).

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The question as to whether there was a right to proceed by way of revision from an order made under section 5 of the Religious Endowments Act, 1863, was raised in *Gopala Ayyar* v. *Arunachallam Chetty*(1), which came before me sitting alone. There the question arose under section 5 of the Religious Endowments Act, 1863. The Privy Council decision was with reference to section 10. But for the purpose of the point I had to determine no distinction can be drawn between the two sections. There was a revision petition to this Court against the order of the District Judge A preliminary objection was taken that no revision petition lay. My attention was called

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District Judge of Tanjore. One of them was by Balakrishna Odayar. He asked for a declaration that his election was legal and valid. The other application was by a person interested asking that the vacancy among the members of the committee should be filled by nomination by the Court. The order which the learned District Judge made on these two applications was, "I therefore consider the election of M.R.Ry. T. A. Balakrishna Odayar was regular and I accept him as a member of the committee.' It may be that these latter words "I accept him as a member of the committee" are surplusage. All that the learned Judge holds is that a good election had been held. It is obvious as it seems to me that the Judge did not intend to appoint Balakrishna Odayar. All he says is "I accept him." As I understand the order, the Judge accepted him, because in the view of the Judge, the election was good and the vacancy was duly filled up. It is sought to impeach this order on the ground that the procedure by election was bad, and that, if so, the Judge had no power either to accept him as a member of the committee in pursuance of the election or to appoint him The order of the learned Judge seems to me to be an adjudication on the question whether, the procedure having been by election, Balakrishna Odayar was legally appointed. The question we have to decide is : Does a Revision Petition lie against such an adjudication.

The learned Advocate-General relied on the decision of the Privy Council in *Meenakshi v. Subramanya*(1). There, a District Court made an order appointing a certain individual a member of a temple committee. There was an appeal to the High Court and the ground of appeal was that the person appointed was not a suitable person for the office. The Privy Council held that there was no right of appeal from that order from the District Court to the High Court. The first ground upon which they based their decision was that the Act itself conferred no right of appeal. The right of appeal, it is scarcely necessary to say, is a creature of Statute. Their Lordships of the Privy Council say: "There is nothing in the Act which would suggest it, unless it is to be found in section 10." Then their Lordships say: "In the opinion of their Lordships the 10th section places the right of

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Court under section 18, the District Judge who constitutes the Court is asked to adjudicate judicially and not to exercise his discretion as a *persona designata*. I am told by my learned brother—he speaks from experience as a District Judge—that it is the practice of the High Court to entertain revision petitions from orders made under section 18 of the Act. I do not want to say more than is necessary for the purposes of this case. All I desire to say is that the order made in this case seems to me to be an order which might be impeached by way of a revision petition.

The only other point is the argument in connection with section 115 of the new Civil Procedure Code, which corresponds to section 622 of the old Code. It was suggested by the learned Advocate-General that the matter which he has argued was not a case, and that the District Judge was not a Court. It seems to me for the reasons I have already stated that the Judge in dealing with this matter was a Civil Court and that the matter was "a case." I think the preliminary objection fails and that the petition should be disposed of on the merits.

OLDFIELD, J.

OLDFIELD, J.—I concur.

This petition coming on again for hearing on the merits and having stood over for consideration, the Court delivered the following judgment:—

WHITE, C.J.

WHITE, C.J.—I have set out the facts of this case in dealing with the preliminary objection.

The question whether the learned Judge's order can be supported depends on the construction of section 10 of the Act of 1863.

The order of the learned Judge made on July 19, 1913, was a decision to the effect that by virtue of the fact that Balakrishna Odayar had been elected the vacancy in the committee had been legally filled up

The scheme of section 10 appears to me to be this In the first instance a vacancy is to be filled up by election, and provision is made for the time within which, and the manner in which, the election is to be held. Then the section lays down what is to be done, if the vacancy has not been filled up by election within the prescribed period. In that event the Court may appoint a person to fill the vacancy, or the Court may order

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to the Privy Council decision, and it is scarcely necessary for me to say that, if I had been of opinion that the principle of the Privy Council decision applied to the facts of that case. I should have followed it; but the view I took was that the principle did not apply. There I pointed out that the question in the Privy Council case was one of appeal.

Our attention has been called to the decision of the Bombay High Court in *Balaji Sakharam* v. *Merwanji Nowroji*(1). There the question arose with reference to a section of the Bombay District Municipal Act Amendment Act of 1884. That enactment contains a section (section 23) providing that, where the validity of any election of a Municipal Commissioner is brought in question, the District Judge, after such inquiry as he deems necessary, may make an order confirming the election or setting it aside. The Chief Justice and PARSONS, J., were of opinion that "a District Judge acting under section 23 of the Bombay District Municipal Act Amendment Act, 1884, is not a Court within the meaning of the word in section 622 of the old Civil Procedure Code." They suggest that he was a *persona designata* apparently for a specific purpose. That seems to be so. It seems to me that under the Act in question the District Judge is a *persona designata* for a specific purpose and not an officer exercising judicial functions under the Act. As regards the Religious Endowments Act, it is clear that for the purpose of several sections of the Act, the District Court is not a *persona designata* but a Civil Court exercising jurisdiction under the Act. For instance, section 9 provides that no member shall be removed except by an order of a Civil Court. Section 14 is another section; section 16 is another under which the District Judge exercises judicial functions as a Civil Court and not as a *persona designata*. It seems to me it would be inconvenient if for certain purposes the District Judge is a Civil Court exercising judicial functions under the Act, and for other purposes under the Act he is a *persona designata* not exercising judicial functions. My learned brother calls my attention to section 18 which provides, "No suit shall be entertained under this Act without a preliminary application being first made to the Court for leave to institute such suit." When an application is made to the

(1) (1897) I.L.R., 21 Bom., 279.

Court under section 18, the District Judge who constitutes the Court is asked to adjudicate judicially and not to exercise his discretion as a *persona designata*. I am told by my learned brother—he speaks from experience as a District Judge—that it is the practice of the High Court to entertain revision petitions from orders made under section 18 of the Act. I do not want to say more than is necessary for the purposes of this case. All I desire to say is that the order made in this case seems to me to be an order which might be impeached by way of a revision petition.

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that the vacancy be forthwith filled up by the remaining members of the committee. Lastly, if the Court makes the order that the vacancy be filled up by the remaining members of the committee, and the order is not complied with, the Court may appoint a person to fill the vacancy. The object of the section would seem to be to prevent a dead-lock when the committee do not do their duty and arrange for an election, by providing that where an election has not been held within the prescribed time, the Court may make the appointment if it thinks fit, or if it does not think fit to do so, may order the remaining members of the committee to appoint. The section does not say either expressly, or, as it seems to me, by implication, that the remaining members of the committee are to hold an election before they appoint. No provision is made as to the time within which an election is to be held, the word "forthwith" indicates that what is to be done should be done at once. The holding of an election would involve further delay, which, I think, is what the legislature desired to obviate. If the construction adopted by the learned Judge is right, the mode of dealing with the situation created by the remaining members of the committee not doing their duty in the first instance by holding an election, is that the Court, if it does not think fit to make an appointment, should order the committee to do what the section required them to do. I should not be disposed to adopt this construction unless the language of the section was clear. It is not necessary to empower the Court to make such an order as a condition precedent, if it is not complied with, to the Court appointing, as the Court already has the power to appoint, if it thinks fit to exercise it, without reference to the committee.

It is to be observed that the rules made by the Madras Government for the election of Temple Committee members make no provision for the holding of an election after three months have elapsed since the vacancy occurred. The procedure prescribed by the rules would seem to apply only to an election held under paragraphs 1 and 2 of the section.

I should have had little difficulty as regards this question of construction, if it had not been for the decision of this Court in *Ramanuja Iyengar* v. *Anantaraman Iyer*(1). I am not sure

(1) (1896) 6 M.L.J., 1.

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whether the facts are fully set out in the report, but the learned Judges no doubt held that where there has not been an election within three months of the vacancy, and the remaining members of the committee are ordered by the Court to fill up the vacancy, an appointment by a majority of the remaining members, without holding an election, is bad.

For the reasons I have stated I find myself unable to agree with the learned Judges as regards the construction of the section. In their judgment they observe that the construction which appears to me to be the right construction, would give the committee the power of taking advantage of their own default in not giving the notice and taking the action which under the section they are bound to take, and that it is reasonable enough to say that, if the committee abstain from acting, the appointment may be made by the Judge, but that it is quite another thing to confer this power on the committee as a result of their omission to comply with the law. With all respect, I cannot follow this reasoning.

No power is conferred upon the committee as a result of their omission to comply with the law. If they fail to comply with the law the Court can make the appointment without reference to the committee If the Court is not prepared to do this it may direct the remaining members of the committee to fill up the vacancy. In that case the power of the committee is derived from the order of the Court, and the Court is not bound to give them this power unless it thinks fit to do so.

I do not think this question of construction was discussed in *Santhalva v. Manjunna Shetty*(1), but in my judgment in that case I made an observation to the effect that the surviving members of the committee must act so that the date of the election should be fixed not later than three months from the date of the vacancy and that, if they did not so act, their powers of election were gone.

The case in the Madras Law Journal to which I have referred has not been reported in the authorised reports and I observe that in Mr. Ganapathi Ayyar's book on the Law relating to Hindu and Muhammadan Religious Endowments the correctness of the decision is doubted. I am not prepared to follow it.

(1) (1911) I.L.R., 34 Mad., 1.

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the prosecution to prove, in case of disobedience to an order made under Act III of 1887, that the accused's disobedience was likely to cause danger, etc. The contention of the accused's counsel in this case that in the absence of such proof, the *conviction under section 188 could not* be supported, is therefore untenable.

The really important question is whether the disobeyed order was a lawful order made under Act III of 1897. The Act is a very short one of 4 sections, of which the second section is the longest and most important. Clause (1) of that section provides (I quote only the portion relevant for this case) that the Governor-General in Council "may . . . empower any person to take such measures" and that the Governor-General in Council may himself "prescribe such temporary regulations to be observed by the public or by any person or class of persons as he shall deem necessary to prevent the outbreak of" any dangerous epidemic disease "or the spread thereof."

By clause (3) of section 2, the Governor-General in Council may direct that all his powers may be exercised by a Local Government, with respect to the Local Government's territories. The Madras Government has been invested with such powers, that is, the Madras Government can "take measures," can "empower any person to take measures" and can "prescribe regulations to be observed by the public or by any person or

Sub-Collector does not say that the Local Government empowered him to take any measures, but it says that he made the evacuation order "under the powers conferred by the Collector." The Collector can be empowered by the Local Government under the Act to "take measures," but the Collector cannot be empowered under the Act to himself give "powers" to others. The Regulations made under the Act by Government prescribe what acts should be observed by the public or by any person or class of persons and give powers to any person to take measures but such powers cannot be delegated by that person in his turn to others, *unless such delegation* ought to be necessarily implied from the nature of the measures to be taken under the granted powers. The Regulations made by the Local Government under the Act do not confine themselves to the Regulations "to be observed by the public, etc." but also contain provisions empowering certain persons to take certain measures and even contain penal clauses which do not properly fall under Regulations to be observed by the public, etc. The Act (section 2, clause 1) keeps these two powers of the Government distinct, namely (1) the power "to empower any person to take measures" and (2) the power "to make Regulations for the conduct of the public," etc.

Rule 71 of the Local Government's Regulations, clause (5), seems to empower a Plague Officer (the Sub-Collector in this case comes within the meaning of that term "Plague Officer,") to direct the evacuation of a town *when authorized* by the Collector. The power "to take measures" may include the power to ask others to evacuate their houses. A direction to the public to comply with that requisition falls, in my opinion, to be exercised under the power to make Regulations to be observed by the public, etc., that is, that direction should be made by the Regulations passed by the Government.

In this case, the Sub-Collector did not get the authority of the Collector under rule 71 (5) to require the public of Udamalpet to evacuate their houses but seems to have acted under the powers delegated to him in 1904 by a general order of the then Coimbatore Collector passed under rule 104 of the Regulations. Rule 104 is as follows: "The Collector may, *from time to time,* assign to Plague Officers and Assistant Plague

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In the present case, the order disobeyed was the order of the Sub-Collector of Pollachi division to the public of Udumalpet to vacate their houses, etc. The order was not filed as an exhibit in the case and the duty of the prosecution to prove all the facts necessary to bring home the offence to the accused was not discharged in this case. Of course, if the accused pleaded guilty the Court could act upon it without evidence. But where the accused pleaded "not guilty" the fact that he did not deny the passing of the order or did not contest its legal validity cannot absolve the prosecution from its duty of proving the order and its legal validity. On this simple ground, the convictions are liable to be set aside.

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I had the order of the Sub-Collector produced before me during the arguments in this petition case. I find that the

Sub-Collector does not say that the Local Government empowered him to take any measures, but it says that he made the evacuation order "under the powers conferred by the Collector." The Collector can be empowered by the Local Government under the Act to "take measures," but the Collector cannot be empowered under the Act to himself give "powers" to others. The Regulations made under the Act by Government prescribe what acts should be observed by the public or by any person or class of persons and give powers to any person to take measures but such powers cannot be delegated by that person in his turn to others, *unless such delegation* ought to be necessarily implied from the nature of the measures to be taken under the granted powers. The Regulations made by the Local Government under the Act do not confine themselves to the Regulations "to be observed by the public, etc." but also contain provisions empowering certain persons to take certain measures and even contain penal clauses which do not properly fall under Regulations to be observed by the public, etc. The Act (section 2, clause 1) keeps these two powers of the Government distinct, namely (1) the power "to empower any person to take measures" and (2) the power "to make Regulations for the conduct of the public," etc.

Rule 71 of the Local Government's Regulations, clause (5), seems to empower a Plague Officer (the Sub-Collector in this case comes within the meaning of that term "Plague Officer,") to direct the evacuation of a town *when authorized* by the Collector. The power "to take measures" may include the power to ask others to evacuate their houses. A direction to the public to comply with that requisition falls, in my opinion, to be exercised under the power to make Regulations to be observed by the public, etc., that is, that direction should be made by the Regulations passed by the Government.

In this case, the Sub-Collector did not get the authority of the Collector under rule 71 (5) to require the public of Udamalpet to evacuate their houses but seems to have acted under the powers delegated to him in 1904 by a general order of the then Coimbatore Collector passed under rule 104 of the Regulations. Rule 104 is as follows: "The Collector may, *from time to time,* assign to Plague Officers and Assistant Plague

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Officers jurisdiction over such local areas and confer on the latter officers such powers as he may deem fit."

This rule seems to be *ultra vires* of the Local Government. The Government itself can give powers under the Act to an Officer or to Officers to take measures, but it cannot give powers under the Act to any person so as to enable the latter to himself give the said powers to others unless such powers by their very nature can be exercised only through agents. The Collector went even further in his order of 1904, in which he says that he "is pleased to *delegate* the powers detailed in the annexed schedule" (including the power to order evacuation) "to all Plague Officers and Assistant Plague Officers" and not merely to appoint them as his sub-agents. (The order does not say expressly that the Officers to whom the Collector's powers are delegated should exercise them only within their jurisdiction as Revenue Officers or as public servants to any other department.)

The Collector had no power to delegate his own powers and the Local Government had no right to empower the Collector to delegate the powers which the Local Government gave to the Collector except in respect of performance of acts which by their nature are or can be usually done only through agents and sub-agents. The Government can, by Regulations empower any person "to take measures" for the suppression of plague and can prescribe *temporary* Regulations directing the public or any person or class of persons to observe such Regulations, that is, the Local Government can itself order the public or any person or class of persons to evacuate their houses, etc. Curiously enough, the Regulations do not directly require the public on the Collector's request to evacuate but this may be implied from the tenor of several rules. The phrase "to take measures" seems to mean the doing of disinfection work, the destruction of rats and other similar measures (see section 231 of the District Municipalities Act) and may include requisitions to be given to other persons to do certain acts such as evacuation, but the directions to those other persons to obey the requisitions should be made by the Local Government under *temporary* Regulations. The Regulations to be observed by the public or a class of persons are to be *temporary* Regulations made by the Local Government.

The Madras Regulations are not called "Temporary." I think that they ought to show in the beginning or the end up to what time (say, till Government declares the Madras Presidency to be free from plague) they are to be in force. In my opinion, the power "to take measures," which power may be granted to any person by the Local Government is a different thing (though closely connected with the effective carrying out of the measures taken under that power) from the Regulations or orders which have to be observed or obeyed by the public or a person or class of persons in respect of those measures. These latter orders to be obeyed by the public or a person or class of persons cannot without great danger to the liberty of the subject be left to be promulgated by any authority except the Local Government and hence the Act gave almost autocratic power to the Local Government alone to issue temporary Regulations or orders to be observed (that is, obeyed) by the public or a person or class of persons (orders to evacuate dwelling houses, etc.) interfering very seriously with the rights of the public. The Collector in this case has delegated his right to take measures, *i.e.*, calling upon people to evacuate houses, to his Divisional Officer, whoever the latter officer may happen to be from and after 1904. This seems to me to be illegal. The Divisional Officer as a Plague Officer can under rule 71 (5) apply for authority to the Collector to ask people to evacuate and when so authorized, the power given by the Local Government to the Plague Officer by section 71 to take measures will come into operation and give him the right to require evacuation of houses. But as I said already, the Sub-Collector did not get or apply for authority under rule 71 (5) in this case before he passed the order to the public to evacuate houses and he acted under the delegation under rule 104 by a former Collector of the Collector's own powers. That rule is *ultra vires*, and the delegation under that rule is of no legal effect to confer any powers on the Sub-Divisional Officer. It cannot surely be said that the power to order evacuation of houses is a power of such a character that from its nature it could be conveniently exercised only through appointing agents to exercise that power by delegation as each occasion arises without any further reference to the principal on any particular occasion (see the analogy of section 190 of the Indian Contract Act).

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As regards the conviction under section 269, Indian Penal Code there was no proof let in by the prosecution that the accused were guilty of any unlawful or negligent *act* likely to spread the infection of any disease, etc. Taking it that "act" includes illegal omission (section 32, Indian Penal Code) if the order of the Divisional Officer was illegal, the omission to comply with it is not an illegal omission.

I therefore, set aside the convictions and sentences and direct the fine, if levied, to be refunded to the second accused.

APPELLATE CIVIL.

Before Mr. Justice Sadasiva Ayyar and Mr. Justice Spencer.

1913. September 17, 23 and 24 and October 9.

A. SURYANARAYANA (PLAINTIFFS NOS. 2 AND 3), APPELLANTS IN ALL,

v.

A. PATANNA AND EIGHT OTHERS (DEFENDANTS), RESPONDENTS.*

Madras Estates Land Act (I of 1908), ss. 8 (excep.), 3, cl. 2 (d)—Inamdar—Right to kudivaram—No presumption in favour of Inamdar—No distinction between zamindar and inamdar as to presumption—Surrender or abandonment of holding, not an acquisition by landholder of right to kudivaram—Suit in ejectment—Jurisdiction of Civil or Revenue Court.

The presumption is that an inamdar like a zamindar, is not the owner of the kudivaram right.

Per SADASIVA AYYAR, J.—Surrender or abandonment of the holding by the tenant, is not a case of acquisition of the kudivaram right by the landholder within the terms of the exception to section 8 of the Estates Land Act and such land does not therefore cease to be part of the estate; consequently the Civil Courts have no jurisdiction to entertain suits in ejectment brought by inamdars against the defendants who were tenants in possession, but the plaints should be returned for presentation to the Revenue Courts.

Per SPENCER, J.—A narrow interpretation should not be placed on the word 'acquired' in the exception to section 8, so as to exclude acquisition by an inamdar by surrender or abandonment of the kudivaram right by a tenant.

SECOND APPEALS against the decrees of F. A. COLERIDGE, the Acting District Judge at Masulipatam, in Appeals Nos. 472, 473

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* Second Appeals Nos. 1205, 1207 and 1208 of 1912.

and 474 of 1911, preferred against the decrees of S. NILAKANTAM PANTULU, the Additional District Munsif in Original Suits Nos. 271, 272 and 275 of 1909, respectively.

These were suits in ejectment filed in the Munsif's Court by Inamdars and Agraharamdars against their tenants alleging that the latter had no occupancy rights in the lands.

The other facts appear from the judgment of SPENCER, J.

The Honourable Mr. *L. A. Govindaraghava Ayyar* and *P. Nagabhushanam* for the appellants.

V. Ramesam for the respondents.

SADASIVA AYYAR, J.—My learned brother has fully dealt with the facts and the points of law involved in these Second Appeals. I add a few words in my own language out of respect to the strenuous arguments advanced by the appellants' learned vakil.

SADASIVA AYYAR, J.

Having regard to the observations in *Bhadrayya* v. *Bapayya*(1) and *Lakshmi Narasimha Rao* v. *Seetaramaswami*(2), *Venkata Narasimha Appa Rao* v. *Subba Reddi*(3), *Narasimhacharyalu* v. *Ramabrahmam*(4), *Virabhadrayya* v. *Sonti Venkanna*(5), and to the judgment in *Venkataraghavayya* v. *Ramakrishnayya*(6) and *Nukanna* v. *Sanyasi Naidu*(7), I think that no distinction should be made between an inamdar and a zamindar as to the presumption to be raised in respect of the kudivaram right in lands of which the inamdar or the zamindar is the proprietor. In other words, the presumption ought to be that the inamdar or the zamindar is not the owner of the kudivaram. There are no doubt some observations in *Indety China Nagadu* v. *Potu Konchi Venkatasubbayya*(8) and *Marapu Tharalu* v. *Telukula Neelakanta Behara*(9) which favour the appellants' contention. But the authority of those cases can no longer be relied on, having regard to the uniform tendency of the later decisions. The distinction made in one or two cases between the presumption to be drawn where the jurisdiction of the Civil Courts will be ousted if the inamdar is held not to own the kudivaram, and the presumption to be drawn if no such question of jurisdiction arises in the suit,

(1) (1911) 21 M.L.J., 803. (2) (1913) 24 M.L.J., 288.
(3) (1913) 24 M.L.J., 655. (4) (1913) 24 M.L.J., 656.
(5) (1913) 24 M.L.J., 659. (6) Appeal No. 137 of 1908.
(7) Second Appeal No. 168 of 1912. (8) (1910) M.W.N., 632.
(9) (1907) I.L.R., 30 Mad., 502.

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seems to me (with the greatest respect) a little too fine and far-fetched.

The other contention of the appellants that an inamdar could acquire the kudivaram through abandonment or surrender by the tenant of the holding and that, when he so acquires it, the holding ceases to be a part of the inam estate, has caused me much more anxiety before I could arrive at a decision satisfactory to my mind. The *exception to section 8 uses the general expression* "the kudivaram interest has been or is acquired by the inamdar." Mr. Ramesam's argument is that, as it is an exception to section 8, the modes of acquisition mentioned in the preceding clauses of section 8 ought to be looked into to find out what the meaning of 'acquired' is as used in the exception. These preceding clauses speak of acquisition by transfer, succession or otherwise. And, *according to the decisions of the Calcutta High Court on* the corresponding section of the Bengal Tenancy Act [see *Badan Chandra Das* v. *Rajeswari Debya*(1) and *Muktakeshi Dasi* v. *Pulin Behary Singh*(2)], this does not include acquisition by mere abandonment or surrender. Again, section 6, *clause 2 of* the Estates Land Act is as follows:—"Where land held by a ryot with a permanent right of occupancy, is *surrendered or abandoned* or *save in the case falling within . . . the exception to section* 8, comes into the possession of the landholder." This shows that the exception to section 8 which relates to acquisition of the kudivaram right by the landholder is distinguished from *the case where the landholder gets power to deal* with the land through surrender or abandonment by the tenant—in other words a right got by the landlord through surrender or abandonment of a holding is put under a different category from a right to kudivaram acquired under the exception to section 8.

As the appellants' possession of some of the lands during an occasional year or two arose out of surrender and abandonment and not alienation or succession derived from the tenant, the exception to section 8 cannot be relied upon, and the contention that those lands ceased to be part of the estate therefore fails.

As these suits, ought, on the above conclusions, to have been brought in the Revenue Court, the plaints in the suits will be

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(1) (1905) 2 C.L.J., 570. (2) (1908) 8 C.L.J., 324.

returned to the plaintiffs to be presented to the proper Court. The costs up to date must be paid by the appellants to the respondents.

SPENCER, J.—Seven items of lands are in dispute in these appeals: three are minor inams included in an Agraharam, and the others are ordinary agraharam lands. The District Munsif found on the second issue that the suit lands were not portions of an estate within the meaning of section 3, clause 2 (*d*) of the Estates Land Act. He placed the burden heavily on the defendants of showing that the village in question came within the definition and found that they had failed to discharge it.

The District Judge, finding no evidence of an original grant of both varams and, adopting it as a legal presumption that both were not granted, found this issue for the defendants, and dismissed the suits owing to the want of jurisdiction in the District Munsif to dispose of them when the property concerned was an estate falling under section 3, clause 2 (*d*) of the said Act.

No deed has been produced to show the terms of the original grant. But it appears from Exhibits GG and EE2 that this agraharam was given by a Reddi Raja to agraharamdars of the Ivaturi family and that it is a sarva agraharam paying *nothing to the circar. The plaintiffs were purchasers from* the original grantees. The original grantees were Brahmans, and the District Judge finds that it was only in 1846 that one of the agraharamdars became a resident in the village owing to the difficulty of collecting rent at a distance.

Mr. Govindaraghava Ayyar for the appellants raises three contentions: (1) that the original grant was of both kudivaram and melvaram, (2) that the subsequent conduct of the parties must be traced to a legal origin, from which the original grant of both varams can be deduced, and (3) that the plaintiffs have acquired the kudivaram right even if they did not have it originally, and that by the nature of such acquisitions the exception to section 8 of the Estates Land Act takes the case out of the purview of the Act.

The District Judge expressed his inability to conclude from the evidence that both varams were granted in the first instance, *and therefore he fell back on the legal presumption that the* melvaram only was granted. We find no sufficient reasons for

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not accepting the District Judge's finding on questions of fact. After a careful consideration of his judgment and a comparison of the conclusions drawn by him with the evidence on which they are based, we are not able to discover any misstatements of facts of any importance or any misconstruction of documents. The *pros* and *cons* of every argument have been considered by him with reference to the evidence on record in paragraphs 6 to 12 of his judgment, and we cannot see that the conclusions he comes to at the end are unreasonable or unsupported by evidence. On the first point for the appellants, great stress has been laid on the language in Exhibit EE7. This purports to be deed of gift confirming a prior grant of the agraharam in favour of a member of the Ivaturi family. It contains a clause permitting the grantee "to go on getting the lands cultivated extensively and to enjoy the produce thereof from generation to generation." It is a question whether this clause affected or was intended to affect the rights of the cultivating tenants. The District Judge declined to draw any conclusive inference from the words so used. He remarks that similar words might be used if the rights of melvaram alone were granted. He alludes to the fact of which he finds clear traces that the village was inhabited and cultivated at the time when the earliest grant came into existence and that the soap-nut trees were the special perquisite of the agraharamdars. We do not think that the grant is so expressed as to leave no doubt that the intention of the donor was to deal with the rights in the soil.

The expression 'to enjoy the produce of the land' appears to be not uncommon in grants of inams, and a similar expression has been interpreted in *Ravji Narayan Mandlik* v. *Dadaji Bapuji Desai*(1), as meaning only an alienation of the land revenue. In *Sriramulu* v. *Srinivasa Charlu*(2) (unreported) the expression 'to get cultivated and enjoy, was interpreted by the District Judge as implying that the grant was one of both varams and his finding was accepted, but in that case there were other reasons for considering that the lands were uncultivated previously. Here there is nothing to show that the suit lands were not cultivated previously, although there is some ground

(1) (1875) I.L.R., 1 Bom., 523. (2) Second Appeals Nos. 705 to 714 of 1909.

for thinking that the agraharam contained a considerable portion of unoccupied and waste lands at one time. In *Rajya* ... *alkrishna Gangadhar*(1), it was assumed in a case where ... was not produced that the grant was one of the Royal ... are ... and it was observed that, if owing to antiquity ... was no ... of the commencement of a tenancy, it mig... presum... be co-extensive with the duration of the tenure ... landlor... *Lakshmi Narasimha Rao* v. *Seetaramaswamy*... presump... was raised that the Government did not intend ... with th... hts of the occupants when they made the gran... ryots in that case being tenants of a mokhasa in a zamindari... presumption is the same whether the grant of th... inam was ... Government or by a zamindar. So the fact ... the grant in this case was made by certain Reddi rule... that part of the country will make no difference.

In *V... Janárdan Joshi* v. *The Collector of Thána and the Conser... of Forests*(3), the rule of English law as to the constru... of grants to subjects by the Crown was held to be the co... rule to be applied by the Courts in India in construing ... s by former governments. In that case, words to the effect ...t the grantees were to enjoy the inam grant of the village hereditarily without disturbance were held not to operate as an alienation of the soil of the village. The headnote in *Secretary of State for India* v. *Subbarayudu*(4) is quoted to show that a grant of land could not be split up into a grant of melvaram and a grant of kudivaram without words in the document to that effect, but the decision is one dealing with a case of archaka inam and applying section 4 of the Pensions Act, 1871. It cannot be taken as restricting the Court from putting the proper construction on the documents filed in the present case.

On the second contention, the District Munsif finds as a conclusion of fact on the evidence that all the defendants had only recent possession of the suit items, that the items concerned in Second Appeal No. 1207 were subject to changes in tenants, that one of them was home-farm in fasli 1305, that two were waste for a time, and that there was variation in rent in respect

(1) (1905) I.L.R., 29 Bom., 415. (2) (1913) 24 M.L.J., 258.
(3) (1869) 6 Bom. H.C.R., 191. (4) (1912) 23 M.L.J., 728.

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of one. He also found that the tenant of the inams concerned in Second Appeal No. 1208 was ejected in 1883 and that it was home-farm land in fasli 1305. The District Judge also refers to the change in holdings evidenced by the amarakam accounts, to mortgages and sales of the land, not merely of the melvaram share in the land, to grants of inams by the agraharamdars, to cases of eviction, to conditions in the *khats* under which the tenants agreed to quit at the end of their tenancy, and to high prices at the sales of land. On the other hand, he finds that the agraharamdars were non-resident Brahmans not to be found in the village till 1846, and the District Munsif finds that many of the old cowles contained no stipulation to quit (*vide* Exhibit XIII series). In fact, the finding of both the Courts is that these tenants obtained possession of the suit lands recently and that some of them had been in the possession of some other tenants and some were allowed to lie waste.

In *Bhadrayya* v. *Bapayya*(1), failure on the part of ryots to prove permanent occupation of their predecessors, the fact of other ryots having no proved connection with the defendants cultivating in a few stray years, admissions by ryots of other inamdar's kudivaram right, past admissions by a holder of a *portion of the plaintiff's inam of his right to eject*, and want of uniformity in the rents were facts considered and held to be insufficient in the circumstances of that case to prove a right to eject.

In cases of change of possession the presumption applied in *Cheekati Zamindar* v. *Ranasooru Dhora*(2), must be applied to this case, viz., that when the new occupants are admitted to the enjoyment of waste or abandoned land, the intention is that they should enjoy on the same terms as those under which the prior occupants held, unless this presumption is rebutted by proving that the usual condition of things did not prevail in the particular estate or that particular contracts were made with the tenants.

Courts have now to be guided by the rules in sections 6 and 8 of the Madras Estates Land Act, which embody the presumptions formerly recognised in reported decisions. *It* is not the

(1) (1911) 21 M.L.J., 803. (2) (1900) I.L.R., 23 Mad., 318.

commencement of possession of the present tenants that is so important as the *commencement of the tenancy, and neither the* District Munsif nor the District Judge has been able to find the origin of the tenancy in each case. If in these Second Appeals we had a finding that the tenancy originated in leases containing definite terms that the tenants concerned in this litigation should vacate at the end of their term, the position might be very different.

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Our attention has been called to some evidence of recent occupation, and the terms of the *khata* in recent years are in favour of such a finding. But there is no finding by the District Judge that the defendants are tenants at will or tenants from year to year. He says in paragraph 16, " All that this evidence shows is that defendants came into possession of the suit lands very recently and not as they alleged from time immemorial. But it is also clear that the lands had been continuously under the occupation of tenants with an occasional break for *banjar* and in some cases a year of cultivation by the plaintiff as *kamatam*. Therefore, it is certain that these lands are *seri* lands and not *kamatam* lands and therefore occupancy right exists in them. The evidence being inconclusive the District Judge finally gave effect to the legal presumption that there was no grant of kudivaram to the agraharamdars.

The presumption of occupancy rights in the tenants in zamindaris has been established by a long course of decisions before the introduction of the Madras Estates Land Act. In this connection, it is sufficient to refer to *Venkatanarasimha Naidu* v. *Dandamudi Kotayya*(1), as the Land Estates Act has now introduced a statutory presumption in favour of zamindar's tenants.

As regards agraharams and whole inams, which, if the agraharamdar or inamdar does not own the kudivaram, will now fall under section 3, clause 2 (*d*) of that Act, three of the most recent decisions dealing with agraharams in the Kistna district are reported, *Venkata Narasimha Appa Rao* v. *Subba Reddi*(2), *Narasimhacharyalu* v. *Ramabrahmam*(3), *Virabhadrayya* v. *Sonti Venkanna*(4). The appellants rely on the decisions in

(1) (1897) I.L.R., 20 Mad., 299. (2) (1913) 24 M.L.J., 655.
(3) (1913) 24 M.L.J., 658. (4) (1913) 24 M.L.J., 659.

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Rajaram Rao v. *Sundaram Iyer*(1), and in *Lingayya* v. *Venkataratnam* (unreported)(2), *Marapu Tharalu* v. *Telukula Neelakanta Behara*(3), and *Virabhadrayya* v. *Sonti Venkanna*(4), as being in their favour. In *Marapu Tharalu* v. *Telukula Neelakanta Behara*(3), it was held that the presumption in favour of zamindari tenants could not be extended to the case of inamdars, whose position materially differed from that of zamindars. The learned Judges who decided that case, BODDAM and WALLIS, JJ., stated reservedly that *as the case then stood* they were not prepared *necessarily* to apply the same presumption to persons becoming tenants to inamdars. The Estates Land Act must be taken to have altered the position as regards whole inams also and with all deference to the opinion of those learned Judges we think that this decision can therefore no longer be taken as an authority for the general proposition that there is a presumption that the tenants of inamdars have no occupancy rights. In *Indety China Nagadu* v. *Potu Konchi Venkatasubbayya*(5), an observation occurs that there is no presumption that an inam was granted to a person not owning the kudivaram, whatever may be said as to there being a presumption that the inam was only a grant of the land revenue. The onus was placed on the defendant to show that the village came within section 3, clause (*d*) of the Act. In *Venkataraghavayya* v. *Ramakrishnayya* (unreported) (6) the Court declared that there was no presumption that an inamdar was the owner of both kudivaram and melvaram rights in the inam. In this respect the decision in *Srinivasa Chetti* v. *Nunjunda Chetti*(7), was followed. That case related to a mittadar, and it was held that he must prove that he had kudivaram as well as melvaram before he could treat the tenancy as one from year to year. In *Venkatacharlu* v. *Kandappa*(8), in an ejectment suit the burden was thrown on the inamdar of proving that under the terms of his tenancy he had a right to eject his tenant. In *Narasimhulu* v. *Narsimhulu*(9), the principle was recognised with reference to section 13 (i), (ii) of Act III of 1895 and the preamble to Madras Act, VIII of 1869 that inams

(1) (1910) M.W.N., 566.
(2) Second Appeal No 661 of 1903.
(3) (1907) I.L.R., 30 Mad., 502.
(4) (1913) 24 M.L.J., 659.
(5) (1910) M.W.N., 639.
(6) Appeal No. 137 of 1903.
(7) (1881) I.L.R., 4 Mad., 174.
(8) (1890) I.L.R., 15 Mad., 95.
(9) (1906) 16 M.L.J., 333.

are *primâ facie* to be taken as assignments of the melvaram right only. For the purposes of that Act the above-mentioned section contains a special proviso reserving the jurisdiction of Civil Courts over suits for the recovery of the land itself.

In *Narasimhacharyalu* v. *Ramabrahmam*(1), a presumption was said to arise that an agraharamdar who obtained his inam from the Nuzvid zamindar had only the melvaram rights. In *Venkata Narasimha Appa Rao* v. *Subba Reddi*(2), in the absence of evidence that the inam grant included the kudivaram or that the inamdar was himself the owner of the kudivaram at the time the inam was granted, it was held that an agraharam village was an estate within the meaning of section 3 of the Estates Land Act. The learned Judges observed that a Brahman was not likely to have been a cultivating tenant, an observation which applies to the present case. The decision in *Virabhadrayya v. Sonti Venkanna*(3), *related to* a sarva agraharam granted by a Nuzvid zamindar and treated as *lakkiraj* at the settlement and excluded from the zamindari and afterwards enfranchised at the inam settlement. On the facts of that case both the Courts came to a concurrent finding that kudivaram and melvaram rights had always belonged to the agraharamdars and their predecessors in title. The judgment admits the difficulty arising from the onus falling on different parties for different purposes. We feel no doubt that the burden of proving that the Court has no jurisdiction to try the suit will fall on the party which seeks to oust the Court's jurisdiction, but where in the absence of conclusive evidence one way or the other, neither side is in a position to show where the jurisdiction lies, the natural presumption which Courts have recognized about grants from the Crown being grants of revenue only, comes into play and will have the effect of shifting the onus to the party to whom it is disadvantageous. In *Suri Venkata Subbaraya Sastri* v. *Darappareddi Kiristnaiya*(4), the onus was placed on the plaintiff in a suit for ejectment by an inamdar to prove his title to eject. In that case the defendants (vendors) came into possession on condition of paying the arrears. In *Appa Rau* v *Subbanna*(5), the presumption laid down by a course of decisions was

(1) (1913) 24 M.L.J., 656 (2) (1913) 24 M.L.J., 655.
(3) (1913) 24 M.L.J., 659. (4) (1910) 20 M.L.J., 526.
(5) (1891) I.L.R., 13 Mad., 60.

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stated to be that a pattadar or ryot in a mitta was entitled to continue in possession so long as he regularly paid rent and had a saleable interest. In *Lingayya* v. *Venkataratnam* (unreported)(1) a presumption was raised, where the occupancy right was not found, that the tenancy was from year to year, but it does not appear from the judgment what was the nature of the holding. Those three as well as the three decisions—*Narasimhacharyalu* v. *Ramabrahmam*(2), *Venkata Narasimha Appa Rao* v. *Subba Reddi*(3) and *Virabhadrayya* v. *Sonti Venkanna*(4)—are all cases from the Kistna district. Each of these authorities must be considered in the light of the facts and findings of the particular case. *Nukanna* v. *Sanyasi Naidu* (unreported)(5) was a case of a *Darmilla inam* (or inam granted by zamindar after permanent settlement) which was held to be part of an estate and it followed therefrom that the Civil Courts had no jurisdiction under the Estates Land Act. This, apparently, was a case falling under section 3, clause 2 (*e*).

In *Rajaram Rao* v. *Sundaram Iyer*(6) there is only a finding by the Subordinate Judge of Tanjore that the Tanjore Palace estate had ceased to be an estate within the meaning of the Act.

As regards minor inams in the agraharam, it is argued that as between the minor inamdar and the tenant none of the presumptions either in the Estates Land Act or otherwise apply. But we are clearly of opinion that the agraharamdar could not have granted more than what he had to give, and therefore, if he did not possess the kudivaram, it follows that the minor inamdar also did not have it. This is pointed out in *Madidu Yerrayya* v. *Yadulla Kangali Naidu*(7), in these words: "If the plaintiffs' inam were in a zamindari they could not be in a better position as regards the right to eject the defendant than the zamindar who created the inam." Similar observations occur in *Sriramulu* v. *Srinivasacharlu*(8), to the effect that an inamdar stands in no better position than the zamindar if the inam is carved out of the zamindar's interest; also in *Bhadrayya* v. *Bapayya*(9). The position in this suit of the tenants under the minor inamdars appears to be stronger than that of the other

(1) Second Appeal No. 561 of 1908
(2) (1913) 24 M.L.J., 656.
(3) (1913) 24 M.L.J., 655.
(4) (1913) 24 M.L.J., 659.
(5) Second Appeal No. 168 of 1912.
(6) (1910) M.W.N., 566.
(7) (1911) I.L.R., 34 Mad., 246 at p. 247, s.c., (1910) 20 M.L.J., 764.
(8) Second Appeals Nos. 705 to 714 of 1909.
(9) (1911) 21 M.L.J., 803.

tenants of the agraharamdars, and the inamdar must show that he let in the defendants as tenants at the beginning of their occupation [*vide Parvataneni Venkatramiah* v. *Parvataneni Narayudu*(1)]. On the whole we consider that the view taken by the District Judge of the legal presumptions arising in the case is correct.

On the third contention that the plaintiffs have acquired the kudivaram rights in these lands it was held in *Ganpatrav Trimbak Patwardhan* v. *Ganesh Baji Bhat*(2), that a saranjamdar or inamdar might acquire occupancy rights by cultivating unoccupied land himself or through tenants. This principle corresponds to the statutory provision in the exception to section 8. We are not prepared to accept the appellant's contention that section 6 (2) of the Estates Land Act was intended only to apply to zamindaris, nor am I disposed to place a narrow interpretation on the word "acquired" in the exception to section 8 so as to exclude acquisition by surrender or abandonment. The second clause of section 6 simply excludes that form of acquisition in whole inam villages for the purposes of that particular clause. In my opinion, this exception must be read with section 6, clause 1, where the word "acquired" occurs again, and with section 3 (7), which gives ten years for a land to be permanently uncultivated or let without occupancy rights as the limitation period which must elapse before rights can be thus 'acquired' by the landholder. An inamdar apparently may acquire kudivaram rights by transfer, succession or otherwise, *e.g.*, by purchase at any time, but a zamindar's acquisition by such methods is subject to the restrictions contained in clauses 1 to 4 of section 8. It does not appear from the findings on the facts of this case that the plaintiffs have thus acquired the kudivaram right in any particular holding concerned in these suits. The presumption, therefore, is that laid down in *Cheekati Zamindar* v. *Ranasooru Dhora*(3), that new occupants of waste or abandoned holdings enjoy on the same terms as those under which prior occupants held.

The result will be as stated in my learned brother's judgment.

(1) (1912) 12 M.L.T., 313

(2) (1886) I.L.R., 10 Bom., 112 (3) (1900) I.L.R., 23 Mad., 318.

APPELLATE CIVIL.

Before Mr. Justice Sankaran Nair and Mr. Justice Tyabji.

1913. September 25 and 26 and October 10.

MAHABOOB SARAFARAJAWANT SRI RAJA PARTHASARATHY APPA RAO BAHADUR ZAMINDAR GARU (PLAINTIFF), APPELLANT,

v.

THE SECRETARY OF STATE (DEFENDANT), RESPONDENT.*

Madras Regulation (XXV of 1802), sec 4—Pre-settlement inams—Lands held on service tenure in addition to payment of quit-rent—Service to Zamindar—Service quasi-*public before settlement—Its discontinuance thereafter—Resumption by Government, right of—Presumption—Onus of proof, as to exclusion prior to settlement—Evidence Act (I of 1872), ss. 106 and 114, ill. (g).*

Where lands in a zamindari were pre-settlement inams granted on condition of rendering personal service to the zamindar and paying a favourable quit-rent, and the Government resumed such inams on the ground of discontinuance of such services,

Held, that as the grant was for services purely personal to the zamindar, *primâ facie* the inams formed part of the assets of the zamindari and the zamindar, and not the Government, was entitled to resume.

Held, also that where such service was rendered in addition to quit-rent, the proviso to section 4, Regulation XXV of 1802, had no application.

The onus of proving that such lands were excluded from the assets of the zamindari and that the Government had the right to resume lay on them.

Per TYABJI, J —The Government having special means of knowledge as to exclusion or otherwise, of these lands, at the settlement, from the zamindari, the burden was upon them according to section 106 of the Evidence Act and the necessary presumption arising from the non-production of the records in their possession should be drawn against them

SECOND APPEAL against the decree of F. A. COLERIDGE, the Acting District Judge of Kistna at Masulipatam, in Appeal No. 503 of 1911, preferred against the decree of P. R. GOVINDA RAO, the Acting District Munsif of Bezwada, in Original Suit No. 512 of 1909.

The plaintiff (a zamindar), alleged that the suit inams formed part of the plaintiff's estate and were originally granted to the ancestors of the present holders on a tenure of personal service to the Zamindar, such as following him with arms in the journeys, watching his treasury, etc. The inamdars

* Second Appeal No. 1416 of 1912.

ceased to render any service. Thereupon the Government resumed these inams in 1907 and granted pattas to persons in possession of these lands. The suit was brought by the plaintiff (the Zamindar) holding a permanent sanad, for a declaration that the reversionary right of resumption belonged to him and that the action of the Government in resuming them was illegal and void and that the Government had no right to enfranchise them. The Court of First Instance decreed the suit. The Lower Appellate Court came to the conclusion that the suit lands fell within the proviso to section 4 of Regulation XXV of 1802 and reversed the decree of the Court of First Instance.

Plaintiff preferred this Second Appeal.

S. Srinivasa Ayyangar for the appellant.

The *Government Pleader* for the respondent.

SANKARAN NAIR, J.

SANKARAN NAIR, J.—The question for decision is whether the reversionary right in inams granted prior to the permanent settlement for services to be rendered by the inamdars to the Zamindar, in addition to the payment of quit-rent is vested in the Government or in the Zamindar. The suit is brought by the plaintiff, a Zamindar holding a permanent sanad. His case is that the lands in suit were granted in inam to the ancestors of the present holders on condition of rendering personal service to the Zamindar, such as following him with arms in the journeys, watching his treasury, etc. He alleges the inam forms part of the zamindari estate and the Government has no right to the same. According to him, the full rental value of the inams and not merely the rent which was paid thereon was included in the zamindari at the time of the permanent settlement and his contention is that no additional assessment can be imposed by the Government. The Government have resumed these inams in 1907 and granted pattas to the persons in possession of those lands. He contends that such resumption is illegal. The contention of the Secretary of State for India is that inams were pre-settlement inams and that the reversionary right in them therefore vests in the Government and, as the inamdar has ceased to render any services to the Zamindar, they were rightly resumed by the Government who assessed them and assigned them to the present holders thereof on ryotwari patta.

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Where lands in a zamindari were pre-settlement inams granted on condition of rendering personal service to the zamindar and paying a favourable quit-rent, and the Government resumed such inams on the ground of discontinuance of such services,

Held, that as the grant was for services purely personal to the zamindar, *primâ facie* the inams formed part of the assets of the zamindari and the zamindar, and not the Government, was entitled to resume.

Held, also that where such service was rendered in addition to quit-rent, the proviso to section 4, Regulation XXV of 1802, had no application.

The onus of proving that such lands were excluded from the assets of the zamindari and that the Government had the right to resume lay on them.

Per TYABJI, J.—The Government having special means of knowledge as to exclusion or otherwise, of these lands, at the settlement, from the zamindari, the burden was upon them according to section 106 of the Evidence Act and the necessary presumption arising from the non-production of the records in their possession should be drawn against them.

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SANKARAN NAIR, J.

There is no denial in the written statement that the lands were granted on inam for rendering services to the Zamindar as alleged by the plaintiff. The Munsif passed a decree in favour of the plaintiff. That decree has been reversed by the District Judge, and this is an appeal from his decision.

It appears from the inam record, Exhibit III, that the services rendered by the inamdars consisted of guarding the revenue collected in the village by the Zamindar, accompanying the remittances to the Zamindar's residence and attending on him at his residence; and it appears that for these two latter they also received some batta. It is said in the written statement filed by Government that "as the inamdars ceased to render any service, they (the inams) were rightly resumed by Government." Now it is not explained how the failure to render the services above enumerated, and it is not alleged that there were other services to be rendered, gave the Government a right to resume the inams. Neither the Government nor any portion of the community were interested in those services. They do not suffer in any way by their non-performance. The person injured is the plaintiff, and he is entitled to take steps to have the services performed by the inamdars or to get them performed by others and get damages from them. If the inams are resumable, *primâ facie* therefore he is the person entitled to resume them; the written statement discloses no valid answer to this objection. However the lower Appellate Court has not considered this question. What was argued before the District Judge apparently was whether these were lands excluded from the permanent settlement under section 4 of Regulation XXV of 1802. In Second Appeal it is contended on behalf of the Appellant that the question is concluded by authority. In Second Appeal No. 73 of 1908, *Raja Venkatarangayya* v. *Appalarazu*(1), the case relied on, the facts were these; the lands in question were given by the Zamindar for minstrel service in 1718. On the death of one of the service holders the Zamindar resumed these lands. In 1900 the Government imposed an assessment alleging that they were *lakhiraj* lands in 1802 at the time of the permanent settlement and therefore that he had no title thereto. The learned Judges MILLER AND MUNRO, JJ., held that on the evidence in the

(1) (1910) 20 M.L.J., 79.

the inam was granted by the Zamindar before the permanent settlement for private services rendered to him and on condition that they should be held so long as the services were continued to be rendered. They were of opinion no presumption arose under these circumstances that the land was *lakhiraj* or exempt from payment of public revenue and therefore excluded from the permanent settlement with the Zamindar. They referred to the observations of the Chief Justice in *Rajah Nilmoney Singh Deo* v. *The Government*(1), that, "the Government would not have allowed any portion of their Revenue in consideration of private services to be rendered to the zemindar." This observation was quoted without disapproval by the Privy Council in *Rajah Nilmoni Singh* v. *Bakranath Singh*(2), and they pointed out that holding lands free of money rent to the Zamindar did not make them exempt from the payment of 'public revenue' as used in section 4 of Regulation XXV of 1802. According to these cases, therefore, when lands were held on condition that the holders were to render certain services which were purely personal to the Zamindar and in which the Government were not interested, *i.e.*, when such services had nothing to do with police or magisterial duties, or did not concern the community or the villagers, then the Government were entitled to include in the zamindari assets for settling the peshkash the income from the lands allowed in lieu of such services which were not allowed for in the settlement; there is therefore no presumption they did not do so or treated the land as free from payment. In the case before us the Judge states that this cannot be regarded as personal service to the Zamindar in consideration of which the Government would not allow any portion of their revenue. It may be that prior to the permanent settlement these were *quasi* public duties, as it was the Zamindars who collected the revenue for the Government but from the time of the settlement they ceased to be such and it was not necessary for the Government that those services should any longer continue to be done by the Zamindars, because in the performance of those services the Government or any section of the community were not interested and there is no reason for the Government continuing any allowances for these duties.

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(1) (1866) 6 W.R., 121. (2) (1882) 9 I.A., 104 at p. 121.

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SANKARAN NAIR, J.

The District Judge also holds that the decision in *Raja Venkatarangayya* v. *Appalarazu*(1), does not apply to the case, presumably for the reason that in addition to rendering the services the holders of land had also to pay a rent of Rs. 6 per putti. The point for consideration in such cases is whether the Government only included the income actually received by the Zamindar from these lands in the estate of the Zamindar when they fixed the peshkash. If they included the whole income, then the Government are admittedly not entitled to enfranchise the land. If they included only Rs. 6 which was the rent then actually paid by the inamdar, then the Government would be entitled to do so. The question is purely one of fact. As pointed out by the Chief Justice in the passage above extracted, the Government would not have allowed any portion of their revenue for services to be rendered to the Zamindar, and, as a rule, the reports of the various officers when the permanent sanads were granted show that this rule was followed, and, whenever any reductions were made by the Zamindar from the total income derivable from the zamindari for payment to peons and other persons who were rendering services to the Zamindar, in the continuance of which the public were not interested, they were disallowed. The reports on which the peshkash in question was fixed are with the Government and they do not produce them. About 1860 an Inam Commissioner was appointed to enfranchise the inams in which the Government have a reversionary right, and the fact that in the course of that enquiry the Government decided not to enfranchise these inams in question on the ground that they were not entitled to a reversion is strong evidence against them. The Judge states:— "It seems to me evident that at the time of settlement, Government would have exempted all lands that were paying only a favourable rent when arriving at the total income of the zamindari; for, if they did not, it would amount to this, that if they were taking a two-thirds share in the income of the zamindari on all such lands, if they included them in the income, they would only get one-fourth of the nominal rent, whereas the Zamindar would get his one-third of the nominal rent and all of the service to pay for which the rent had been reduced.

(1) (1910) 20 M.L.J., 728.

"For example in these cases if the real rent was Rs. 18 a putti and it was reduced to Rs. 6 quit-rent, Government would get only Rs. 4 as its share instead of Rs. 12 whilst the Zamindar would get the full service just as before or, in other words, Government would be paying two-thirds of his servants' wages and he only one-third though Government would be getting no benefit from the service." This begs the question in issue which is whether the Government took Rs. 18 or only Rs. 6 for settlement purposes. The presumption is they took Rs 18. The usage of more than a century is in support of that view. Even otherwise the practice of a century is not to be set aside by a theory as to the Government procedure in 1802.

The Judge also gives another reason. I will give it in his own words:—"It has been argued that the word 'only' coming before 'favourable quit-rent' means that the lands must pay quit-rent and nothing else and as in these cases there was service rendered as well, they would not fall within the exempted lands. This is too much hair splitting to appeal to me and I need merely remark that all grants of inams on favourable quit-rent imply some service to be rendered. Also if we are to go into the very words I do not think that in 1802 when English was at its best that even a draftsman of a legal enactment would have thought of including 'rendering of services' under the word 'paying'."

The answer to this is contained in the words of the section referring to the lands. The words run thus: "Of all other lands paying only favourable quit-rents." In my opinion this obviously does not include lands which are held on condition of paying a certain rent and of rendering certain services in addition to that rent. In such a case the land is not held on a favourable quit-rent.

For these reasons I reverse the decree of the Court below and restore that of the District Munsif with costs payable by the first defendant in this and in the Lower Appellate Court.

TYABJI, J.

TYABJI, J.—The question involved in this appeal is whether the Government is entitled to resume the lands referred to in the plaint, on the ground which is thus stated in the written statement of the Secretary of State (the first defendant) :—

"The inams being pre-settlement grants, the reversionary right in them vests in Government and as the inamdars ceased

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to render any service, they were rightly resumed by Government, assessed and assigned to the present enjoyers on ryotwari patta."

If the lands were included as part of the plaintiff's zamindari in the permanent assessment made in accordance with Regulation XXV of 1802, then it is admitted that the Government has no right to resume the lands.

The Government contend that the lands were not so included, having been excluded under section 4 of the said Regulation. The part of section 4 at present material is as follows:—

"4. The Government having reserved to itself the entire exercise of its discretion in continuing or abolishing, temporarily or permanently, the articles of revenue included, according to the custom and practice of the country, under the several heads of . . . all other lands paying only favourable quit-rents —the permanent assessment of the land-tax shall be made exclusively of the said articles now recited."

It is admitted that "the suit lands were inams granted by the ancestors of the plaintiff" (see the District Judge's judgment, paragraph 2). It would therefore seem to be for the Government to establish that prior to the permanent settlement the lands had been so severed from the plaintiff's zamindari as no more to form part of it. That fact can be established by the production of the records of the permanent settlement, which would show almost conclusively whether the lands had been assessed as part of the zamindari, or had been excluded as "lands paying only favourable quit-rents" (under section 4). Those records have not been adduced in evidence by the Government. It was at one stage of the argument suggested on behalf of the Government that there might have been some difficulty in the production of those records; but that suggestion had to be abandoned, especially in view of the fact referred to by my learned brother in the course of the arguments that a considerable portion of the records has been printed as part of the records in another appeal. Under these circumstances, it seems difficult for the respondent to withstand the applicability of section 106 of the Evidence Act which lays down that "When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him," and illustration (g) to section 114 to the effect that "The Court may presume that

evidence which could be and is not produced would, if produced, be unfavourable to the person who withholds it"

Notwithstanding these circumstances, the District Judge has held, "that the suit lands fall within the exempted lands mentioned in section 4 of Regulation XXV of 1802." He came to that conclusion in a carefully written judgment, but it seems to me that he erred in drawing the legal conclusions from the facts which were before him; and that consequently the error was of such a nature that we ought to interfere in second appeal.

In holding that the lands in question fall within the description of 'lands paying only favourable quit-rents' in section 4, the learned District Judge states that he "can find nothing to distinguish between quit-rent to Government and quit-rent to the Zamindar in section 4." But the answer to the question to whom such rent is payable seems to me to have an important bearing on the question whether or not the lands form part of the zamindari. When the quit-rent is favourable there must be some circumstance such as the rendering of services, or dedication to a charitable or religious object which is favoured by the Government, and the existence of which circumstance forms so to say the complement of the favourable rent: and the two together (viz, the favourable rent and the rendering of service or other circumstance of a similar nature) make up that total consideration which in ordinary cases is represented solely by rent. In cases therefore where the land is held in consideration partly of a favourable quit-rent and partly of services rendered by the holder of the land, if it is not clear whether the services are to be rendered for the benefit of the Government or of the Zamindar, it seems not unreasonable to look to the destination of the rent for discovering where the services are due. There may be cases where one of the two portions, into which the consideration proceeding from the holder of the land is so split up, becomes due to the Government and the other to the zamindar. But such cases would in the natural course of events be rare In my view of the case, therefore, the learned District Judge erred in overlooking the significance of the fact that the rent was payable not to the Government but to the zamindar.

The learned District Judge next expresses the opinion that all lands paying a favourable quit-rent to the Zamindar in consideration of services rendered to him must have been exempted

to render any service, they were rightly resumed by Gov[illegible]ment, assessed and assigned to the present enjoyers on ry[illegible] patta."

If the lands were included as part of the plaintiff's zamir[illegible] in the permanent assessment made in accordance with Re[illegible]tion XXV of 1802, then it is admitted that the Government [illegible] no right to resume the lands.

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"4. The *Government* having *reserved to itself* the entire exercise of its discretion in continuing or abolishing, *temporarily* or permanently, the articles of revenue included, according to the custom and practice of the country, under the several heads of . . . all other lands paying only *favourable quit-rents* —the permanent assessment of the land-tax shall be made exclusively of the said articles now recited."

It is admitted that "the suit lands were inams granted by the ancestors of the plaintiff" (see the District Judge's judgment, paragraph 2). It would therefore seem to be for the Government to establish that prior to the permanent settlement the lands had been so severed from the plaintiff's zamindari as no more to form part of it. That fact can be established by the production of the records of the permanent settlement, which would show almost conclusively whether the lands had been assessed as part of the zamindari, or had been excluded as "lands paying only favourable quit-rents" (under section 4). Those records have not been adduced in evidence by the Government. It was at one stage of the argument suggested on behalf of the Government that there might have been some difficulty in the production of those records; but that suggestion had to be abandoned, especially in view of the fact referred to by my learned brother in the course of the arguments that a considerable portion of the records has been printed as part of the records in another appeal. Under these circumstances, it seems difficult for the respondent to withstand the applicability of section 106 of the Evidence Act which lays down that "When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him," and *illustration (g)* to secti[illegible]n 114 to the effect that "The Court may presume that

evidence which could be and is not produced would, if produced, be unfavourable to the person who withholds it."

Notwithstanding these circumstances, the District Judge has held, "that the suit lands fall within the exempted lands mentioned in section 4 of Regulation XXV of 1802." He came to that conclusion in a carefully written judgment, but it seems to me that he erred in drawing the legal conclusions from the facts which were before him; and that consequently the error was of such a nature that we ought to interfere in second appeal.

In holding that the lands in question fall within the description of 'lands paying only favourable quit-rents' in section 4, the learned District Judge states that he "can find nothing to distinguish between quit-rent to Government and quit-rent to the Zamindar in section 4." But the answer to the question to whom such rent is payable seems to me to have an important bearing on the question whether or not the lands form part of the zamindari. When the quit-rent is favourable there must be some circumstance such as the rendering of services, or dedication to a charitable or religious object which is favoured by the Government, and the existence of which circumstance forms so to say the complement of the favourable rent · and the two together (viz., the favourable rent and the rendering of service or other circumstance of a similar nature) make up that total consideration which in ordinary cases is represented solely by rent. In cases therefore where the land is held in consideration partly of a favourable quit-rent and partly of services rendered by the holder of the land, if it is not clear whether the services are to be rendered for the benefit of the Government or of the Zamindar, it seems not unreasonable to look to the destination of the rent for discovering where the services are due. There may be cases where one of the two portions, into which the consideration proceeding from the holder of the land is so split up, becomes due to the Government and the other to the zamindar. But such cases would in the natural course of events be rare. In my view of the case, therefore, the learned District Judge erred in overlooking the significance of the fact that the rent was payable not to the Government but to the zamindar.

The learned District Judge next expresses the opinion that all lands paying a favourable quit-rent to the Zamindar in consideration of services rendered to him must have been exempted

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from the assessment; for otherwise the Government would lose the land revenue in respect of that portion of the rent which is represented by the services. This argument assumes that the assessment is based entirely on the rent received by the Zamindar, irrespective of a consideration of such circumstances as might indicate that the rent so received does not represent the full rental value of the land. For this assumption I find no warrant either in the materials before us or in the methods of assessment usually adopted by the Government. So far as the materials before us warrant any conclusion on the point, there is no reason to suppose that lands paying a favourable rent to the Zamindar, should be assessed otherwise than on their full rental value: the rental value would be determined on a consideration of circumstances some of which would have no reference to the rent paid in money to the Zamindar: compare *Rajah Nilmoney Singh Deo* v. *The Government*(1); *Rajah Nilmoni Singh* v. *Bakranath Singh* (2); *Raja Venkatarangayya* v. *Appalarazu*(3). If on the other hand such lands are burdened with services due to the Government and not to the Zamindar in his personal capacity, then the zamindari would presumably be taxed only in respect of its interest in the lands, viz., the favourable rent.

Finally the District Judge has come to the conclusion that the services due from the lands were quasi-public duties, and not such private services due to the Zamindar as the Court had to deal with in *Raja Venkatarangayya* v. *Appalarazu*(3). This decision is opposed to the view expressed by the Inam Commissioners in 1859. If these services were due to the Government, some explanation ought to have been forthcoming of the circumstance that for over a century these lands were allowed by the Government to be held on a favourable quit-rent, though the services that were due from them were no more required by Government. The District Judge says that prior to the permanent settlement the Zamindars were collectors of revenue, and that the services due from the holders of the lands in the present case were in respect of collection of revenue and they fell into abeyance when the Government itself began to collect revenue Had this been so then, the case would have been

(1) (1860) 6 W R, 121. (2) (1882) 9 I.A, 104 at p. 121.
(3) (1910) 20 M.L.J, 723.

parallel to that contemplated in section 6 of Regulation XXV of 1802 which provides for the resumption of lands held on condition of performing police duties. The fifth report to the Circuit Committee to which the District Judge refers was not relied upon before us. On the materials before us I see no ground for supporting the conclusion that the services were of a public nature.

It seems to me, therefore, with every respect to the learned District Judge, that he has proceeded on entirely erroneous assumptions and that the conclusions drawn by him from the documents before him were opposed to law. The appeal must therefore, in my opinion, be allowed and the decree of the District Munsif restored with costs throughout.

APPELLATE CIVIL.

Before Mr. Justice Miller and Mr. Justice Spencer.

1913. October, 10.

R. V R. P. CHINNATHAMBIAR AVARGAL, ZAMINDAR OF SIVAGIRI (DEFENDANT, APPELLANT IN ALL),

v.

MICHAEL *alias* SANKARALINGAM AND FOUR OTHERS (PLAINTIFFS), RESPONDENTS *

Madras Estates Land Act (I of 1908), ss. 54 and 78, cl. (2)—Tender of patta by a landlord to his tenant at his house—Tenant, refusal by—Subsequent affixture of patta to the tenant's house, not to his land—Tender, validity of—Methods of tender under the Act—Delivery of patta, meaning of—Essentials of a valid tender under the Act.

Where a patta was offered by a landlord to his tenant at his house but the tenant refused to receive it, and thereupon the patta was affixed to the tenant's house but not to the land in his holding;

Held, that there was no valid tender of patta to the tenant as required sections 54 and 78, clause (2) of the Madras Estates Land Act (I of 1908)

An offer of a patta to the ryot is not delivery to him When once an offer of patta is made and refused, the tender by delivery cannot be effected, and it then becomes necessary to affix the patta to the land in the ryot's holding. If this is not done, there is no valid tender of patta

Meaning of 'tender' and 'deliver' considered

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* Second Appeals Nos 2250 to 2254 of 1912.

CHINNA-THAMBIAR v. MICHAEL.

SECOND APPEAL against the decree of F. D. P. OLDFIELD, the District Judge of Tinnevelly, in Appeals Nos. 156, 158, 160, 159, 157, of 1912, respectively, preferred against the decree of the Revenue Divisional Officer of Koilpatti, in Summary Suits Nos. 112, 114, 116, 115 and 113 of 1911, respectively.

The facts of the case are found in the judgment of SPENCER, J.

C. P. Ramaswami Ayyar, A. Duraiswami Ayyar and *M. Subbaraya Ayyar* for the appellant.

V. Viswanatha Sastriyar for the respondents.

MILLER, J.

MILLER, J.—I cannot accede to the contention that section 54 permits the landlord to select a method of tender which is not one of those prescribed by the section itself and to treat the provisions of section 78 (2) as merely affording him a way of proving that he has made a tender. That might have been possible under section 7 of the Act of 1865, which enacted what should be deemed sufficient proof of tender, but is not possible under the present Act which enacts how tender may be effected. The word 'may' indicates that the landlord can choose between the methods provided but not that he is at liberty to select some other method. It would require clearer language to warrant the construction contended for by the appellant, reading sections 54 and 78 (2) of the Act together, tender of patta may be made by delivery to the ryot. The Civil Procedure Code, Order V, rule 16, seems to draw a distinction between tender and delivery, but, no doubt the legislature is entitled to prescribe delivery if it so pleases as necessary to complete a tender.

The question is whether when a patta is offered and refused it has been sufficiently tendered.

The patta here was offered and refused and was then affixed to the ryots' house. Section 78 (2) does not provide for affixing a patta to a house but only to the land when service by delivery cannot be effected.

If then this offer and refusal is not sufficient tender within the meaning of the Act, the affixing of the patta to the house does not seem to be any use to the landlord though it is not improbable that the omission from the present Act of that method of tender was intended to be for his benefit.

So, if the patta was validly tendered in this case, it can be only on the ground that it was delivered to the ryot. It is not said that it was delivered to any one on his behalf.

Now the landlord has not merely to deliver himself of the patta, he has to deliver it to the ryot, and giving the widest meaning I can to the word 'deliver,' I do not see that it is possible to hold that an offer of the patta to the ryot is delivery to him.

CHINNATHAMBIAR v. MICHAEL.

MILLER, J.

The Code of Civil Procedure has, wisely I venture to think, provided expressly for this case of tender and refusal of a summons (Order V, rule 17). In the Estates Land Act, there is no express provision in section 78 (2), and I agree with the District Judge that it is necessary to hold that, when once offer is made and refused, the tender by delivery cannot be effected, and it then becomes necessary to affix the patta to the land. If this is not done, there is no valid tender of the patta.

The appeals fail in my opinion and must be dismissed with costs.

SPENCER, J.

SPENCER, J.—Second Appeal No. 2280 of 1912 is a suit brought under section 112 of the Madras Estates Land Act objecting to the *attachment by a landlord of the lands of his tenant.* The plaintiff alleged *inter alia* that no patta was tendered. An objection was taken at the trial that, because the patta was affixed to the house of the plaintiff instead of the land as required by sections 54 and 78, clause 2, of the Estates Land Act, the tender was illegal. The Deputy Collector found, that, when the Estate servants went to the pattadar's house with patta, he was present in his house and he refused to receive it and consequently it was affixed to his house. He observed that, in his opinion, there was no necessity for affixing the patta to the land as that was "a course evidently meant to be adopted only in the case of absentee pattadars." He found this issue in favour of the defendant, and the plaintiff failing on the other issue, the suit was dismissed with costs.

In appeal, the District Judge held that a tender or service under section 78 (2) was "not completed by mere physical offering of the patta or notice to the tenant." He held it to be essential that the tenant should either receive it, or if for any reasons he did not receive it, that the requirements of the law as to affixture should be complied with. He agreed with the Lower Court in finding that it had been proved that the patta was tendered to the tenant and affixed to his house as he refused to receive it; but as the patta had been affixed to the plaintiff's house instead of being posted upon the land, he reversed the Lower Court's

CHINNATHAMBIAR v. MICHAEL.

SPENCER, J.

finding on this issue and cancelled the attachment. Both Courts agreed in finding the remaining issue in favour of the defendant.

Section 53 of the Madras Estates Land Act declares, "No landholder shall have power to proceed against a ryot for the recovery of rent by distraint and sale of his moveable property or by sale of his holding under Chapter VI, unless he shall have exchanged a patta and muchilika with such ryot or tendered him such a patta as he was bound to accept or unless a valid patta or muchilika continues in force." Section 54 provides for the tender of patta. It declares: "The tender of a patta may be made to the ryot in the manner provided for the service of notice under subsection 2 of section 78, or if the Collector on the application of the landholder shall so permit, in respect of any estate or any portion of an estate by filing it in the office of the Collector or such other officer as the Local Government may by general or special order direct." Section 78 which deals with the service of written demands on defaulters at the time when distraints are made, provides in sub-section 2 as follows: "The demand and account shall be dated and signed by the distrainer and shall within one year from the date on which the arrear became due be served upon the defaulter by delivering a copy to him or to some adult male member of his family at his usual place of abode provided that it is in the neighbourhood of the land to which the distress refers, or to his authorised agent, or when such service cannot be effected, by affixing a copy of the notice on some conspicuous part of the land to which it refers." Section 112, which deals with the sale of ryots' holdings, provides that a notice of the intention to sell may be served "by delivering a copy to the defaulter or to his authorised agent, or to some adult male member of his family at his usual place of abode, or, if such service cannot be effected, by affixing a copy thereof on some conspicuous part of his last known residence, if he has any within ten miles of the holding or on some conspicuous part of the holding." That these are ampler provisions than those under section 78 may be seen by the fact that section 78 does not provide for affixing a copy of the notice to the defaulter's residence as section 112 does, and section 112 defines when the place of abode is in the neighbourhood by limiting neighbourhood to a distance within ten miles of the holding. We are here concerned in considering, not whether the processes for distraint

and sale were properly effected, but whether there was a proper preliminary tender of patta. In sections 54 and 78 of the present Act the provisions of sections 7 and 39 of Act VIII of 1865 have been to some extent repeated; for section 7 declares a tender of patta "shall be sufficiently evidenced by such proof of service as is provided for by section 39 in the case of notice," and section 39 provides for the service of notice by "delivering a copy to the defaulter or to some adult male member of his family at his usual place of abode, or to his authorised agent, or when such service cannot be effected, by affixing a copy of the notice on some conspicuous part of his last known residence or on some conspicuous part of the land to which it refers." The only apparent differences are the use of the word "shall" instead of "may" in section 7, the insertion of the words in section 39 which allow a copy of the notice to be affixed to the defaulter's *residence and the treatment in section 7 of the prescribed* formalities as evidenciary rather than directory. Under Regulation XXX of 1802, which was the law until Act VIII of 1865 was passed it was necessary for the landholder to offer the patta itself in the presence of witnesses before he could bring a suit to compel its acceptance.

The principal questions for decision here are what meaning is to be attached to the word "delivering" in section 78, and when it may be said to be effected and when it may be said that "such service cannot be effected." In Order V, rule 16 of the Civil Procedure Code, corresponding to section 79 of the Act of *1882 the* words "deliver" and "tender" occur together. *Order* V, rule 17, throws a side light on what is meant in section 78, clause 2 of the Estates Land Act by the words "when such service cannot be effected." It mentions the two contingencies, (1) if the defendant refuses to sign the acknowledgment, (2) if he cannot be found. In both events it becomes necessary to affix a copy of the summons. Now the Estates Land Act contains no provision for the serving officer obtaining the signature of a ryot who refuses the tender of patta, but if we take a refusal to sign as meaning all that a refusal to accept tender means and something more, viewed in this light, section 78 seems to indicate that something else remains to be done by the serving officer beyond merely offering the patta for acceptance.

CHINNA-THAMBIAR v. MICHAEL.

SPENCER, J.

Next, as regards the word "deliver," does it necessarily involve any reciprocal action on the part of another? In the American Cyclopædia of Law and Procedure, volume 13, page 773, I find, "the word 'deliver' has perhaps as many shades of meaning ascertained by judicial interpretation as any other term known to the law." In some connections it "does not imply an act of the will on the part of someone else, nor an acceptance of anything." In Webster's Dictionary the synonyms of "deliver" are stated to be 'give forth, discharge, liberate, pronounce, utter,' and as an example, one who "delivers" a package "gives it forth." Sections 54 and 78 read together show that a tender of patta may be made by "delivering" a copy to the defaulter. Although the serving officer may be said to "give forth" a patta when he delivers it, the section requires that he should deliver it *to the defaulter* and this in my opinion denotes a transfer of possession of the document. The action of delivering here cannot be completed by one person who delivers without involving a reciprocal action of another who receives.

I therefore concur in thinking that this Second Appeal must be dismissed with costs. Though the strictly legal view which the District Judge has taken of the provisions of the Act as they stand has resulted in this case in the landholder losing his remedy by attachment in spite of the finding of two Courts that the ryot was well aware of the tender of patta, hard cases like this will become rare when the provisions of the Act become better understood, for parties will take care to comply with the exact wording of the sections even if the formality of affixing the pattas to the land may entail a journey of some miles from the place of tender. The other appeals follow the result in this appeal.

APPELLATE CIVIL.

Before Mr. Justice Tyabji.

K. NARAYANAN MOOTHAD AND TWO OTHERS (PLAINTIFFS), PETITIONERS,

1913. October 16.

v.

THE COCHIN SIRCAR REPRESENTED BY K. NARAYANA MARAR, DIWAN OF COCHIN NOW REPRESENTED BY A. R. BANERJI, THE PRESENT DIWAN OF COCHIN (FIRST DEFENDANT), RESPONDENT IN ALL.*

Civil Procedure Code (Act V of 1908), sec. 86—Sovereign Prince or Ruling Chief in British India, suit against—Sovereign or private capacity—Suit against him as trustee of certain temples—Rule of international law—Jurisdiction of municipal courts—Waiver.

Under section 86 of the Civil Procedure Code (Act V of 1908), no Sovereign Prince or Ruling Chief can be sued in a court of British India without the previous consent of the Governor-General in Council, whether the suit is brought against him in his sovereign capacity or in his private capacity such as a trustee of a temple in British India.

The Maharaja of Jaipur v. *Lalji Sahai* (1907) I.L.R., 29 All., 379, *Mighell* v. *Sultan of Johore* (1894) 1 Q.B., 149, *Statham* v. *Statham and the Gaekwar of Baroda* (1912) L.R. Pr., 92 and *Chandulal* v. *Awad bin Umar Sultan* (1896) I.L.R., 21 Bom., 351, referred to.

Duke of Brunswick v. *The King of Hanover* (1848) 2 H.L.C., 1, explained.

PETITIONS under section 115 of the Civil Procedure Code (Act V of 1908), to revise the orders of K. IMBICHUNNI NAIR, the Subordinate Judge of South Malabar at Calicut, in Original Suits Nos. 32, 40 and 26 of 1911.

The plaintiff, alleging that he had *saswatom* or perpetual *karaima* right in the plaint mentioned Triprayar Devaswom, situated in British India, instituted this suit in British India against the Cochin Sirkar represented by His Highness the Cochin Rajah's Diwan A. R. Banerji, and six others for a declaration that the defendants have no right to prevent him from discharging his duties in the Triprayar temple and from collecting his emoluments and to suspend him from his office and also to recover damages. The first defendant contended that His Highness the Cochin Rajah is a Sovereign Prince or a

* Civil Revision Petitions Nos. 510 to 512 of 1912.

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Ruling Chief and that the suit was not maintainable against him in the face of the fact, that the consent required by section 86 of the Code of Civil Procedure had been refused by the Government. The Subordinate Judge ordered the name of the first defendant in the case, the Cochin Rajah represented by his Diwan, to be struck off from the plaints, and against the said orders the plaintiff preferred civil revision petitions to the High Court.

T. R. Ramachandra Ayyar and *N. A. Krishna Ayyar* for the petitioners.

C. V. Ananthakrishna Ayyar for the respondent.

TYABJI, J.

TYABJI, J.—The question in this case is whether the Subordinate Judge was right in ordering the name of the first defendant as representing the Rajah of Cochin to be struck off from the record. He made this order because he was of opinion that section 86 of the Civil Procedure Code applied, and that the Rajah of Cochin could not accordingly be sued. It is admitted that the consent of the Governor-General in Council for suing the Rajah of Cochin has not been obtained, and that if the section applies, the Subordinate Judge's order is correct.

It was argued before me however that in this case the Rajah of Cochin was sued not as such Rajah, but as trustee of the temples referred to in the plaint, and that section 86 applies only in cases where a Prince or Chief is sued in his capacity as such Prince or Chief. I am unable to accede to this argument. I see nothing in section 86 to warrant a Prince or Chief being brought on the record except on the terms referred to in section 86. The section seems to me to be exhaustive with reference to the question when such a Chief or Prince can be brought on the record against his wish. I see nothing to support the contention that the question whether or not a Chief or Prince can be brought on the record depends upon the relief sought or upon the question whether the acts alleged to constitute the cause of action are of a sovereign or of a private character. It seems to me that section 86 definitely lays down in which cases Municipal Courts have the power to adjudicate upon any matters whatsoever as against such Princes or Chiefs as are referred to in the section. It was held in *The Maharaja of Jaipur* v. *Lalji Sahai*(1) that the

(1) (1907) I.L.R., 29 All., 379.

Governor-General in Council has no power to give his consent to a suit except in the three instances specifically referred to in clauses (*a*), (*b*) and (*c*) of the section and that if leave is granted in cases not falling within any of the three clauses, Courts of Law are required to dismiss the suit as against the Prince or Chief.

As the question is of importance, I think it necessary to refer to the authorities, in order to explain rather than to support the view that I have taken of the construction of section 86, for the section seems to me to be clear in itself.

The general rule of International Law is thus stated in Westlake on Private International Law "Foreign States, and those persons in them who are called sovereigns, whether their title be emperor, king, grand-duke, or any other, and whether their power in their states be absolute or limited, cannot be sued in England on their obligations, whether *ex contractu, quasi ex contractu,* or *ex delicto*:" 5th edition (1912), page 271. The apparent exceptions to that general rule, so far as the English Courts are concerned, are stated in the same book, and in *Mighell* v. *Sultan of Johore*(1).

It seems to me that section 86 of the Civil Procedure Code lays down the same general rule with certain exceptions specified and clearly defined in the section itself,—which exceptions are a legislative extension of the jurisdiction ordinarily exercised by Municipal Courts, and are made to depend upon the consent of the Governor-General in Council being previously obtained.

The general rule of International Law just referred to by me was lately re-stated in *Statham* v. *Statham and the Gaekwar of Baroda*(2). In that case the question was whether His Highness the Maharaja Gaekwar of Baroda could be made a party to proceedings in the Courts of England against his will, and it was laid down in the clearest terms that that course could not be adopted. It was not alleged that the question whether or not the Gaekwar could be sued in England depended upon the nature of the cause of action, or upon whether he was purported to be sued in his private or in his sovereign capacity, and yet these contentions could have been raised on the facts in that case if they could have furnished any answer to the objection.

(1) (1894) 1 Q B, 149 at p. 156. (2) (1912) L.R. Pr, 92.

NARAYANAN MOOTHAD v. THE COCHIN SIRCAR. —— TYABJI, J.

The cases relied upon by the learned pleader who appeared for the petitioner seem to me to furnish very little assistance for the decision of the point with which I have now to deal. The first case relied upon by him was that of *Chandulal* v. *Awad bin Umar Sultan*(1) in which, STRACHEY, J., expressed the view that it is in the power of the Prince or Chief to waive the provisions of section 86 and submit himself to the jurisdiction of the Courts of British India.

It is not alleged that there was any waiver in the present case. But it is argued that if waiver can give jurisdiction to the Court, then it is implied that the exceptions [contained in clauses (*a*), (*b*) and (*c*) to the general rule] in section 86 are not exhaustive—in other words that the sole exceptions to the general rule are not those specifically mentioned in section 86 itself; and that just as waiver may be added to the exceptional cases in which the Courts have jurisdiction over independent sovereigns, so also another exception may be made; and that one such other exception is the case when the sovereign is sued in his private capacity and *not* as sovereign. As I understand, however, STRACHEY, J.'s decision, it is to the effect that, though section 86 provides certain exceptions to the general law that sovereigns may not be sued, that general law is in itself subject to the proviso that the sovereign may himself waive his right of questioning the jurisdiction of Municipal Courts. Therefore assuming that this argument for the petitioner can have any force in the construction of the section, it can certainly have no force unless it is shown that the alleged exception is recognised in International Law as restricting the scope of the general rule just in the same way as the exception about waiver is recognised. But in the first place I do not think that the ruling in *Chandulal* v. *Awad bin Umar Sultan*(1) establishes another exception to section 86 so as to derogate from the section being construed as exhaustive in itself. Secondly the alleged exception is not recognised by general International Law. It was contended before me that certain dicta in *Duke of Brunswick* v. *The King of Hanover*(2) show that sovereigns may be sued in their private capacity. But the actual decision in that case was that the Court had no jurisdiction, and I do not think that the cautious dicta on which

(1) (1896) I.L.R., 21 Bom., 351 at p. 373. (2) (1848) 2 H.L.C., 1.

reliance was placed can be of any assistance in view of the law as laid down in such cases as *Mighell* v. *Sultan of Johore*(1) and *Statham* v. *Statham and the Gaekwar of Baroda*(2). The point was expressly considered by WILLS, J., in *Mighell* v. *Sultan of Johore* (1) where the effect of *Duke of Brunswick* v. *The King of Hanover*(3), explained.

For these reasons I think that this petition must be dismissed.

The judgments in Civil Revision Petitions Nos. 511 and 512 of 1912 will follow.

I do not wish to interfere with the order of the Lower Court as to costs; but here the petitioner in each case will pay one-third of the respondent's costs.

[Letters Patent Appeals Nos. 133 to 135 of 1913 filed against this decision were dismissed by OLDFIELD and SADASIVA AYYAR, JJ.]

APPELLATE CRIMINAL.

Before Mr. Justice Ayling and Mr. Justice Hannay.

Re RAMBILAS AND THREE OTHERS (ACCUSED), PETITIONERS *

1914. October 12 and 21.

Indian Penal Code (Act XLV of 1860), sec 405—Criminal Procedure Code (Act V of 1898), ss. 179 and 182—Criminal breach of trust—Hundis sent from Dharapuram—Cashed in Bombay—Jurisdiction.

The offence of criminal breach of trust is completed by the misappropriation or the conversion of the property dishonestly It is only the *intention* which is essential; whether wrongful gain or loss actually results is immaterial; it is a consequence, but no essential part of the offence, and a person is not accused of the offence by reason of it.

Where, therefore, the accused, brokers in Bombay, were charged in the Court of the Sub-Divisional Magistrate of Erode with the offence of having committed criminal breach of trust in respect of the proceeds of certain hundis entrusted to them by the complainants, merchants at Dharapuram, for encashment at Bombay,

Held, that the hundis having been cashed and the proceeds misappropriated by the accused in Bombay, the Erode Court had no jurisdiction to try the case

Ganeshi Lal v *Nand Kishore* (1912) I L R, 34 All., 487, approved.

Assistant Sessions Judge of North Arcot v. *Ramaswami Asari* (1914) 26 M L J., 235, distinguished

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(1) (1894) 1 Q B., 149 at pp 154, 155 (2) (1912) L.R. Pr., 92. (3) (1848) 2 H L.C., 1.

* Criminal Revision Case No. 326 of 1914 (Criminal Revision Petition No. 279 of 1914).

Re RAMBILAS.

Queen-Empress v. *O'Brien* (1897) I.L.R., 19 All., 111 *and Emperor* v. *Mahadeo* (1910) I.L.R., 32 All., 397, commented on.

Held, also that, where, as in this case, the complaint clearly charged dishonest misappropriation to accused's own use and not use or disposal in violation of law or contract, the offence fell under the first part of section 405 of the Indian Penal Code and not under the second.

And secondly, if it were otherwise, the offence would be committed where the dishonest use or disposal took place, not where the contract was made, or should have been performed.

PETITIONS under sections 435 and 439 of the Criminal Procedure Code (Act V of 1898), praying the High Court to revise the order of M. SUNDARARAJA AYYAR, the Sub-Divisional Magistrate of Erode. The facts, so far as they are material for the purpose of this report, are as follows :—

The complainants are Muhammadan merchants carrying on business at Dharapuram within the jurisdiction of the Court of the Sub-Divisional First Class Magistrate of Erode. They complained in that Court that the accused committed criminal breach of trust in respect of money to the extent of Rs. 8,205-7-9 realised by them on account of certain hundis sent to them for encashment at Bombay and thus committed an offence punishable under section 409, Indian Penal Code.

The pleader for the accused raised the objection that as the offences complained of, viz., cashing and misappropriation were committed outside the Presidency, the Erode Court had no jurisdiction to entertain the complaints and enquire into them.

The Sub-Divisional Magistrate of Erode relying on the ruling in *Queen-Empress* v. *O'Brien*(1) came to the conclusion that he had jurisdiction to enquire into the complaints and accordingly decided to proceed with the enquiry.

Against that the accused preferred this petition to the High Court.

Dr. *S. Swaminathan* for the petitioners.

The *Acting Public Prosecutor* for the Crown.

AYLING AND HANNAY, JJ.

JUDGMENT.—Petitioners, who are stated to be brokers carrying on business in the Bombay Presidency, are accused in two cases on the file of the Sub-Divisional Magistrate of Erode. The complaint against them is that they committed criminal breach of trust in respect of the proceeds of certain hundis, entrusted

(1) (1897) I.L.R., 19 All., 111.

to them for encashment by the complainants, merchants of Dharapuram in the Erode Sub-division.

The question is whether the Erode Sub-Divisional Magistrate has jurisdiction to try the cases.

From the recitals in the complaints, it is clear that the hundis were received and cashed by the accused (petitioners) in Bombay and that the cash proceeds were retained and misappropriated there.

It is conceded in the course of the hearing before us that the accused have been, and still are, residing outside this Presidency: so that section 185 of the Criminal Procedure Code does not apply.

The Sub-Divisional Magistrate has held the cases to fall within his jurisdiction in virtue of section 179 of the Criminal Procedure Code on the ground that the wrongful loss occasioned by accuseds' acts accrued to complainants at their residence and place of business, Dharapuram.

We have carefully considered the effect of section 179 of the Criminal Procedure Code read with section 405 of the Indian Penal Code: and are clearly of opinion that it cannot be interpreted as giving jurisdiction to the Erode Sub-Divisional Magistrate to try the present cases. The offence of criminal breach of trust is completed (assuming a preliminary trust) by the misappropriation or conversion of the property (in this case the cash proceeds of the hundis) dishonestly, *i.e.*, with the intention of causing wrongful gain or wrongful loss. It is only the *intention* which is essential. Whether wrongful gain or loss actually results is immaterial; it is a consequence, but no essential part of the offence, and a person is not accused of the offence by reason of it. The learned Public Prosecutor has drawn our attention to the second part of section 405, which deals with dishonest use or disposal of property in violation of law or contract. He says accused had contracted by letters received at Dharapuram to remit the amounts to the complainants there, and argues that the contract was broken by failure to deliver the money at Dharapuram, and that this fact gives jurisdiction to the Erode Court.

We are unable to follow this reasoning. In the first place the present case falls under the first, and not the second part of the section: the complaint clearly charges dishonest misappropriation to accuseds' own use, and not use or disposal in

Re RAMBILAS.

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violation of law or contract Secondly, if it were otherwise, the offence would be committed where the dishonest use or disposal took place not where the contract was made or should have been performed.

No authority has been quoted in support of this last argument: but the Sub-Divisional Magistrate has based his decision on two rulings of the Allahabad High Court *Queen-Empress* v. *O'Brien*(1) and *Emperor* v. *Mahadeo*(2). These cases are undoubtedly in point, and afford some authority in support of his view. We observe that in the first case the Court was proceeding under section 185 of the Criminal Procedure Code: and appears to have been influenced to some extent by considerations of convenience. The second case was decided by a single Judge, who was disposing of a revision petition against a conviction. In declining to interfere, he quoted *Queen-Empress* v. *O'Brien*(1) and was prepared to follow it, but he also relied on section 182 of the Criminal Procedure Code as giving jurisdiction, and, further, on section 531 of the Criminal Procedure Code as justifying his refusal. This decision certainly adds nothing to the earlier one: and, if the latter is to be taken as an expression of opinion or the strict interpretation of section 179, then with all respect we are unable to follow it.

In a later case—*Ganeshi Lal* v. *Nand Kishore*(3)—another learned Judge of the same Court, KARAMAT HUSAIN, J., while distinguishing *Queen-Empress* v. *O'Brien*(1) on the facts, discussed the meaning of section 179 of the Criminal Procedure Code in relation to a similar case to the present one and expressed exactly the same view as we are inclined to adopt. In a still later case *Langridge* v. *Atkins*(4), another learned Judge (MUHAMMAD RAFIQ, J.) elected to follow *Queen-Empress* v. *O'Brien*(1) but did not discuss the point apart from the rulings thereupon.

The only case of this Court to which we are referred is *Assistant Sessions Judge of North Arcot* v. *Ramaswami Asari*(5). This arose out of an application to quash a commitment: and the main point for determination was the applicability of section 188 of the Criminal Procedure Code and the necessity of a certificate from the Political Agent. SPENCER, J., remarked

(1) (1897) I.L.R., 19 All., 111.
(2) (1910) I.L.R., 32 All., 397.
(3) (1912) I.L.R., 34 All., 487.
(4) (1913) I.L.R., 35 All., 29.
(5) (1914) 26 M.L.J., 235.

that the loss occasioned by the breach of trust in that case was a "consequence" within the meaning of section 179 of the Criminal Procedure Code sufficient to give jurisdiction and quoted *Queen-Empress* v. *O'Brien*(1) and *Langridge* v. *Atkins*(2) as authority. But the bulk of the judgment of both the learned Judges was devoted to the effect of the want of a certificate and with all respect we do not feel compelled to treat this as a considered ruling on the point binding upon us.

These are all the cases to which we are referred: and we do not think their effect would justify our adopting a different interpretation of section 179 of the Criminal Procedure Code and section 405 of the Indian Penal Code to that which a careful consideration of the sections themselves seems to indicate.

We set aside the order of the Sub-Divisional Magistrate, and direct the discharge of the petitioners.

APPELLATE CIVIL.

Before Mr. Justice Sadasiva Ayyar and Mr. Justice Spencer.

1913. October 23.

G SESHAMMA DEFENDANT), APPELLANT,

v

B. V. SURYANARAYANA AND ANOTHER (PLAINTIFF'S LEGAL REPRESENTATIVES), RESPONDENTS *

Civil Procedure Code (Act XIV of 1882), sec 373—Legal Representative—Abatement of suit—Withdrawal of suit with permission to bring a fresh one—Its effect on the representative not on record.

When a suit has abated against a defendant by reason of his legal representative not having been brought on the record within the time allowed by law and when the plaintiff thereupon withdraws his suit with permission to bring a fresh one, such a permission can only empower him to bring a fresh suit against those defendants who were on the record on the date of the withdrawal and not against the legal representatives of a defendant who was dead at the time of the withdrawal and whose said representatives had either not been brought on the record or had been removed from the record by an appellate order which set aside the order of the First Court bringing them on the record

Perumal v *Karuppan* (1911) 21 M L J, 574, dissented from

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(1) (1897) I L.R, 19 All, 111 (2) (1913) I.L.R., 35 All., 29.

* Appeal Against Order No. 280 of 1912.

SESHAMMA v. SURYA-NARAYANA.

APPEAL against the order of A. L. HANNAY, the District Judge of Vizagapatam, in Appeal No. 884 of 1911, preferred against the order of P. NARAYANA RAO NAYUDU, the District Munsif of Vizianagram, in Original Suit No. 828 of 1910.

One Gade Sitaramadoss deceased, executed the suit mortgage-deed to the Bulusu Appaya Garu on 26th April 1903. In execution of a decree of the Court of District Munsif of Vizianagram, in Original Suit No. 534 of 1903, obtained by a stranger the equity of redemption in the mortgaged property was sold and the defendant's husband became the auction-purchaser. The plaintiff instituted Original Suit No. 162 of 1905 for the mortgage-money against the widows of the mortgager and the defendant's husband, the auction-purchaser. The suit was decreed, on a preliminary point. The decree was reversed by the Appellate Court and the suit remanded for trial on the merits; the appellate judgment was dated 30th March 1907. The defendant's husband died on 8th April 1907. His legal representative was not brought on record within the period of six months allowed by law. Long after the expiry of the period prescribed, *i.e.*, on 29th February 1908, plaintiff applied for the legal representative, viz., the present defendant to be brought on record. The then District Munsif excused the delay and allowed the application on 29th June 1908. This order was appealed against and in appeal was set aside. The parties who thus stood on record were only the widows of the mortgagor. The widows of the mortgagor were not necessary parties at all to the previous suit, as the relief prayed was for money by sale of the hypotheca and the other property of the auction-purchaser. The mortgagor's widows had no interest in the hypotheca, as it had been sold away in Court auction to the defendant's husband long before. Seeing that the suit, if prosecuted in the absence of the auction-purchaser's representative would be of little avail, plaintiff moved the Court for permission to withdraw the suit and file another on the same cause of action. The then District Munsif granted the leave asked for and plaintiff filed the present suit, dropping the widows of the mortgagor and impleading as the sole defendant, the widow and legal representative of the auction-purchaser whom he had failed to bring on record in the previous suit. The leave granted to institute

a fresh suit was long after the expiry of six months from the date of the death of the auction-purchaser.

The Court of First Instance held that this suit could not be maintained against the defendant, the previous suit having abated as against her husband who died more than six months prior to the granting of the permission to bring a fresh suit. The Lower Appellate Court reversed the decree of the Lower Court and remanded the suit for disposal upon the merits.

The defendant appealed against the order of remand.

T. Rangachariyar for the appellants.

S. Srinivasa Ayyangar for the respondents.

SADASIVA AYYAR AND SPENCER, JJ.

JUDGMENT.—We are of opinion that, when a suit has abated against a particular defendant by reason of his legal representatives not having been brought on the record within the time limited by law and when the plaintiff thereupon withdraws his suit with permission to bring a fresh suit, such a permission can only empower him to bring the fresh suit against those defendants who were on the record on the date of the withdrawal and not against a defendant who had ceased to be on the record or against the legal representatives of a defendant who was dead at the time of the withdrawal and whose said representatives had either not been brought on the record or had been removed from the record by an appellate order which set aside the order of the First Court bringing them on record.

As regards *Perumal* v. *Karupan*(1), the learned Judges were no doubt (if we may say so with respect) right in saying that the cause of action in that case survived as against the defendants other than the deceased defendant and hence a new suit would be under the permission granted under section 373 as against the other defendants. But in so far as that decision holds that even against the legal representatives of a defendant who was dead at the time of the withdrawal with permission to bring a fresh suit, the new suit would be sustainable, we respectfully dissent therefrom, the learned Judges themselves having evidently arrived at their conclusion after much hesitation.

Further the modifications made by the new Civil Procedure Code in the language of old sections 373 and 368 [Order XXXIII,

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(1) (1911) 21 M.L.J., 274.

SESHAMMA v. SURYA-NARAYANA. — SADASIVA AYYAR AND SPENCER, JJ.

rule 1 and clause (2) of Order XXII, rule 4] seem to make the matter quite clear and to prevent the bringing of the fresh suit as against a defendant who was not on the record at the time of the withdrawal.

We therefore reverse the learned District Judge's order and restore the Munsif's decision with costs in this and in the Lower Appellate Court in favour of the appellant.

APPELLATE CIVIL.

Before Sir Charles Arnold White, Kt., Chief Justice, Justice Sir Sankaran Nair and Mr. Justice Oldfield.

1913 October. 22 and 24.

THE SECRETARY TO THE COMMISSIONER OF SALT, ABKĀRI AND SEPARATE REVENUE, REVENUE BOARD, MADRAS (REFERRING OFFICER),

v

MRS. E. M. ORR AND THE BANK OF MADRAS (THE EXECUTANT AND EXECUTEE OF THE DOCUMENT IN QUESTION).*

Indian Stamp Act (II of 1899), sec. 2 (17), and arts. 40 and 64—Mortgage-deed—Hypothecation, letter of, accompanying a bill of exchange.

Where a document ran as follows —"The executant being desirous of carrying on her deceased husband's business of which she is now the owner declares a trust in favour of the Bank of Madras in respect of machinery, plant, fixture and furniture and stock-in-trade in consideration of advances of money to be made by the Bank from time to time not exceeding in all Rs. 4, 50,000 for the purpose of financing the business All such advances carry interest at the rate of 6 per cent. per annum The trustee has got full power to use, employ, sell or exchange or otherwise deal with the trust property in the ordinary course of business but should make good the property that may be sold with other goods of a similar nature and value, any goods so substituted shall be included in the security. The trustee may retain in his hands the sum of Rs. 20,000 annually in trust to pay and apply the same in payment of sums advanced by the Bank."

Held, that the document created a trust in express language in respect of the machinery, etc, in or upon the business premises of the firm and that the object of the instrument was to give the Bank some rights by way of security and it was a mortgage-deed for the purpose of the Stamp Act.

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* Referred Case No. 5 of 1913.

Reference under Stamp Act, sec. 46 (1888) I.L.R., 11 Mad., 216, referred to.

Semble.—The document is not a letter of hypothecation within the meaning of the exemption in article 40.

Obiter.—A fiscal enactment should be construed strictly and in favour of the subject.

CASE stated under section 57 of the Indian Stamp Act (II of 1899) for the decision of the High Court by H. H. F. M. TYLER, Secretary to the Commissioner of Salt, Abkāri and Separate Revenue.

The facts of the case appear from the judgment of WHITE, C.J.

The *Government Pleader* for the referring officer.

W. Barton for the executant.

Executee not represented.

WHITE, C.J.—The question we have to consider is whether the instrument which has been submitted to us is a mortgage-deed within the meaning of section 2 (17) of the Indian Stamp Act (II of 1899). If so it is chargeable with stamp duty as such under article 40 of the first schedule to the Act. Mr. Barton has argued that the instrument in question is a declaration of trust and that it is chargeable as such under article 64. At the conclusion of his argument he suggested that the instrument might be construed as a letter of hypothecation accompanying a bill of exchange and therefore fell under the second exemption to article 40. WHITE, C.J.

A mortgage-deed is defined for the purposes of the Stamp Act, and for the purposes of that Act only, as including "*every instrument whereby, for the purpose of securing money* advanced, or to be advanced, by way of loan, or an existing or future debt, or the performance of an engagement, one person transfers, or creates, to or in favour of, another, a right over or in respect of specified property." The definition is almost as wide as the definition of a bill of sale in the English Bills of Sale Acts.

What are the material provisions of this deed? It is an instrument to which the parties are one Mrs. Orr and the Bank of Madras. It recites that probate of the will of the late Mr E. W. Orr was granted to Mrs. Orr as sole executrix thereof, that the late Mr. Orr was the sole proprietor of certain gold and silver smith's business, that Mrs. Orr in order that certain

THE SECRETARY TO THE COMMISSIONER OF SALT, ABKĀRI AND SEPARATE REVENUE, REVENUE BOARD, MADRAS v. MRS. ORR.

WHITE, C.J.

creditors of the firm may be repaid their loans and with a view to certain other matters, has entered into an agreement with the Bank of Madras by which the Bank has agreed to advance to Mrs. Orr a certain amount on a promissory note to be executed by one Thomas William Barton in favour of the firm (Messrs. P. Orr and Sons) and endorsed by them to the Bank of Madras upon the said Mrs. Orr executing a declaration of trust of the machinery, plant, stock-in-trade, goods, chattels and effects in connection with the business more particularly described in the schedule to the instrument. In consideration of advances to be made by the Bank Mrs. Orr declares that she holds the said machinery, plant, stock-in-trade, etc., on trust for and on behalf of the Bank. There is a provision as regards interest. There is then a provision that the trustee shall have full power to use and employ the trust property in certain ways and to replace and make good such portions of the trust property as may be sold or otherwise dealt with and that the substituted goods shall be included in the security; there is a provision for insurance. Then there is a declaration that the trustee stands possessed of the net profits, realised after payment of all expenses including the retention by the trustee of a sum not exceeding Rs. 20,000 annually, in trust to pay and apply the same in payment of sums advanced by the Bank. (The reference in the letter of the Board of Revenue to this part of the instrument is not quite accurate.)

Those are the covenants to which I need refer. In the schedule we have the headings "Machinery, plant, fixtures and furniture in Madras and Rangoon," and "Stock-in-trade, goods, chattels and effects in Madras and Rangoon." Under these headings are set out the various classes of articles with their respective values. By the instrument Mrs. Orr creates a trust, declares that she is the trustee and that certain property shall be trust property. She constitutes the Bank of Madras *cestuis que trust* in respect of the trust property. That is the object and purport of the deed. Whatever the precise rights of the *cestuis que trust* may be it is not for us to consider. But it seems to me anomalous for a party who sets up a case to say that the trust does not give a beneficial interest to the *cestuis que trust*, or that the *cestuis que trust* has not, in the language of section 2(17) any right in respect of the trust property. That is really what

Mr. Barton's argument comes to. It seems to me that there are two trusts created by the deed. Mr. Barton has argued that there is a trust in respect of the net profits in paragraph 5 of the deed, but there is also a trust in express language in paragraph 1 in respect of the machinery, plant, stock-in-trade, goods, chattels and effects in or upon the business premises of the firm.

It has been suggested that the definition is not satisfied because the trust property is not specified and could not be specified, since the trust property consists of the net profits. We have been referred to a Full Bench decision of this Court *Reference under Stamp Act, sec.* 46(1). In that case there was an agreement between certain persons to transfer the future surplus profits of their respective trades to a trustee, in order that the trustee should hold the fund so to be created on certain trusts declared in the agreement. It was held that it was liable to stamp duty as a declaration of trust, and it was also held that the fund intended to be created under the agreement was not "specified property." In that case the learned Judges had to consider whether a certain sum of money which was to be accumulated by certain parties who were willing to contribute money for certain purposes was "specified property." It may be that the net profits here are not "specified property" within the meaning of the definition But we have a trust declared by the instrument in respect of the machinery, plant, stock-in-trade, etc. With regard to them we have the schedule to which I have referred. It seems to me that so far as the stock-in-trade, etc., which are described in the deed as trust property are concerned, the trust property is specified. It is perfectly clear that the object of the instrument was to give the Bank some rights by way of security. They had their contractual rights on the promissory note—they wanted something more ; and I see no reason for holding that the deed does not to some extent—to what extent it is unnecessary for us to consider,—carry out the object which was in the mind of the parties when the deed was prepared

I need scarcely say that the fact that the instrument is a trust deed does not make it a mortgage It is, in my opinion, a

(1) (1888) I.L.R., 11 Mad., 21.

THE SECRETARY TO THE COMMISSIONER OF SALT, ABKĀRI AND SEPARATE REVENUE, REVENUE BOARD, MADRAS *v.* MRS. ORR.

WHITE, C.J.

mortgage-deed, for the purposes of the Stamp Act, because it creates a *right in respect of specified property for the purpose of* securing money advanced or to be advanced.

I can deal shortly with Mr. Barton's second point. A hypothecation is not defined in the Stamp Act nor in the Transfer of Property Act either. Assuming that this instrument is a bill of exchange within the meaning of the definition in the Stamp Act, it seems to me it is not a letter of hypothecation within the meaning of the exemption. According to Mr. Barton the instrument is a formal declaration of trust I do not think a formal declaration of trust can be treated as a letter of hypothecation within the meaning of the exemption. I quite agree that a fiscal enactment should be construed strictly and in favour of the subject, but it seems to me that whatever else the instrument may be, it is a mortgage-deed within the meaning of the definition in section 2 (17) of the Stamp Act.

SANKARAN NAIR, J.—I agree

OLDFIELD, J.—I agree.

APPELLATE CIVIL.

Before Mr. Justice Miller.

1913. October 24 and 29.

M R. SRINIVASA RAU (RESPONDENT), PETITIONER,

v.

PICHAI PILLAI (PETITIONER), RESPONDENT.*

Civil Procedure Code (Act V of 1908), sec 115—Civil Rules of Practice, Rule 27—Criminal Procedure Code (Act V of 1898), sec. 145—Pleader engaged proceedings under—Whether disqualified to act for the other side in subseque civil suit.

A pleader who had appeared for a party in proceedings under section 145 of tl Code of Criminal Procedure must, before appearing for the opposite party in subsequent civil suit flowing out of such proceedings, satisfy the Court th in acting in those proceedings he did not as a fact obtain from his then clie any knowledge which would be of use to his present clients, or, that if he di obtain any such knowledge then, such knowledge is now, so to speak, publ

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* Civil Revision Petition No. 633 of 1913.

property available to any pleader who can obtain inspection of the record of the proceedings in the Magistrate's Court. If he fails to do so, he brings himself within Rule 277 of the Rules of Practice framed by the High Court and it cannot be said that the Court has wrongly exercised its discretion in refusing him audience.

Little v *Kingswood Collieries Company* (1882) 20 Ch D., 733, referred to.

PETITION under section 115 of the Code of Civil Procedure (Act V of 1908) praying the High Court to revise the order of K. SOWRIRAJULU NAYUDU, the District Munsif of Mannargudi, in Original Petition No. 424 of 1910.

The facts of the case appear from the Judgment.

T. R. Ramachandra Ayyar and *T. R. Krishnaswami Ayyar* for the petitioner.

T. R. Venkatarama Sastriar for the respondent.

MILLER, J.—In this case the District Munsif has made an order prohibiting a second-grade pleader from appearing for the plaintiffs, in Original Suit No. 32 of 1913 on his file. MILLER, J.

The pleader had appeared and acted in a proceeding in the Magistrate's Court under section 145, Criminal Procedure Code, and had there obtained an order for his client maintaining his possession until he should be disturbed by a Civil Court. Original Suit No. 32 of 1913 was instituted nearly three years after the date of this order by the unsuccessful party in the magisterial proceedings, and the pleader filed the plaint on their behalf and appeared for the purpose of conducting the case, but on the defendant's (his former client's) objection has been prohibited from doing so.

The District Munsif relies on Rule 277 of the Civil Rules of Practice as justifying his order, and in my opinion he is, in substance, right. Mr. Ramachandra Ayyar contends that this rule being in the Civil Rules of Practice has no application when one of the proceedings in question is a proceeding in a Magistrate's Court These rules of practice, as is seen by their preamble, are to be applied only in Civil Courts, but here the matter which gives rise to the question is Original Suit No. 32 of 1913, a proceeding in a Civil Court, and I am not inclined to restrict the word "proceeding" in the earlier part of the rule to proceedings in a Civil Court when neither the language of the rule nor the preamble requires that limitation. It was further contended that the suit is not a matter connected with the

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proceeding before the Magistrate. I have had some doubt on this point, but I agree with Mr. Venkatrama Sastri's argument that the rule is not to be given too narrow a scope, and should be interpreted as liberally as its language will allow and I do not think it is very difficult to hold that Original Suit No. 32 of 1913 is a matter which, to use the words of HALL, V.C., in *Little* v. *Kingswood Collieries Company*(1), "flows out of" the former proceeding and "may be considered as something in the nature of a continuance of, or supplemental to," that proceeding. No doubt the title and not the possession is to be decided in the suit, but that does not affect the present question, for the mere fact that the questions to be decided are different will not necessarily involve the conclusion that the two proceedings are unconnected. The suit is that which was indicated in the Magistrate's order and so flows out of it; it was necessitated by that order, and it relates to the property with which that order was concerned and it is between the parties to that order.

In spite therefore of the lapse of three years between the one proceeding and the other, I am of opinion that the later is a matter connected with the earlier.

It was suggested at the end of his argument, though not taken as a ground in his petition, by Mr. Ramachandra Ayyar, that Rule 277 is *ultra vires* of the High Court in the sense that it is not founded on any section of the Legal Practitioners Act which gives power to make it. It may be that that is so, but I do not think it necessary to search the statutes for enabling powers in this case. I may take it for my present purpose that the rule merely defines the view of the High Court as to what will amount to a sufficient reason for punishing a pleader in the particular matter, that if a practitioner does not infringe the rule he will not lay himself open to punishment or reprimand even though he may not attain to that standard of fidelity which may seem desirable in persons professing to deserve the degree of confidence which must of necessity be placed in a legal practitioner by his client. Of course if a pleader be found as a matter of fact to have disclosed to one client secrets confided to him in his capacity of legal adviser by another that would give rise to different considerations, which would not depend

(1) (1882) 20 Ch. D., 733.

on the existence of a rule like rule 277 of the Civil Rules of Practice. Whether the two clients were ranged as opponents or not, such conduct would be necessarily be grossly improper. Taking this view of the rule, I have to consider the further objection that the District Munsif had no jurisdiction to make the order he has made. The rule however clearly empowers the Court, *i.e.*, the Court in which the "connected matter" is under consideration to authorize or refuse to authorize the pleader to act, and I take the Munsif's order simply to amount to a refusal to give the necessary authority. If, in spite of the refusal, the pleader were to continue to act, it might be necessary to consider in what manner the District Munsif's authority is to be vindicated but it is not necessary to go into that question here. I do not suppose that any rule is necessary to enable a District Munsif, subject to correction by this Court, to refuse an audience to a pleader in a case in which that pleader by his very appearance is guilty of what will be viewed as professional misconduct, and that is all, as I understand the matter, that has been really done by the District Munsif here, though the District Munsif does not take exactly that view of it.

There remains the question whether the District Munsif ought to have authorised the pleader to act for the plaintiffs in Original Suit No. 32 of 1913.

Considering that a large number of documents of title were produced in the proceeding in the Magistrate's Court, it seems to me that it lay on the pleader to satisfy the District Munsif that in acting in that proceeding he did not as a fact obtain from his then client any knowledge which would be of use to his present clients, or that, if he did obtain any such knowledge then, such knowledge is now, so to speak, public property available to any pleader who can obtain inspection of the record of the proceeding in the Magistrate's Court. The pleader did not satisfy the District Munsif on these points and Mr. Ramachandra Ayyar did not satisfy me on them. As then in my opinion, the pleader has brought himself within the rule, I cannot say that the District Munsif has wrongly exercised his discretion in refusing him audience.

In declining to interfere on behalf of the pleader, I thi[nk I] ought to observe that the District Munsif is probably [right in] holding that he is not guilty of misconduct involving

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turpitude. It is not shown, that is to say, nor do I see any reason to suspect that he accepted the plaintiff's vakalat in order to make use of such knowledge formerly derived from the defendant, nor with any idea of making use of such knowledge. But the District Munsif is right in saying that he ought to have offered his services to the defendant before acting for the plaintiffs, and if it be objected that an unscrupulous defendant might easily in the circumstances have undertaken to employ him and then have refused after the plaintiffs had engaged some one else, one answer seems to be that practitioners must, even at some risk of sacrifice, refrain from taking up positions calculated to impair the confidence reposed in them by their clients; on grounds of policy if on no other ground this suggests itself as the better course.

The District Munsif made the pleader pay the costs of the argument before him, and I think he was right. In this Court too, as the pleader has persisted in his contention that the rule does not apply to him and so has necessitated argument in this case, he must pay the costs of the respondent.

APPELLATE CIVIL.

Before Mr. Justice Miller and Mr. Justice Tyabji.

N. VENKATARAMIER AND ANOTHER (PLAINTIFFS), APPELLANTS,

1913. October 2, 6 and 31.

v.

VAITHILINGA THAMBIRAN, THE DAKSHINAM KARWAR AND AGENT OF AMBALAVANA PANDARA SANNADHI (DEFENDANT), RESPONDENT.*

Madras Estates Land Act (I of 1908), sec. 192—Suit under sec. 213—Appellate decree—Second Appeal—Limitation Act (IX of 1908), sec. 23—Distraint, no continuing wrong—Cause of action.

A second appeal lies to the High Court under the provisions of the Code of Civil Procedure from an appellate decree passed in a suit instituted under section 213 of the Estates Land Act.

Section 192 of the Act makes the provisions of Chapter XLII of the Code of 1882 applicable and the provisions that give a right of appeal cannot be struck out and those only which prescribe in what manner an appeal is to be heard and determined, retained.

Where the proceedings which give rise to a cause of action consist in wrongful distraint, that distraint is not a continuing wrong, and will not therefore give rise to a continuing cause of action under section 23 of the Limitation Act.

Patnu Sanyasi v. *Zamindar of Jayapur* (1902) I.L.R., 25 Mad., 540, followed.

Continuing cause of action, under English law, considered.

Hole v *Chard Union* (1894) 1 Ch., 293, referred to.

SECOND APPEAL against the decree of F. D. P. OLDFIELD, the District Judge of Tinnevelly, in Appeal No. 218 of 1912 preferred against the decree of M. SUNDARA RAJA AYYAR (Deputy Collector), the Revenue Divisional Officer of Tinnevelly, in Summary Suit No. 5 of 1911.

The plaintiffs are tenants of Kottakulam village, Tenkasi taluk. The defendant is the agent of the mutt which is the landholder. In 1909, the defendant distrained paddy belonging to the plaintiffs and stored in the thrashing floor for arrears of rent due and on 18th October 1909, the plaintiffs received through the Taluk Officer, Tenkasi, a notice under section 95 of Act I of 1908. The plaintiffs forthwith filed a suit contesting the distraint on the ground that the defendant was not entitled to proceed under Act I of 1908. At the same time and in order

* Second Appeal No. 159 of 1913.

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to save their paddy from damage, they paid the amount claimed into Tenkasi Sub-Treasury under protest. The distraint was thereupon raised and the amount paid into the Sub-Treasury by the plaintiffs was also withdrawn by the defendant. The Revenue Divisional officer, Shermadevi, dismissed the plaintiffs' suit on the ground that the village was not an 'estate' within the meaning of the Act and that the defendant was not a landholder and that being so, the plaintiffs had no *locus standi* to file the suit to set aside the distraint as section 95 contemplated only a suit by a ryot. The plaintiffs have accordingly brought the present suit for damages under section 213 of the Act.

The Court of First Instance decreed the claim. The Lower Appellate Court reversed the decree and dismissed plaintiffs' suit as barred by limitation.

The plaintiffs preferred this Second Appeal.

The Honourable Mr. *L. A. Govindaraghava Ayyar* for the appellants.

S. Muthayya Mudaliyar for the respondent.

MILLER, J.

MILLER, J.—This was a suit instituted under section 213 of the Estates Land Act before a Deputy Collector decreed by him and dismissed by the District Judge on appeal. A preliminary objection is taken that no appeal lies to the High Court from the decree of the District Judge, and is based on a contention that section 192 applies the provisions of the Civil Procedure Code only to the procedure in proceedings authorized by the Act, and not so as to give an appeal which the Act does not give.

In my opinion, this objection must fail. The language of section 192 of the Act does not support it, and there are two cases under the repealed Rent Recovery Act of 1865 which point the other way. *Ganne Kotappa* v. *Venkataramiah*(1) and *Veeraswamy* v. *Manager, Pittapur Estate*(2).

Reliance was placed on the recent case in the Privy Council *Rangoon Botatoung Co., Ltd.* v. *The Collector, Rangoon*(3), in which their Lordships held that no appeal lies as of right to His Majesty from a decision of the Chief Court of Lower Burma confirming the award of a Collector under the Land Acquisition Act in the town of Rangoon.

(1) (1899) 10 M.L.J., 308. (2) (1903) I.L.R., 26 Mad., 518.
(3) (1912) I.L.R. 40 Calc., 21 (P.C.)

That case seems to have turned on the question whether the decision was a decree or order of the Chief Court, and the Privy Council, as I understand the case, held that it was not a decree or order within the meaning of section 109, Civil Procedure Code, but was in the nature of an award. This case therefore does not help the respondent. In the present case the District Judge's decision is embodied in a decree, and he was sitting in appeal. The provisions of Chapter XLII of the Code of 1882 are by section 192 made applicable to the matter, and, as I have said, we cannot strike out those provisions which give the right of appeal and retain merely those which prescribe in what manner an appeal is to be heard and determined. It is not denied that the corresponding provisions of the present Code of Civil Procedure apply where the old Code applied, and the preliminary objection therefore fails. I have dealt with it, as it was fully and ably argued for the respondent, but in my view the decision of the District Judge is right.

He held that the suit under section 213 of the Estates Land Act is barred by limitation not having been instituted within three months of the cause of action. In the appeal as argued before us, the decision is attacked on the ground that the plaintiffs had a continuing cause of action for the detention of his property until he paid the money demanded and released it, and that was within three months of the institution of the suit. The weight of authority in this Court is against the contention, the appellant may be said to receive some support from *Yamuna Bai Rani Sahiba* v. *Solayya Kavundan*(1), but that case is distinguished in *Pamu Sanyasi* v. *Zamindar of Jayapur*(2), and *Raja of Venkatagiri* v. *Isakapalli Subbiah*(3) is undoubtedly an authority against him *Ram Narain* v *Umrao Singh*(4) contains a dictum which supports the respondent The present is not a case in which an order to restore the property had been made and the damages accrued owing to disobedience to the order, and I agree with the view taken in *Pamu Sanyasi* v. *Zamindar of Jayapur*(2), that, where the proceedings which give rise to the cause of action consists in the wrongful distraint that distraint is not a continuing wrong, though no doubt the

(1) (1901) I L R., 24 Mad., 339. (2) (1902) I L R., 25 Mad., 540.
(3) (1903) I.L.R., 26 Mad., 410. (4) (1907) I.L.R., 29 All., 615.

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injury continues; and, not being a continuing wrong, it will not give rise to a continuing cause of action under section 23 of the Limitation Act. In England the question what is a continuing cause of action seems to have arisen principally in regard to the point of time up to which damages can be assessed in any given action; and then a continuing cause of action has been defined as involving a repetition of acts or omissions of the same kind as that for which the action was brought; *Hole* v. *Chard Union*(1).

That definition, if it can be used as a guide to a definition of a continuing wrong, does not help the appellant.

It seems to me that difficulties surround the case which the appellant urges upon us, and that we are on safer ground if we follow the authorities in this Court.

The appellant presented an alternative case thus: the claim is for return of the money paid by the plaintiffs to save their property from sale; such a suit is not cognizable by a Deputy Collector. Therefore the suit is not competent and he should dismiss it on that ground, leaving the plaintiffs to their rights in a Civil Court.

The answer is that this suit is not for recovery of the money paid, it is a suit for damages under section 213 of the Estates Land Act and, if it bases a suit for the money in the Civil Court, that was for the plaintiffs to consider when they instituted it. They have not asked to be allowed to withdraw it. I need not deal with the other questions raised, as in my opinion the appeal must be dismissed with costs on the question of limitation.

TYABJI, J.

TYABJI, J.—It seems to me that section 192 of the Madras Estates Land Act allows in this case an appeal to the High Court. *Rangoon Botatoung Company, Ltd.* v. *The Collector, Rangoon*(2), seems to me to be distinguishable. It was decided in that case that no appeal lay to the Privy Council from an award under the Land Acquisition Act, as such an award was not a decree within the terms of section 109 of the Civil Procedure Code, 1908 (section 595 of the Act of 1882). Here we have a decree, which seems to me to fall under the terms of that section.

On the point whether the suit as framed is barred, I agree that it is. The plaint proceeds on the basis that the cause of

(1) (1894) 1 Ch., 293. (2) (1913) I.L.R., 40 Calc., 21 (P.C.).

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action arose (within the meaning of article 21 of Part A of the schedule to the Estates Land Act) when the plaintiff was served with the notice under section 95 of the said Act. Receiving such a notice would in itself cause no damage, for which alone a suit under section 213 lies. The only other alternative on the allegations in the plaint seems to be that the cause of action in respect of which this suit is brought, arose on the date of the distraint. The payment made by the plaintiff after notice under section 95 is not alleged in the plaint as giving rise (either by itself or in combination with the distraint) to the cause of action. The payment is referred to merely for assessing the damages claimed. It was suggested (though not admitted) in argument that rent was actually due, and that this was the reason why the plaintiff did not wish the question of the payment to be raised in the suit. It was also argued that a suit on the payment would lie in a Civil Court, not before the Collector. But whatever his reasons the plaintiff did not frame his suit on the basis that the payment constituted a part, or the whole, of the cause of action. In *Pamu Sanyasi* v. *Zamindar of Jayapur*(1), it was held that continuance of a distraint wrongfully made was not in itself a continuing wrong distinguishing *Yamuna Bai Rani Sahiba* v. *Solayya Kavundan*(2) (where the detention continued after the attachment had been set aside). See also *Raja of Venkatagiri* v. *Isakapalli Subbiah*(3). The plaint before us however makes no allusion to any continuing wrong.

If my view of the effect of the plaint is right the only cause of action shown in the plaint, if any is shown, is the distraint, and time must be taken to run from then. The suit is therefore barred and the appeal must be dismissed with costs.

[The first point is dealt with in the Privy Council Case of *Ravi Veeraraghavulu* v. *Venkata Narasimha Naidu Bahadur*(4)].

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(1) (1902) I.L.R., 25 Mad., 540. (2) (1901) I.L.R., 24 Mad., 33?.
(3) (1903) I.L.R., 26 Mad., 410. (4) (1914) I.L.R., 37 Mad., 443 (P.C.).

APPELLATE CIVIL.

Before Mr. Justice Sadasiva Ayyar and Mr. Justice Spencer.

1913. November, 7.

MUTHU SASTRIGAL (PLAINTIFF—PETITIONER), APPELLANT,

v.

VISVANATHA PANDARASANNADHI (ADHINAKARTHAR OF SRI VADARANYESWARASWAMI TEMPLE AT VADARANYAM (DEFENDANT—RESPONDENT), RESPONDENT.*

Varthamanam or letter—Not stamped—Unconditional undertaking to pay—Promissory note, inadmissible in evidence—Evidence Act (I of 1872), sec. 91—Suit on original liability, not maintainable.

A *varthamanam* or letter which says, "Amount of cash borrowed of you by me is Rs 350 I shall in two weeks' time, returning this sum of Rupees three hundred and fifty with interest thereon at the rate of Rupee one per cent. per month, get back this letter," amounts to an unconditional undertaking to repay borrowed money and is therefore a promissory note and not merely an offer to borrow or an acknowledgment of indebtedness.

Bharata Pisharodi v. Vasudevan Nambudri (1904) I.L.R., 27 Mad., 1 (F.B.), distinguished.

Tirupathi Goundan v. Rama Reddi (1898) I.L.R., 21 Mad., 49, doubted.

When such a document is inadmissible for want of a stamp, to allow a suit as one on "account for money had and received," concealing the real contract of loan which had been reduced to the form of a document would nullify section 91 of the Indian Evidence Act (I of 1872).

Pothi Reddi v. Velayudasivan (1887) I.L.R., 10 Mad., 94, followed.

Chinnappa Pillai v. Muthuraman Chettiar (1911) 9 M.L.T., 231 and *Malliya v. Ramayya* (1911) 21 M.L.J., 462, approved.

Krishnaji v. Rajmal (1900) I.L.R., 24 Bom., 360 and *Baij Nath Das v. Salig Ram* (1912) 16 I.C., 33 dissented from.

Doctrines of English Courts of Equity are not to be imported into the construction of such a document.

Per SPENCER, J.—The mere use of the word *varthamanam*, instead of promissory note, will not deprive the document of its real character of promissory note if its terms show that it is such.

APPEAL under clause (15) of the Letters Patent against the judgment of MILLER, J., dated 19th March 1913, in Civil Revision Petition No 171 of 1912, preferred to the High Court against the decree of J. R. GNANIYAR NADAR, the Temporary Subordinate Judge of Negapatam, in Small Cause Suit No. 1230 of 1911.

The following is the judgment of MILLER, J., in *Civil Revision Petition* No. 171 of 1912:—

* Letters Patent Appeal No. 66 of 1913.

"MILLER, J.—The plaintiff in the witness box said that the defendant asked for a loan; he undertook to lend if a letter was given: accordingly he lent the money and got the letter.

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"The letter is, I have no doubt, a promissory note, and I cannot distinguish the case from *Somasundaram* v. *Krishnamurti*(1) which binds me.

"The petition is dismissed with costs"

The plaintiff thereupon preferred this Letters Patent Appeal.

The facts of the case appear from the judgment of SADASIVA AYYAR, J.

S. Varadachariyar for the petitioner.

K. S. Jayarama Ayyar for *G. S. Ramachandra Ayyar* for the respondent.

SADASIVA AYYAR, J.—The plaintiff is the appellant in this Letters Patent Appeal. He sued on the strength of a letter which has been held to be inadmissible in evidence and his suit has been dismissed by all the Courts I shall now briefly refer to the arguments advanced by his learned vakil and to some of the cases quoted during those arguments.

SADASIVA AYYAR, J.

In the cases in the foot-note to *Queen-Empress* v. *Somasundaram Chetti*(2), and in *Bharata Pisharodi* v. *Vasudevan Nambudri*(3), relied on by him the documents themselves showed that they were not to be treated as vouchers or securities unless the persons to whom the letters were sent gave loans as requested in the letters. As said in *Bharata Pisharodi* v. *Vasudevan Nambudri*(3), "There is no unconditional undertaking on the face of the document to pay the money." In the present case the so-called *varthamanam* or letter says, "Amount of cash borrowed of you by me is Rs. 350. I shall in two weeks' time, returning this sum of rupees three hundred and fifty with interest thereon at the rate of one rupee per cent. per month, get back this letter."

It is clearly an unconditional undertaking on the face of this document to repay borrowed money, and it is therefore a promissory note and not merely an offer to borrow or an acknowledgment of indebtedness.

As regards *Tirupathi Goundan* v. *Rama Reddi*(4), the language of the document in question in that case was quite

(1) (1907) 17 M L J, 123 (2) (1900) I L R, 23 Mad, 155 at pp 156 and 157.
(3) (1904) I.L.R., 27 Mad., 1 at p. 3 (F.B). (4) (1898) I.L R., 21 Mad., 49.

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SADASIVA AYYAR, J.

different and very vague. Even so, I wish (with the greatest respect to the Judges who decided it) to be permitted to reserve my opinion if a document similarly worded happens to come, before me *for interpretation.*

I therefore agree with the Lower Courts that the *varthamanam* sued on is a promissory note and is inadmissible in evidence as not duly stamped.

As regards the contentions that, apart from the promissory note, there was an independent obligation implied from the receipt of the plaintiff's money by the defendant and that that obligation could be established by proof of that fact, I think we are bound by the decisions in *Pothi Reddi* v. *Velayudasivan*(1), and *Somasundaram* v. *Krishnamurti*(2). It is contended that *Pothi Reddi* v. *Velayudasivan*(1) is not good law, as the learned Judges misunderstood an observation of GARTH, C.J., in *Sheikh Akbar* v. *Sheikh Khan*(3), on which they relied in support of their position. I am not satisfied that the learned Judges did so misunderstand *Sheikh Akbar* v. *Sheikh Khan*(3); and even if they misunderstood *Sheikh Akbar* v. *Sheikh Khan*(3) they give independent reasons as follows:—

"It is a necessary condition to every written contract that the terms should be orally settled before they are reduced to writing, and to hold when such a contract has been reduced to writing, that a plaintiff can take advantage of the absence of a stamp on the promissory note to sue at once for the return of money which he may have contracted to lend for a fixed period, would entirely defeat the provisions of s. 91 of the Evidence Act."

Whatever may be the views of English Courts or even of the other High Courts [see the cases collected in *Baij Nath Das* v. *Saligram*(4)], I feel bound by *Pothi Reddi* v. *Velayudasivan*(1) not only because it has never been dissented from, but because the reasons above given appeal to my mind (if I may say so with respect) as very cogent. The contract in the case of a loan and a simultaneous promissory note has been reduced to writing in the form of the note which contains the definite terms of the contract, and we cannot, in my opinion, resort to inconsistent

(1) (1887) I.L.R., 10 Mad., 94 at p. 97. (2) (1907) 17 M.L.J., 126.
(3) (1881) I.L.R., 7 Calc., 256. (4) (1912) 16 I.C., 33.

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SADASIVA AYYAR, J.

or consistent implied contracts in such cases simply because the contract as entered in the promissory note cannot be admitted in evidence. Not only has *Pothi Reddi* v. *Velayudasivan*(1) not been dissented from, but it has, without disapproval, only been distinguished in *Ramachandra Rao* v. *Venkataramana Ayyar*(2) and *Yarlagadda Veera Ragavayya* v. *Gorantla Ramayya*(3), while it has been expressly followed in *Chinnappa Pillai* v. *Muthuraman Chettiar*(4) and *Mallaya* v. *Ramayya*(5).

To import the doctrines laid down in English cases about vague obligations to repay arising out of equity and not out of contract, or about obligations which can be enforced if the plaintiff skilfully draws up his plaint as one on account for money had and received concealing the real contract of loan which had been reduced to the form of a document is, it seems to me, merely trying to nullify section 91 of the Indian Evidence Act.

I do not intend to say that, if there is a contractual or other definite completed obligation capable of proof, prior in date to the invalid promissory note, the plaintiff cannot sue on that prior independant obligation. But to treat the money paid at the very time of the execution of the promissory note inadmissible in evidence, as giving rise to an independant contractual or other obligation seems to me to be inadmissible

I would therefore dismiss the appeal with costs.

SPENCER, J.

SPENCER, J.—I read the plaintiff's unfiled exhibit as containing a promise to pay This promise, though not a promise to pay on demand or to order, is an unconditional promise. There are no signatures of attesting witnesses so as to convert the document into a bond.

The mere use of the word "*varthamanam*" instead of promissory note will not deprive the document of its character of promissory note, if its terms show that it is such.

The execution of the document and the payment of the money may be treated as practically simultaneous, as the document was not made over to the plaintiff until it was ascertained that he was prepared to make the advance It is all part of the same transaction.

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(1) (1887) I L R, 10 Mad., 94. (2) (1900) I L R, 23 Mad, 527.
(3) (1906) I.L R, 29 Mad, 111. (4) (1911) 9 M.L.T., 281.
(5) (1911) 21 M.L.J., 462.

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SPENCER, J.

It is argued that the plaintiff may have a separate cause of action to fall back up on the original liability of the debtor and to sue the defendant for money had and received.

This is the view taken in *Krishnaji* v. *Rajmal*(1), and more recently in *Baij Nath Das* v. *Salig Ram*(2) where the matter received full discussion.

The trend of Madras decisions is however different. See *Pothi Reddi* v. *Velayudasivan*(3), the same principle having been followed in *Chinnappa Pillai* v. *Muthuraman Chettiar*(4), and *Mallaya* v. *Ramayya*(5).

I am not prepared to dissent from the view taken repeatedly by this High Court by various learned Judges. I therefore concur in dismissing this Letters Patent Appeal with costs.

APPELLATE CIVIL.

Before Mr. Justice Sadasiva Ayyar and Mr. Justice Spencer.

1913. November 10.

C FAKEERAPPA (REPRESENTED BY HIS PARTNER K. HANUMANTAPPA) AND FOUR OTHERS (COUNTER-PETITIONERS), APPELLANTS IN BOTH,

v.

M THIPPANNA AND TWO OTHERS (CLAIMANT AND PARTY—RESPONDENTS), RESPONDENTS.*

Railway receipt—Mercantile document of title, pledge of—Local custom—Charge—Holder thereof—Provincial Insolvency Act (III of 1907), sec. 16, cl. 3.

A railway receipt is a mercantile document of title to goods and lawful possession as pledgee of such receipt enables the holder by virtue of local custom to get possession of the goods from the carrier, and the insolvents' right to get possession under section 16, clause (3) of the Provincial Insolvency Act (III of 1907) ceases with the pledge.

Amarchand & Co. v. *Ramdas* (1913) 15 Bom. L.R., 590, followed.

APPEAL against the order of W. W. PHILLIPS, the District Judge of Bellary, in Insolvency Applications Nos. 383 and 389 of 1908 in Insolvency Petitions Nos 9, 10 and 11 of 1908.

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(1) (1900) I.L.R., 24 Bom., 360.
(2) (1912) 16 I.C., 33.
(3) (1887) I.L.R., 10 Mad., 94.
(4) (1911) 9 M.L.T., 231.
(5) (1911) 21 M.L.J., 402.

* Appeal Against Orders Nos. 233 and 234 of 1911.

One Mundloor Thippanna, residing at Bellary, had a commission bazaar at Bellary. His chief business was to sell grains cotton, etc., of customers upon commission. Sometimes he advanced moneys to customers on the security of their goods deposited with him or upon delivery to him of receipts of railway goods duly endorsed relating to them. Such advances carried interest at 1 per cent per mensem.

Bhimaji and Jaitmull were father and son and formed an undivided Hindu family. The father had a bazaar under the name of Bhimaji Mulji in Bellary and other places dealing in grain, cotton, etc., for many years on an extensive scale. Latterly the son also worked and assisted the father in the trade.

On the 7th December 1908, Bhimaji endorsed and delivered to M. Thippanna railway goods receipt Nos. 6506 and 6520 and invoice Nos 67 and 70 for 294 bags of grain with an order in writing to receive the goods and sell them on commission at Rs. 1·9 per cent. on grains generally and on 3 per cent. on paddy and on the security of the said goods Thippanna advanced to Bhimaji Rs. 2,000. Thippanna enquired on the 7th, 8th and 9th instant at the Railway station at Bellary and the goods had not arrived yet. This advance was cash paid down at the time and he was not Bhimaji's creditor then except for Rs. 36-7-6 due by him on 7th instant. The goods covered by the goods receipts were by local custom securities for his abovesaid advance of Rs. 2,000.

Bhimaji Mulji was carrying on the trade as usual till the closing of shops on the 8th instant. Thippanna heard nothing about Bhimaji's bankruptcy till 9 A.M. on the 9th instant; when he found a number of shop-keepers, etc., of Bellary and Raichur, said to be Bhimaji Mulji's creditors, crowding at his godown.

The above transaction of Bhimaji with Thippanna was in the usual course of business, *bonâ fide* and for valuable consideration and without any knowledge of his bankruptcy or even of an impending one.

A petition having been filed to declare Bhimaji an insolvent, Thippanna put in a claim petition that the goods relating to the above goods receipts were not liable to an order for seizure.

The District Judge of Bellary allowed the claim.

The insolvent creditors appealed to the High Court.

T. V. Muthukrishna Ayyar for the appellants.

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Per SPENCER, J.—It is either a usufructuary mortgage deed with a clog on the equity of redemption or a usufructuary mortgage combined with a mortgage by conditional sale and in either case redeemable under section 60 of the Transfer of Property Act.

Gopalaswami v *Arunachella* (1892) I.L.R., 15 Mad., 304, referred to.

Kangayya Gurukal v. *Kalimuthu Annavi* (1904) I.L.R., 27 Mad., 526, distinguished.

APPEAL against the order of remand passed by E. L. THORNTON, the District Judge of Trichinopoly, in Appeal No. 435 of 1911, preferred against the decree of V. K. DESIKACHARIAR, the Subordinate Judge of Trichinopoly, in Original Suit No. 18 of 1911.

The facts of the case are set out in the judgment of SADASIVA AYYAR, J.

A. S. Cowdell (not present), *T. Rangachariar* and *C. V. Ananthakrishna Ayyar* for the appellants Nos. 1 and 3 to 5.

N. Rajagopalachariar for the second appellant.

S. Srinivasa Ayyangar and *K. V. Krishnaswami Ayyar* for the respondent.

SADASIVA AYYAR, J.

SADASIVA AYYAR, J.—This is an appeal against an order of remand. The appellants are the defendants.

The plaintiff sued for redemption of a mortgage created in 1884. This mortgage document (Exhibit A) begins by calling itself a usufructuary mortgage, and, in two or three places in the course of the deed, it is expressly called a usufructuary mortgage deed. It, however, contains a clause that, if the mortgage amount was not paid on a date which is stipulated in the document at an interval of exactly nine years from the date of the document, the mortgage was to work itself out as a sale for the principal amount due on the mortgage bond. Possession was given to the mortgagee in accordance with the nature of the document and its spirit. At the end, there is a covenant to this effect. "I, the mortgagor, shall pay to you the costs of the construction of earthwork, etc., on the date fixed for redemption as per your accounts along with the mortgage money."

The question is, what is the nature of this document. It is contended by the appellants' learned Vakil that this is a combination of three kinds of mortgages, a simple mortgage, a usufructuary mortgage and mortgage by conditional sale. The plaintiff's contention on the other hand, is that it is usufructuary mortgage with a covenant at the end clogging the equity of redemption. I am inclined to think that it is a combination of

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a simple mortgage and a usufructuary mortgage with a covenant clogging the equity of redemption. I think it cannot be called a mortgage by conditional sale or it was executed after the Transfer of Property Act came into force, and it does not come within the definition of a mortgage by conditional sale found in section 58, clause (c) of the Transfer of Property Act. There is no ostensible sale of the mortgaged property on the date of the document. It is what was known as the Hindu form of the mortgage by conditional sale before the Transfer of Property Act was enacted; but it seems to me that the definition given in section 58, clause (c) of the Act was expressly framed so as to exclude this Hindu form of mortgage by conditional sale from the definition of mortgage by conditional sale in the Transfer of Property Act. That Hindu form of mortgage by conditional sale which began as a mortgage and worked itself out as a sale on breach of certain conditions by the mortgagor formed the subject of several decisions of the High Courts and the Privy Council, and because much confusion resulted from conflicts between those decisions, their Lordships of the Privy Council expressly stated in *Thumbusawmy Moodelly* v. *Hossain Rowthen*(1). "An Act" of the Legislature "affirming the right of the mortgagor to redeem until foreclosure by a judicial proceeding and giving to the mortgagee the means of obtaining such a foreclosure, with a reservation in favour of mortgagees whose titles, under the law as understood before 1858, had become absolute before a date to be fixed by the Act, would probably settle the law, without injustice to any party." I think that the Transfer of Property Act, so far as the Hindu form of mortgage by conditional sale was concerned, treated it as a mortgage either simple or usufructuary according to its terms and treated the condition as to its afterwards working out as a sale as not enforceable by enacting section 60 in the Act which gives to the mortgagors generally a right to redeem A mortgage deed which begins as a mortgage transaction cannot, in my opinion, be called a mortgage by conditional sale—though it is a mortgage which gives the mortgagee after a certain time and on breach of certain conditions by the mortgagor a right to claim a title as vendee. It is a mortgage with a clause providing for a future conditional sale and not a mortgage by means of a present sale transaction.

(1) (1875) I.L.R., 1 Mad., 1 at p. 23.

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If, then, this document is not a mortgage by conditional sale it is clearly a usufructuary mortgage according to the definition in section 58, clause (*d*) of the Transfer of Property Act. I think that as there is the covenant at the end by the mortgagor which expressly says: "I shall pay some monies along with the mortgage money on the date of redemption," the document might according to its literal construction, be treated as containing a personal covenant to pay the mortgage money; and following *Rama Brahmam* v. *Venkatanarasu Puntulu*(1), I would hold that, owing to the existence of that covenant, it is also a simple mortgage. Hence the document becomes a combination of a simple and a usufructuary mortgage.

It was next contended that even a combination of a simple and a usufructuary mortgage is an anomalous mortgage under the definition of section 98 of the Transfer of Property Act. That section is as follows:—"In the case of a mortgage not being a simple mortgage, a mortgage by conditional sale, or usufructuary mortgage or an English mortgage, or a combination of the first and third, or the second and third, of such forms, the rights and liabilities of the parties shall be determined by their contract as evidenced in the mortgage deed, and, so far as such contract does not extend, by local usage." The construction sought to be put by the appellants' learned vakil upon this section is that the words 'in the case of a mortgage being' should be understood before the words, 'a combination of the first and third.' I do not think that this is a reasonable construction of the section. I think the meaning is "or in the case of a mortgage not being a combination, etc."

Reliance was placed upon the decision in *Amarchand* v. *Kila Marar*(2). In that case the respondent was not represented, and I think that that case was wrongly decided. Reference was also made to *Ramayya* v. *Gururva* [illegible] tion in that case that the [illegible] case in the lower Court treated the mortgage in question in that case as an anomalous mortgage; but I do not think that the learned judges of this Court intended to state that that opinion of the Subordinate Judge was correct. Again, reference was

(1) (1912) 23 M.L.J., 131. (2) (1903) I.L.R., 27 Bom., 000.
(3) (1891) I.L.R., 14 Mad., 232

made to *Ammanna* v. *Gurumurthi*(1). There is an observation there that the transaction evidenced by the document in question in that case was a mortgage by way of conditional sale as defined in section 58, clause (c) of Act IV of 1882. That observation was not necessary for the decision in that case, and with the greatest respect I dissent from that observation though it seems to be accepted without criticism by Shephard and Brown (page 238) and by Gour (section 1044) in their commentaries on the Transfer of Property Act. In the result, I hold that the mortgage deed in this case is not an anomalous mortgage as defined in section 98 of the Transfer of Property Act, but it is a combination of a simple mortgage and a usufructuary mortgage and hence that it is redeemable. That, in the case of such a mortgage, the provisions of section 60 would apply seems to me to be clear from the observations in page 707 of Macpherson in his book on the Law of Mortgage. *Perayya* v. *Venkata*(2), also shows that the right of redemption is not extinguished by the existence of a covenant at the end of the mortgage deed similar to the terms given in the present mortgage deed [see also *Ankinedu* v. *Subbiah*(3), where even less onerous terms were held not to destroy the right of redemption].

In this view, it is not necessary for me to consider the question whether the learned District Judge was right in his view that, even if it was an anomalous mortgage, section 60 of the Transfer of Property Act would allow the mortgagor to redeem the mortgage and that the terms of section 98 should be read subject to the provisions of section 60 and other sections of the Transfer of Property Act. I need only say that I would find it very difficult to hold that the express terms of section 98 which are intended to apply specially to anomalous mortgages can be controlled by the provisions of the previous sections of the Act which deal with other matters

In the result I would dismiss the appeal with costs.

SPENCER, J. SPENCER, J.—I agree with my learned brother in the interpretation he has put on section 98 of the Transfer of Property Act. I find it quite impossible to read the words "or a combination of the first and third, or the second and third, of such

(1) (1893) I.L.R., 18 Mad., 64. (2) (1888) I.L.R., 11 Mad., 403. (3) (1912) I.L.R., 35 Mad. 744.

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forms" as not being governed by the negative which comes at the beginning of the sentence. If a different construction is to be put on this section, it would be necessary to imply the words "in the case of" between the words "or" and "a combination, etc." This would be a violation of the meaning of the plain English of the sentence. I am unable to follow the statement of the learned judges, who decided *Amarchand* v. *Kila Marar*(1), that a combination of a simple mortgage and a usufructuary mortgage is an anomalous mortgage provided for by section 98. Mr. Gour in paragraph 1603 of his book on the Law of Transfer in British India treats this statement as an oversight and in paragraph 1606 speaks of there being six, and only six, forms of mortgage eliminated by this section from the category of anomalous mortgages.

As regards the mortgage deed (Exhibit A) as I read the document, I am inclined to treat it as either a usufructuary mortgage deed with a clause containing a clog on the equity of redemption, or a usufructuary mortgage deed combined with a mortgage by conditional sale. In either case, it will be subject to the conditions of section 60 of the Transfer of Property Act and no act of the parties other than a transaction outside the mortgage deed itself will extinguish the right of redemption—*vide* *Perayya* v. *Venkata*(2).

The words which provide for the payment of repairs, improvements, etc., along with the mortgage money are evidently intended only to take effect in the event of the mortgage being redeemed. I do not consider that they constitute a personal undertaking to pay, nor are there any other words in this document which can be construed as a personal covenant, express or implied, to pay the mortgage money—compare—*Gopalasami* v. *Arunachella*(3). In this respect this case may be distinguished from that of *Kangaya Gurukal* v. *Kalimuthu Annavi*(4), in which a personal promise to pay was contained in the words. "We shall cause Rs. 200 to be paid and we shall redeem our land."

If section 58, clause (c) of the Transfer of Property Act is to be read strictly, it is necessary that there should be an ostensible sale of the mortgaged property to constitute a mortgage

(1) (1903) I.L.R., 27 Bom., 600.
(2) (1888) I.L.R., 11 Mad., 403.
(3) (1892) I.L.R., 15 Mad., 304.
(4) (1904) I.L.R., 27 Mad., 526.

by conditional sale. There are no words in Exhibit A which, by themselves, create a sale; but the document implies that if payment is not made by the stipulated date, the property shall be held and enjoyed by the mortgagee as if he had obtained it by absolute sale. In some cases, such words have been treated as a mortgage usufructuary by conditional sale. Instances are given in paragraph 1605, page 1025 of Mr. Gour's book. The next paragraph describes anomalous mortgages.

In *Tularam* v. *Ramachand*(1), the document which passed the ownership of the property usufructuarily mortgaged in case of failure to pay the mortgage money on the prescribed date, was construed as an anomalous mortgage. But in that case, the usufructuary mortgage seems to have been combined with a lease and that may have led the learned judges to treat it as an anomalous mortgage. Whether the present document be treated as an usufructuary mortgage combined with a mortgage by conditional sale, as the Lower Appellate Court treated it, or a usufructuary mortgage with a clog on the equity of redemption,—in either case, the judgment of the Lower Appellate Court will have to be upheld and this appeal dismissed with costs, and I therefore agree in the order proposed by my learned brother.

(1) (1902) I.L.R., 26 Bom., 252.

APPELLATE CIVIL.

Before Mr. Justice Sankaran Nair and Mr. Justice Bakewell.

1913. November 12.

D. BHASKARADU (SECOND PLAINTIFF), APPELLANT,

v.

P. SUBBARAYUDU AND THE SECRETARY OF STATE FOR INDIA IN COUNCIL (FIRST PLAINTIFF AND DEFENDANT), RESPONDENTS.*

Madras Land Encroachment Act (III of 1905), ss. 3, 5 and 14—Penal assessment, levy of—Suit for declaration of title and recovery of penal assessment—Suit brought after six months from date of notice and levy of penal assessment—Suit barred—Limitation.

Where the plaintiff brought a suit against the Secretary of State for a declaration of his title to certain immoveable property and for recovery of penal assessment levied from him by Government under section 5 of the Madras Act III of 1905, more than six months after the issue of notice and levy of the assessment from him,

Held, that the suit for declaration of title as well as for recovery of penal assessment was barred under section 14 of the Madras Act III of 1905.

SECOND APPEAL against the decree of A. SAMBAMURTI AYYAR, the temporary Subordinate Judge of Rajahmundry, in Appeal No 108 of 1911 (Referred Appeal No. 118 of 1910 on the file of the District Court of Godavari) preferred against the decree of J. M. NALLASWAMI PILLAI, the District Munsif of Rajahmundry, in Original Suit No. 210 of 1909.

The plaintiffs brought this suit for a declaration that a certain plot of land, on which the defendant (the Secretary of State for India) levied and collected penal assessment as if it was Government land encroached upon by the plaintiffs, belonged to the plaintiffs as part of their inam patta land and not Government poramboke and for recovery of the penal assessment collected from them. The defendant among other pleas set up the bar of limitation, but did not rely on section 14 of the Madras Act III of 1905 either in the written statement or in the Court of First Instance. The District Munsif decreed the claim in favour of the plaintiff. But on appeal the Subordinate Judge allowed

* Second Appeal No 1517 of 1912.

the plea of limitation based on the provisions of section 14 of the Madras Act III of 1905 to be raised on appeal. The plaintiffs had alleged in the plaint, which was filed on the 11th February 1909, that the cause of action for the suit arose on the 11th February 1908 (which was the date of receipt of the notice to quit the land), or on the 23rd March 1908 (the date of the levy of penal assessment) or on 6th March 1908 (the date fixed in the notice to defendant). The Subordinate Judge held that the suit for declaration of title as well as for recovery of the amount of penal assessment was barred by limitation under section 14 of the Madras Act III of 1905 and dismissed the suit. The second plaintiff preferred the Second Appeal to the High Court.

G. Venkataramayya for the appellant.

The *Government Pleader* for the second respondent.

SANKARAN NAIR, J.—The suit is brought by the plaintiff against the Secretary of State for a declaration of his title to certain property and for the recovery of the penal assessment levied from him by Government under section 5 of Madras Act III of 1905. The Government claim it as Government land. The suit was dismissed by the Lower Appellate Court on the ground that it is barred by limitation under section 14 of Act III of 1905. In Second Appeal it is contended that the prayer for declaration is not barred. The claim to recover the amount levied as penal assessment is not pressed in Second Appeal. Under section 3 of Act III of 1905 the Government is entitled to levy an assessment on land which is unauthorisedly occupied by any person if such land is the property of Government. Under section 5 in addition to the assessment under section 3 the Government is entitled to levy a penalty. Then section 14 confers a right to sue upon the person from whom the assessment is levied. Such suit must be brought within six months. See the 'Explanation' to the section. This suit is admittedly brought after the six months prescribed by that section. Then section 6 declares that the Government may summarily evict the person who is occupying the Government land without their consent. Section 14 gives a right of suit to the person so evicted and under the section read with the explanation that suit must be brought within six months of the eviction. In the case before us there has been no eviction and therefore the explanation does not apply to this suit.

BHASKARADU v. SUBBARAYUDU.

SANKARAN NAIR, J.

Section 14 declares that any suit which may be brought by a person aggrieved by any proceeding under the Act must be brought within six months from the time the cause of action arose. If therefore it is any proceeding under the Act which gives a cause of action for the suit, it must be brought within six months of the date of that proceeding. The cause of action is stated in the plaint to be a 'proceeding' under the Act, *i.e.*, the notice and the levy of penal assessment and the suit was brought more than six months afterwards.

The contention before us is that the suit for declaration may be brought within the ordinary period of limitation and reliance is placed upon the decision in *Narayana Pillai* v. *Secretary of State*(1). It is urged that such suit is maintainable as the title of the plaintiff is not lost till six months have expired from the date of eviction. It may be that the plaintiff has a cause of action to bring a suit within six months of the levy of penal assessment from him in any year to recover the amount so levied, so that, if the plaintiff is compelled to pay any assessment next year or the year after, it is possible that he may have a right to bring the suit within six months from that date. On that point it is unnecessary for us to give any opinion.

It may also be, as contended by the appellant, that, if the Government evict him at some future time from this land, he may have a right to bring a suit within six months from that date of eviction to recover possession of the land and that therefore it cannot be said that he would lose his title to the land till that period has expired. But that again is not the question that we have to consider. The question that we have to consider is when did the cause of action arise for this suit, and whether it is barred under section 14. And the cause of action for this suit for declaration certainly arose as stated in the plaint when the Government denied their title to the property or levied the penal assessment from them. If the plaintiff did not feel himself aggrieved by the notice or levy of the penal assessment, he was not bound to bring a suit for declaration. He might wait till any further step taken by Government gives him a right of suit. But as he alleges that it was a proceeding under this Act, *i.e.*, notice to quit the land, etc., that gives him a cause of action, he

(1) (1912) 23 M.L.J., 162.

was bound to bring his suit within six months from the date of the Act alleged to give him a cause of action, though his title to the property may not have been lost. In the plaint it is said that the cause of action arose on or before the 23rd March 1908. The suit is admittedly brought six months after those dates.

BHASKARADU v. SUBBA-RAYUDU.

SANKARAN NAIR, J.

The Judge is right, therefore, in holding that the suit for the declaration of title is barred, and we accordingly confirm the decree and dismiss the appeal with costs.

BAKEWELL, J.—I entirely agree

BAKEWELL, J.

APPELLATE CIVIL.

Before Mr. Justice Sadasiva Ayyar and Mr. Justice Spencer.

PERIYASAMI KONE (FIRST RESPONDENT—FIRST DEFENDANT), APPELLANT,

1913. November 17.

v.

V. P. R. M. MUTHIA CHETTIAR (PETITIONER—PLAINTIFF), RESPONDENT.*

Decree-holder—Petition for execution—Sale of properties not mentioned in the decree—Personal decree—Civil Procedure Code (Act V of 1908), O. XXXIV, r. 6—Application, if necessary—Court's power to amend—Code of Civil Procedure (Act V of 1908), sec 153

A decree-holder cannot ignore the terms of a decree directing him to bring the properties mentioned in it to sale before proceeding against other properties of the judgment-debtor

Manti Kamoji v Chadimalla Ramamurthy (1908) 3 M L T., 335 and *Varadiah v. Raja Perumal Raja Bahadur*, Appeal Against Order No 257 of 1909, followed.

But when the judgment-debtor has no saleable interest in the properties directed to be sold, the decree-holder need not go through the farce of putting them up to sale

A decree directing the defendant to pay a certain sum, and in default directing the hypothecated property to be sold, is a personal decree.

Raja of Kalahasti v. Varadachariar (1911) 21 M L J, 1036, followed.

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* Appeal Against Appellate Order No. 112 of 1912.

PERIYASAMI KONE v. MUTHIA CHETTIAR.

When there is a personal decree, no application for another personal decree under Order XXXIV, rule 6, can be granted.

Dinabandhu v. *Mashuda* (1912) 16 C.L.J., 318, referred to.

Section 153 of the Code of Civil Procedure (Act V of 1908), enables the Court under the above circumstances to order, if necessary, an amendment of the execution petition.

APPEAL against the order of J. G. BURN, the Acting District Judge of Madura, in Appeal No. 20 of 1912, preferred against the order of K. V. DESIKA ACHARIYAR, the Principal District Munsif of Madura, in Execution Petition No. 420 of 1911 (in Original Suit No. 205 of 1906).

The facts of the case appear sufficiently from the judgment.

S. Muttayya Mudaliyar for the appellant.

A. Krishnaswami Ayyar for the respondent.

SADASIVA AYYAR AND SPENCER, JJ.

JUDGMENT.—The view of the Lower Courts that a decree-holder is entitled to abandon his claim against some of the mortgaged properties even after decree so as to enable him to ignore the terms of the decree if those terms direct him to bring those properties to sale before he could proceed against other properties of the judgment-debtor, that view, though in accordance with certain Allahabad decisions, cannot be accepted as sound as it is against the decision of this Court in *Manti Kamoji* v. *Chodimalla Ramamurthy*(1), which has been recently followed by this Bench in *Vardiah* v. *Raja Perumal Raja Bahadur*(2).

If, of course, the mortgaged properties directed to be sold under the mortgage decree do not belong to the mortgagor, the mortgagee need not be compelled to resort to the farce of bringing them to sale and to undergo the useless delay involved in bringing them to sale, because it is an elementary principle of law that the Court will not do a vain thing, nor will it compel a man to do a fruitless thing.

Chech Lex nil frustra facit. Lex neminem cogit ad vana seu inutilia. See also *Krishnamachariar* v. *Bagiammal*(3).

The contention of the appellant's learned vakil therefore that the decree-holder ought to go through that farce, even if no interest at all in the properties Nos. 2 and 3 ordered to be sold belongs to the mortgagors, cannot be accepted. However, the Lower Courts have not gone into the question of fact whether

(1) (1905) 3 M.L.T., 335. (2) Appeal Against Order No. 257 of 1.0[illegible]

(3) (1912) 22 M.L.J., 125.

PERIYASAMI KONE v. MUTHIA CHETTIAR. — SADASIVA AYYAR AND SPENCER, JJ.

the judgment-debtor had no saleable interest in the properties Nos. 2 and 3 ordered to be sold, and we would have to call for a finding from the Lower Appellate Court, if it was necessary for the decision of this case to call for such finding. It is, however, unnecessary to do so, as the case has to be disposed of on another ground, which, though not taken in the Lower Courts, is a question of law depending on the construction of the decree and has been taken before us in the seventh ground of appeal to this Court. To appreciate that ground, the nature of the decree has to be stated. The decree directs "that the defendants do pay to the plaintiff Rs. 619-1-0, etc. . . ," and then it proceeds as follows "this Court doth further order and decree . . . that in default of payment . . . before the date specified the hypothecated property . . . shall be sold, etc." A similar decree was construed by a Bench of this Court to which one of us was a party [*Raja of Kalahasti* v. *Varadachariar*(1)] as giving a personal decree against the defendants under which execution at the option of the decree-holder can be had against the persons and other properties of the judgment-debtors without reference to the decree for sale of the mortgaged properties. If there is thus a personal decree already, no application for another personal decree under Order XXXIV, rule 6, can be granted. See *Dinabandhu* v. *Mashuda*(2), *Dina Nath Mitter* v. *Bejoy Krishna Das*(3) and *Purna Chandra Mandal* v. *Radha Nath Dass*(4).

The application as it stands cannot be therefore granted. But we think that this is a fit case for allowing the decree-holder to amend the prayer of his petition by adding an alternative prayer that "if the Court thinks that the decree as it stands awards relief personally against the defendant, the Court will be pleased to order arrest of the defendant and attach the following properties" (to be definitely described). We think that section 153 of the Civil Procedure Code gives ample power to the Court to allow such amendment, and that this is a fit case to permit such an amendment Four weeks from receipt of records by the Munsif is granted to make the amendment The Lower Court's orders are set aside. If the amendment is made, the Court of First Instance will pass orders in due course of law on the

(1) (1911) 21 M.L.J., 1036. (2) (1912) 16 C.L.J., 318.
(3) (1903) 7 C.W.N., 744. (4) (1906) I.L.R., 33 Calc., 867 at p. 877.

PERIYASAMI KONE v. MUTHIA CHETTIAR. — SADASIVA AYYAR AND SPENCER, JJ.

alternative relief and on the costs of the petition in that Court. If the amendment is not made, the petition will stand dismissed with the costs of the Court of First Instance. The parties will bear their respective costs in this Court and in the District Court.

APPELLATE CIVIL.

Before Mr. Justice Sadasiva Ayyar and Mr. Justice Spencer.

1913. November 20.

SORNALINGA MUDALI (PLAINTIFF), PETITIONER,

v.

PACHAI NAICKAN *alias* PACHAIYAPPA NAICKEN AND FOUR OTHERS (DEFENDANTS), RESPONDENTS.*

Promissory Note—Joint execution—Consideration—Surety.

The consideration paid to any one of several joint promissors is legally sufficient to support the promise of all the joint promissors.

Narasimha v. *Ramasami* (1913) 24 M.L.J., 91, applied.

Sesha Aiyar v. *Mangal Doss Jee* (1910) 20 M.L.J., 144, distinguished.

Per curiam —Section 92 of the Indian Evidence Act precludes an executant from setting up a contemporaneous oral agreement that he should not be made liable on the promissory note.

Per SPENCER, J.—Section 127 of the Indian Contract Act shows that the value received by the principal debtor is a sufficient consideration to bind the surety and section 128 makes his liability co-extensive.

PETITION under section 25 of Provincial Small Cause Courts Act (IX of 1887), praying the High Court to revise the decree of K. KRISHAMA ACHARIYAR, the District Munsif of Poonamallee, Small Cause Suit No. 473 of 1911.

The facts of the case appear sufficiently from the judgment of SPENCER, J.

T. Arumainatham Pillai for the petitioner.

K. V. Krishnaswami Ayyar for the respondents.

SADASIVA AYYAR, J.

JUDGMENT.—The District Munsif is in error in holding that, where several persons make a joint promise in consideration of money paid to some of them, the others are entitled to contend that, because no portion of the consideration was received by

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* Civil Revision Petition No. 719 of 1911.

them, there was no legal consideration for their own joint promise. The consideration paid to any of the joint promissors, is legally sufficient to support the promise of all the joint promissors.

SORNALINGO MUDALI v. PACHAI NAICKAN.

SADASIVA AYYAR, J.

As regards *Sesha Aiyar* v. *Mangal Doss Jee*(1), the learned Judges seem to have held that the single executant of a promissory note could show that there was no consideration for the only promise relied on, namely, the promise by that single executant. If the learned Judges intended to decide that a person who has made himself liable, according to the tenor of the promissory note, could prove that he and the promisee agreed contemporaneously that he should not be held liable, I respectfully differ from that view, as it is opposed to section 92 of the Evidence Act and to the Law merchant.

Narasimha v. *Ramasuami*(2), shows that as against the holder, one of the joint executants cannot be permitted even to prove that he was a mere surety. The plaintiff's contention as to subsequent interest and costs must also be allowed.

In modification of the Lower Court's decree, a decree will issue in the plaintiff's favour against all the five defendants for the sum decreed by the Lower Court with interest at 6 per cent. per annum from the date of suit and cost in the Lower Court. The costs of this Revision Petition will be paid by the fifth defendant to the plaintiff.

SPENCER, J.

SPENCER, J.—The respondent (fifth defendant) in his written statement said he signed the plaint promissory note believing the plaintiff, who said that, if his name was on the note as that of a person jointly liable, the other defendants would take an interest in discharging the debt. From this it appears that he signed as a surety. The District Munsif seems to have thought that there was no consideration as between the plaintiff and the fifth defendant, but section 127 of the Contract Act shows that the value received by the principal debtor is a sufficient consideration to bind the surety, and section 128 makes his liability co-extensive with that of the principal debtor. He is clearly precluded by section 92 of the Evidence Act from setting up a contemporaneous oral agreement that he should not be made liable on the promissory note—*vide Narasimha* v. *Ramasami*(2).

(1) (1910) 20 M.L.J., 141. (2) (1913) 24 M.L.J., 91.

APPELLATE CIVIL.

Before Mr. Justice Sankaran Nair and Mr. Justice Bakewell.

1913
November 20
and
December 5.

MANJAYA MUDALI AND ANOTHER (DEFENDANTS Nos 1 AND 2), APPELLANTS,

v.

SHANMUGA MUDALI AND SEVEN OTHERS (PLAINTIFF AND DEFENDANTS Nos. 3 TO 9), RESPONDENTS.*

Hindu Law—Joint family co-parcenary—Purchase from a co parcener—Its effect on family co-parcenary—Alienee, not a tenant in common—One member becoming outcaste, excluded from family—Limitation Act (IX of 1908), art. 142.

When a co-parcener alienates his share in certain specific family property the alienee does not acquire any interest in that property but only an equity to enforce his rights in a suit for partition and to have the property alienated set apart for the alienor's share if possible.

Hem Chunder Ghose v *Thako Moni Debi* (1893) I.L R, 20 Calc, 533, *Amolak Ram* v *Chandan Singh* (1902) I L.R, 24 All, 483, *Narayan bin Babaji* v. *Nathaji Durgaji* (1904) I L R, 28 Bom., 201, *Pandurang* v. *Bhaskar* (1874) 11 Bom. H.C R., 72 and *Udaram* v *Ranu* (1874) 11 Bom. H.C.R., 76, approved.

The alienee cannot therefore sue for partition and allotment to him of his share of the property alienated.

Venkatarama v *Meera Labai* (1890) I.L R, 13 Mad, 275, *Palani Konan* v. *Masakonan* (1897) I.L R, 20 Mad, 243, and *Ramkishore Kedarnath* v. *Jainarayan Ramarachhpal* (1913) 14 M.L T., 163, referred to

Such an alienee has no right to possession and no status as a tenant in common although he might have obtained possession of the property in execution of the decree against one of the co-parceners

Deendyal Lal v. *Jugdeep Narain Singh* (1877) 4 I.A., 247, *Suraj Bunsi Koer* v *Sheo Persad Singh* (1880) I.L.R., 5 Calc, 148 (P.C.), *Hardi Narain Sahu* v *Ruder Perkash Misser* (1884) I L R, 10 Calc., 626, followed.

When a co-parcener became an outcaste and was driven out of the family and did not enjoy family property for over twelve years, it amounted to exclusion and the right to recover his share is barred.

Per BAKEWELL, J.—The transferee only acquires an equity and it is only a right *in personam* and not a right *in rem* and the transferor remains a member of the co parcenary until partition is effected.

The question whether a general or partial partition will lie is not one relating to the law of procedure but must be decided according to the principles of Hindu Law

Subba Row v *Ananthanarayana Aiyar* (1912) 23 M L.J, 64 at p 70 and *Ibrahimsa Rowthan* v *Thiruvenkatasami Naick*, (1911) I.L R, 34 Mad, and at p 270, dissented from.

* Second Appeal No. 151 of 1911.

A purchaser of the interest of a co-parcener must sue for a general partition of the entire family property.

Iburamsa Rowthan v. *Theruvenkatasami Naick* (1911) I.L.R., 34 Mad., 269 at p. 274, applied

When such purchaser fails to apply for amendment of his plaint after an issue is raised questioning the frame of the suit, his suit is liable to be dismissed.

Subba Row v. *Ananthanarayana Aiyar* (1912) 23 M L J., 64 at p. 70, referred to.

SECOND APPEAL against the decree of S. RAMASWAMI AYYANGAR, the Subordinate Judge of Madura, East, in Appeal No. 742 of 1909, preferred against the decree of R. ANNASWAMI AYYAR, the District Munsif of Dindigul, in Original Suit No. 642 of 1906.

The plaintiff and the first defendant are the only surviving brothers of a family of six brothers who became divided prior to 1891. The second and third defendants are respectively the sons of the first defendant by his junior and senior wives. Each of them had a full brother who died some time between 1891 and 1904. The suit properties formed the ancestral property of the six brothers originally. After family partition which took place prior to 1891, the first defendant and his four sons formed a Hindu joint family and as such owned ancestral immoveable property.

By a sale-deed, dated 10th December 1891 (Exhibit I), the third defendant, one of the sons of the first defendant, conveyed one-fifth share of certain specified ancestral immoveable property situate in Appayampatti village to one Govindan Chetty, and by a sale-deed, dated 9th December 1894 (Exhibit III), the latter conveyed the same parcels to the first defendant. About the year 1900, the first defendant succeeded by inheritance to ancestral property which had been taken by his brother under the partition made prior to 1891.

By a sale-deed, dated 31st August 1904 (Exhibit A), the third defendant conveyed a half-share of certain specified immoveable properties in Appayampatti and another village to the defendants Nos. 4 and 5, who, by a sale-deed, dated 3rd December 1905 (Exhibit B), conveyed the same parcels to the plaintiff, a divided brother of the first defendant. By a sale-deed, dated 12th November 1904 (Exhibit C), the second defendant conveyed certain shares in specified immoveable property in the same villages to one Muthusami Chetty.

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In his plaint, the plaintiff claimed as assignee from the third defendant, under the deeds (Exhibits A and B), that these properties should be divided and one-third share should be allotted to him. By their written statement the defendants Nos. 1 and 2 pleaded, *inter alia*, that the third defendant had been outcasted and excluded from the family for more than twelve years prior to the suit, and that his right to a share became extinguished by the sale under Exhibit I, and also that certain liabilities of the family should be provided for before any partition could be made.

The Court of First Instance dismissed the suit and the Lower Appellate Court allowed the 2/15 share of the properties.

The first and second defendants preferred this second appeal.

M. K. Narayanswami Ayyar and *K. B. Ranganatha Ayyar* for the appellants.

T. R. Ramachandra Ayyar and *T. R. Krishnaswami Ayyar* for the respondents.

SANKARAN NAIR, J.

SANKARAN NAIR, J.—The third defendant, a member of a Hindu family, conveyed his one-fifth share in certain joint family properties in 1891 by Exhibit I. That interest has now vested in the first defendant, his father. Two of his brothers died, and in 1904 the third defendant again transferred all his interest by Exhibit A. At that time, on the footing that he was a co-parcener, his interest amounted to one-third. The plaintiff has acquired the rights conveyed by Exhibit A and he now seeks to recover possession.

The Subordinate Judge has held that the plaintiff is entitled to a two-fifteenths share of the properties, that is the difference between one-third and one-fifth; and this is an appeal against that decision.

The first question that is argued before us is that by the transfer in 1891 the joint tenancy was put an end to and the third defendant's first alienee became a tenant in common with the other co-parceners so far as the property alienated was concerned and that therefore by the death of the other co-parceners no interest accrued to him by survivorship; and for this the decisions of BENSON AND MILLER, JJ., in *Srinivasa Sundara Thothachariar v. Krishnasawmy Iyengar*(1) and of BENSON and

(1) (1912) 13 I.C., 354.

SUNDARA AYYAR, JJ., in *Subba Row* v. *Ananthanarayana Aiyar*(1), are relied upon. These judgments follow the opinion of KRISHNASWAMI AYYAR, J., in *Chinnu Pillai* v. *Kalimuthu Chetti*(2).

It is argued before us that these decisions are not sound and that the alienation of a co-parcener's interest in a portion of a joint family property does not make the alienee a tenant in common with the other co-parceners in the property so alienated. On principle it is difficult to support the proposition.

When a co-parcener alienates his share in certain specific family property, the alienee does not acquire any interest in that property. He can only enforce his rights in a suit for partition. In dividing the family properties the Court will, no doubt, set apart for the alienating co-parcener's share the property alienated if that can be done without any injustice to the other co-parceners, and such property, if it is so set apart, may be given to the alienee as the transferee of such co-parcener. But this is only an equity and the alienee is not, as of right, entitled to have the property so allotted. If such property is not so set apart, then the alienee would be entitled to recover that property which was allotted to his vendor for his share, though it may not be the property that was alienated in his favour. The property allotted will take the place of the property which has been alienated to him so far as he is concerned.

This law has been repeatedly laid down in various cases by the other High Court also. See *Hem Chunder Ghose* v. *Thako Moni Debi*(3), *Amolak Ram* v. *Chandan Singh*(4), *Narayan bin Babaji* v. *Nathaji Durgaji*(5), *Pandurang* v. *Bhaskar*(6) and *Udaram* v. *Ranu* (7). This, of course, is inconsistent with the view that the alienee acquires any interest in any specific property. The co-parcener who alienated has himself no such interest. It is difficult to see, therefore, how the alienee could acquire such an interest.

For the same reasons, it has been held by this Court that an alienee cannot sue for partition and allotment to him of his share of the property alienated [see *Venkatarama* v. *Meera Labai*(8)]

(1) (1912) 23 M L J., 64 at p. 70.
(2) (1912) I.L R., 35 Mad., 47 (F.B).
(3) (1893) I.L.R., 20 Calc., 533.
(4) (1902) I.L.R., 24 All., 483.
(5) (1904) I.L.R., 28 Bom., 201
(6) (1874) 11 B.H.C R., 72
(7) (1874) 11 B.H C.R., 76.
(8) (1890) I.L.R., 13 Mad. 275.

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and *Palani Konan* v. *Masakonan*(1). This again is inconsistent with the view that a purchaser becomes a tenant in common with the others in the specific property alienated to him. They have not been overruled or dissented from and are inconsistent with the cases above cited relied upon by the appellants.

In *Deendyal Lal* v. *Jugdeep Narain Singh*(2), a suit was brought by a son to recover the property sold in execution of a decree against his father. The Subordinate Judge passed a decree for a moiety of the family property claimed. That decree was reversed by the Appellate Court which dismissed the suit. The High Court, however, gave the plaintiff possession of the whole of the property, not merely the plaintiff's share. In appeal before the Privy Council, their Lordships laid down the position of a purchaser in the following words: "It seems to their Lordships that the same principle may and ought to be applied to shares in a joint and undivided Hindu estate; and that it may be so applied without unduly interfering with the peculiar status and right of the co-parceners in such an estate, *if the right of the purchaser at the execution sale be limited to that of compelling the partition, which his debtor might have compelled, had he been so minded, before the alienation of his share took place.*" In accordance with such declaration, they held that the decree which awarded possession of the joint family property was right, but they added a declaration that the purchaser was entitled to take proceedings to have his alienor's share and interest ascertained by partition; this was the principle which was subsequently acted upon by their Lordships.

In *Suraj Bunsi Koer* v. *Sheo Persad Singh*(3), their Lordships passed a decree confirming co-parceners in their possession of the joint family property including the share of the alienor subject to such proceedings as the alienee might take to ascertain the share that he obtained by means of partition. The decree assumed that till such partition the alienee did not acquire any right to possession. *Suraj Bunsi Koer* v. *Sheo Persad Singh*(3). In the judgment of the Privy Council in *Hardi Narain Sahu* v. *Ruder Perkash Misser*(4), their Lordships decided that in similar cases where the alienee has got

(1) (1897) I.L.R., 20 Mad., 243. (2) (1877) 4 I.A., 247.
(3) (1880) I.L.R., 5 Calc., 148 (P.C.).
(4) (1884) I.L.R., 10 Calc., 626 (P.C.).

where the alienee has got possession of the property he should be turned out of possession of the whole of the property and that the other co-parceners should recover possession of the same subject to a declaration that the alienee is entitled to demand a partition of the share of the alienor.

These decisions negative any right of the alienee to possession and his status as a tenant in common although he might have obtained possession of the property in execution of a decree against one of the co-parceners.

So far as Madras is concerned there is no distinction in this respect between the rights of a purchaser in execution of a decree and by private alienation; and in *Ramkishore Kedernath* v. *Jainarayan Ramarachhpal*(1), which is a recent case of private alienation, the Judicial Committee pointed out that the members of a family who were not bound by the alienation were entitled to recover possession of the entire property as they were entitled to it as joint family property and desired to enjoy it as such. They also pointed out that in a suit for such possession it may be open to the Court to make the whole or any part of the relief granted to them conditional on their assenting to a partition, so far as regards the alienor's interest in the estate, so as to give effect to any right which the alienee may be entitled to, claiming through the alienor. The two Madras cases above referred to as well as these Privy Council decisions do not seem to have been considered by the learned judges in arriving at the conclusion that the alienee becomes a tenant in common of the portion of the joint family property alienated. The decisions of the other High Courts cited by KRISHNASWAMI AYYAR, J., if opposed to these decisions cannot be followed nor has the decision of the Full Bench in *Chinnu Pillai* v. *Kalimuthu Chetti*(2) anything to do with the case. It only determined the time for ascertaining the alienating co-parcener's share which passed to the purchaser. I am accordingly unable to follow the decisions relied upon by the appellants.

The other question is whether the interest of the third defendant has been lost by prescription It is found that he became an outcaste in 1891. It is also found that he was driven out of the family and that he did not enjoy the family properties

(1) (1913) 14 M.L.T., 163 (F.B.). (2) (1912) I.L.R., 35 Mad., 47 (F.B.).

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This is clearly exclusion, and as twelve years have elapsed since the date of exclusion, it appears to me that he had lost all his interest in the joint family property and that therefore the plaintiff did not acquire any interest under Exhibit A. The decree of the Subordinate Judge must for this reason be reversed and that of the District Munsif restored with costs in this and the Lower Appellate Court

BAKEWELL, J.

BAKEWELL, J.—I have had the advantage of reading the judgment which my learned brother has just delivered and I entirely concur therein; since, however, we are differing from learned Judges of this Court for whose opinion I have the highest respect, I think that I should also state my reasons.

The historical development of the law relating to the property of a joint Hindu family whereby a member of the family has obtained a power of disposing of his interest in the joint property is well described by Mr. Mayne in his book on Hindu Law (paragraphs 353 to 360), and he shows that this power is contrary to the theory of the ancient Mitakshara law and is due to modern ideas and is the creature of judicial decisions.

It is clear that an ordinary member of a family cannot convey *to his alienee a larger interest in the joint property* than he himself possesses, and it is desirable to consider shortly the nature of that interest. It is not strictly comparable to any interest under any other branch of the law of property or of contract, still less can it be compared to joint tenancy or tenancy in common under the law of England. In *Appovier* v. *Rama Subba Aiyan*(1), LORD WESTBERY states that "according to the true notion of an undivided family in Hindu law, no individual member of that family, whilst it remains undivided, can predicate of the joint and undivided property, that he, that particular individual, has a certain definite share"; and, when he speaks of the severance of a joint tenancy and its conversion into a tenancy in common, he is careful to point out that he uses the language of the English law merely by way of illustration. With all respect, I think that the learned Judges from whom we are differing by using these terms have imported from the English law some of the ideas which they connote.

If, in order to describe the development of this branch of law, it be permissible to compare it with another branch of law,

(1) (1866) 11 M.I.A., 75.

I would prefer to use the law of partnership rather than the English law of property, in the same manner in which it was used by their Lordships of the Privy Council in *Deendyal Lal* v. *Jugdeep Narain Singh*(1). A member of a joint family cannot, any more than a partner, introduce a stranger into the community; he cannot for his own benefit alienate or deliver to a stranger a particular portion of the common property, and he cannot obtain his share of that property without winding up the concern; and his interest is, therefore, a right to a share of the general assets after the common liabilities have been discharged, and not a right to a share of any specific property of the family. It has accordingly been frequently held that his remedy is a suit for the partition of the whole of the family property, and not of specific property, as is pointed out by SUNDARA AYYAR, J., in *Narayanaswami Naidu Garu* v. *Tirumala Setti Subbayya*(2).

I must respectfully dissent from the dicta of the same learned Judge in *Subba Row* v. *Ananthanarayana Aiyar*(3), and of KRISHNASWAMI AYYAR, J., in *Iburamsa Rowthan* v. *Theruvenkatasami Naick*(4), that the question whether a suit for general or for partial partition will lie is "one relating to processual law and must be decided not according to any rule of Hindu Law but according to the principles of civil procedure." A suit for an account of the property of an undivided family and an enquiry as to its liabilities, that is for general partition, is necessitated by the nature of the interests of the plaintiff and his co-parceners, the circumstances of a particular case may enable this procedure to be dispensed with, but the general rule remains that each co-parcener may ask that it should be followed. It has been clearly laid down by their Lordships of the Privy Council that the purchaser of the interest of a co-sharer in a joint family estate under a sale in execution of a decree, or under a voluntary sale in the Madras Presidency, stands in the shoes of the co-sharer, and acquires the right as against the other co-sharers to compel a partition [*Deendyal Lal* v. *Jugdeep Narain Singh*(1)], the interest which is purchased is not the share at that time in the property, but is the right which the alienor would have to a partition, and what would come to him upon the partition being made; *Hardi Narain Sahu* v. *Ruder Perkash*

(1) (1877) 4 I.A., 247 at p. 255. (2) (1913) 24 M.L.J., 79 at p. 80.
(3) (1912) 23 M.L.J., 64 at p. 70. (4) (1911) I.L.R., 34 Mad., 269 at p. 270.

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Misser(1). "The law as established in Madras and Bombay has been one of gradual growth, founded upon the equity which a purchaser for value has to be allowed to stand in his vendor's shoes, and to work out his rights by means of a partition." *Suraj Bunsi Koer* v. *Sheo Persad Singh*(2). It has been held that this right is not determined by the death of the alienor before partition (*ibid.*), and that the quantum of interest transferred must be taken as that of the alienor at the date of the assignment—*Chinnu Pillai* v. *Kalimuthu Chetti*(3); but there appears to be no reason why the transferor should not by appropriate words convey all such rights as he may possess, whether vested or contingent upon the death of another co-parcener in the transferor's lifetime; and the transferor obviously cannot prevent his share from being diminished by reason of the birth of a collateral co-sharer, or by legitimate payments or alienations by the manager of the family. In accordance with these authorities it has been held that a purchaser of the interest of a co-parcener must sue for a general partition of the entire family property; *Iburamsa Rowthan* v. *Theruvenkatasami Naick*(4).

Since the transferee only acquires an equity to compel a partition he has only a right *in personam* and not a right *in rem*, and the transferor remains a member of the family and retains all the rights which attach to membership, including the right to an increased share upon the death of another co-parcener. An alienation by a co-parcener of a particular item of the family property, or of a specific share in such an item, differs in some respects from an alienation of the whole or a fraction of the interest of the transferor in the general assets of the family. Since a member of a joint family has no right to a specific share of any particular property of that family, an assignment by him of such a share to a stranger conveys no interest whatever to the transferee; if, however, the grantor should subsequently become entitled to the property included in the grant, then on a well settled principle of equity which is embodied in section 43 of the Transfer of Property Act, 1882, he cannot deny the title of the transferee and is bound to make the grant effectual. The Courts have in this case also recognized the right of the transferee

(1) (1884) I.L.R., 10 Calc., 626 (P.C.). (2) (1880) I.L.R., 5 Calc., 168.
(3) (1912) I.L.R., 35 Mad., 47 (F.B.). (4) (1911) I.L.R., 34 Mad., 269 at p. 274.

to stand in the shoes of the transferor and to enforce his equity by means of a suit for the general partition of the entire family property, and in order to do equity as between the transferor and transferee will endeavour to marshall the property in such a way as, if possible, to give effect to the alienation; but this is in order to avoid a fraud upon the transferee, and this procedure will not be adopted to the prejudice of the other co-parceners.

In the present case the first defendant and his four sons in 1891 formed a joint family, and as such owned ancestral immoveable property. By a sale-deed, dated 10th December 1891 (Exhibit I), the third defendant, one of the sons, conveyed one-fifth share of specified ancestral immoveable property situate in Appayampatti village to one Govindan Chetty; and by a sale-deed, dated 9th December 1894 (Exhibit III), the latter conveyed the same parcels to the first defendant. In paragraph 5 of his written statement the first defendant stated that he made this purchase in order to avoid unnecessary litigation, and, since there is no allegation that the purchase monies were his self-acquisition, it may be presumed that the purchase was for the benefit of the family, and the effect of the conveyance Exhibit III was to extinguish the claim of Govindan Chetty under Exhibit I. Even if the deed Exhibit III could be construed as an assignment to the first defendant of Govindan Chetty's right *in personam* against the third defendant, it would merely give to the first defendant an equity against the latter which he could enforce upon a partition of the family property. In either view and in accordance with the principle above enunciated the third defendant remained a member of the family. About the year 1900, the first defendant succeeded by inheritance to ancestral property which had been taken by his brother upon a partition made sometime prior to 1891, and two of his sons died between the years 1891 and 1904. The third defendant then, as a member of the family, became entitled to an increased share both in the property situate in Appayampatti village and in property situate in Poojaripatti village.

By a sale-deed, dated 31st August 1904 (Exhibit A), the third defendant conveyed a half share of specified immoveable properties in both these villages to fourth and fifth defendants, who, by a sale-deed, dated 3rd December 1905 (Exhibit B), conveyed the same parcels to the plaintiff, who is a divided brother of the

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first defendant. By a sale-deed, dated 12th November 1904 (Exhibit C), the second defendant conveyed certain shares in specified immoveable property in the same villages to one Muthusami Chetty.

By his plaint, the plaintiff claimed as assignee from the third defendant, under the deeds Exhibits A and B, that these properties should be divided and one-third share should be allotted to him. By their written statement the first and second defendants pleaded, *inter alia*, that the third defendant had been outcasted and excluded from the family for more than 12 years prior to the suit, and that his right to a share became extinguished by the sale under Exhibit I; and also that certain liabilities of the family should be provided for before any partition could be made.

I think that the plaintiff might have maintained a suit for partition, as assignee of the interest of the third defendant in the properties comprised in the sale-deeds (Exhibits A and B); but that his proper remedy was by suit for general partition of the family properties, and that when an issue was raised by the District Munsif as to the frame of the suit, he should have applied for amendment of his plaint accordingly, and that the suit might have been dismissed upon this ground [see *Subba Row* v. *Ananthanarayana Aiyar*(1)].

I agree with my learned brother that the plaintiff's suit also fails on the ground that the third defendant's rights had been lost by prescription, and with the decree proposed by him.

(1) (1912) 23 M.L.J., 64 at p. 70.

APPELLATE CIVIL.

Before Mr. Justice Sadasiva Ayyar and Mr. Justice Spencer.

ABDUL KADER ROWTHER AND ANOTHER (COUNTER-PETITIONERS—JUDGMENT-DEBTORS), APPELLANTS, 1913. December, 19.

v

KRISHNAN MALAVAL NAIR (KARNAVAN AND MANAGER OF THE TARWAD), (PETITIONER—DECREE-HOLDER), RESPONDENT.*

Limitation Act (XV of 1877), art. 179—Execution, step in aid of—Application, oral, for adjournment.

An application to take a step in aid of execution under article 179 of the Limitation Act need not be in writing.

Amar Singh v *Tika* (1880) I L.R., 3 All., 139 and *Manekllal Jagjivan* v. *Nasia Raddha* (1891) I.L.R., 15 Bom., 405, followed.

An application by the decree-holder for an adjournment to enable him to produce records or evidence necessary to effectively conduct the execution proceedings further is an application to get an order in aid of execution.

Sheshdasacharya v. *Bhimacharya* (1912) 14 Bom. L R., 1204, *Haridas Nanabhai* v. *Vithaldas Kisandas* (1912) I L.R., 36 Bom., 638, *Pitam Singh* v. *Tota Singh* (1907) I.L R., 29 All., 301 and *Kunhi* v. *Seshagiri* (1882) I L R., 5 Mad., 141, referred to.

APPEAL against the decree of A. EDGINGTON, the Acting District Judge of South Malabar, in Appeal No. 904 of 1911, preferred against the order of P. J. ITTEYERAH, the Subordinate Judge of South Malabar at Palghat, in Execution Petition No. 751 of 1911 in Original Suit No. 40 of 1903.

The respondent got a decree on 16th December 1903 and after various infructuous applications presented Execution Petition No. 751 of 1911 on 28th October 1911 for the execution of his decree. This application would have been time-barred unless the oral application he made on 7th August 1908 for adjournment in connection with execution proceedings then pending could be considered to be a step in aid of execution. The Court of First Instance held that it was not a step in aid of execution and dismissed the application as barred by limitation. The Lower Appellate Court held that such an oral application

* Appeal Against Appellate Order No. 5 of 1913.

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first defendant. By a sale-deed, dated 12th November 1904 (Exhibit C), the second defendant conveyed certain shares in specified immoveable property in the same villages to one Muthusami Chetty.

By his plaint, the plaintiff claimed as assignee from the third defendant, under the deeds Exhibits A and B, that these properties should be divided and one-third share should be allotted to him. By their written statement the first and second defendants pleaded, *inter alia*, that the third defendant had been outcasted and excluded from the family for more than 12 years prior to the suit, and that his right to a share became extinguished by the sale under Exhibit I; and also that certain liabilities of the family should be provided for before any partition could be made.

I think that the plaintiff might have maintained a suit for partition, as assignee of the interest of the third defendant in the properties comprised in the sale-deeds (Exhibits A and B); but that his proper remedy was by suit for general partition of the family properties, and that when an issue was raised by the District Munsif as to the frame of the suit, he should have applied for amendment of his plaint accordingly, and that the suit might have been dismissed upon this ground [see *Subba Row* v. *Ananthanarayana Aiyar*(1)].

I agree with my learned brother that the plaintiff's suit also fails on the ground that the third defendant's rights had been lost by prescription, and with the decree proposed by him.

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(1) (1912) 23 M.L.J., 64 at p. 70.

APPELLATE CIVIL.

Before Mr. Justice Sadasiva Ayyar and Mr. Justice Spencer.

1913. December, 19.

ABDUL KADER ROWTHER AND ANOTHER (COUNTER-PETITIONERS—JUDGMENT-DEBTORS), APPELLANTS,

v.

KRISHNAN MALAVAL NAIR (KARNAVAN AND MANAGER OF THE TARWAD), (PETITIONER—DECREE-HOLDER), RESPONDENT.*

Limitation Act (XV of 1877), art. 179—Execution, step in aid of—Application, oral, for adjournment.

An application to take a step in aid of execution under article 179 of the Limitation Act need not be in writing.

Amar Singh v. *Tika* (1880) I.L.R., 3 All., 139 and *Maneklal Jagjivan* v. *Nasta Raddha* (1891) I.L.R., 15 Bom., 405, followed.

An application by the decree-holder for an adjournment to enable him to produce records or evidence necessary to effectively conduct the execution proceedings further is an application to get an order in aid of execution.

Sheshdasacharya v. *Bhimacharya* (1912) 14 Bom. L.R., 1204, *Harides Nanabhai* v. *Vithaldas Kisandas* (1912) I.L.R., 36 Bom., 638, *Pitam Singh* v. *Tota Singh* (1907) I.L.R., 29 All., 301 and *Kunhi* v. *Seshagiri* (1882) I.L.R., 5 Mad., 141, referred to.

APPEAL against the decree of A. EDGINGTON, the Acting District Judge of South Malabar, in Appeal No. 904 of 1911, preferred against the order of P. J. ITTEYERAH, the Subordinate Judge of South Malabar at Palghat, in Execution Petition No. 751 of 1911 in Original Suit No. 40 of 1903.

The respondent got a decree on 16th December 1903 and after various infructuous applications presented Execution Petition No. 751 of 1911 on 28th October 1911 for the execution of his decree. This application would have been time-barred unless the oral application he made on 7th August 1908 for adjournment in connection with execution proceedings then pending could be considered to be a step in aid of execution. The Court of First Instance held that it was not a step in aid of execution and dismissed the application as barred by limitation. The Lower Appellate Court held that such an oral application

* Appeal Against Appellate Order No. 5 of 1913.

ABDUL KADER ROWTHER v. KRISHNAN MALAYAL NAIR.

was an application within the meaning of article 179 of the Limitation Act and was consequently not barred by limitation and set aside the order of the Court of First Instance.

The judgment-debtors appealed.

K. Narayana Rao for the petitioners.

T. R. Ramachandra Ayyar and *N. A. Krishna Ayyar* for the respondent.

SADASIVA AYYAR, J.

SADASIVA AYYAR, J.—Unless the oral application for an adjournment of the hearing of a previous execution petition, made by the decree-holder on the 7th August 1908 is held to be an application to take a step in aid of execution, the present execution application of 3rd July 1911 is clearly barred by limitation.

The question is not free from difficulty. In *Kartick Nath Pandey* v. *Juggernath Ram Marwari*(1), there is an *obiter dictum* showing that an application for adjournment to enable the decree-holder to conduct his petition further with effect is not an application to take a step in aid of execution.

A different view was taken in *Mowar Narasingh Dayal Singh* v. *Mowar Kali Charan Singh*(2), where the point directly arose.

The learned vakil for the judgment-debtors (appellants before us) sought to distinguish *Mowar Narasingh Dayal Singh* v. *Mowar Kali Charan Singh*(2) from the present case on two grounds :—

(*a*) that the application for adjournment relied on in *Mowar Narasingh Dayal Singh* v. *Mowar Kali Charan Singh*(2) was in writing and not oral;

(*b*) that the application in that case was an application for an adjournment to enable the decree-holder to produce an affidavit as evidence to carry on those execution proceedings further, whereas it was not so in the present case.

I think that neither of these contentions is sound. There is nothing in article 179 of the Limitation Act which requires the application to take some step in aid of execution to be in writing. *Amar Singh* v. *Tika*(3) and *Mancklal Jagjivan* v. *Nasia Raddha*(4) are direct authorities to the contrary and I am prepared to follow them.

(1) (1900) I.L.R., 27 Calc., 285.
(2) (1909) 14 C.W.N., 456.
(3) (1880) I.L.R., 3 All., 139.
(4) (1891) I.L.R., 15 Bom., 405 at p. 407

Then as regards the other distinction sought to be made, I am unable to see that the application for an adjournment to enable the decree-holder to produce affidavit-evidence in aid of further proceedings [which was the application in *Mouar Narasingh Dayal Singh* v. *Mouar Kali Charan Singh*(1)], stands on a better footing than an application for an adjournment to enable the decree-holder to produce an encumbrance certificate in respect of the attached property in aid of further proceedings in execution.

Then reliance is placed by the appellant's vakil on the reason given in the *obiter dictum* in *Kartick Nath Panday* v. *Juggernath Ram Marwari*(2). That reason is that an application for adjournment is in retardation of the execution proceedings and not in aid of the execution proceedings I think that there is a fallacy in this reasoning. When an application for adjournment is made by the judgment-debtor, it is almost invariably to retard the execution proceedings. As regards an application by the decree-holder it may be one of three things :—

(a) It may be to get an order in aid or

(b) it may be to get an order in retardation or

(c) it may be to get an order which is neither

An application by the decree-holder to give time to the judgment-debtor merely as a matter of grace is a step in retardation. An application for an adjournment to enable the decree-holder to produce records or evidence necessary to effectively conduct the execution proceedings further will be an application to get an order in aid. *Sheshdasacharya* v. *Bhimacharya*(3); *Haridas Nanabhai* v. *Vithaldas Kisandas*(4), *Pitam Singh* v. *Tota Singh*(5) and *Kunhi* v. *Seshagiri*(6).

An application by the decree-holder to draw money deposited in Court or to obtain copies of sale lists (without anything to indicate that they were necessary to aid further execution) will be application neither in aid nor in retardation.

In the present case, I think that the application for an adjournment was for an order in aid.

I think that the Legislature is a little harsh on decree-holders in fixing the date of applying for execution as one of the starting points for limitation for calculating the three years' period for

(1) (1909) 14 C.W.N., 186. (2) (1900) I.L.R., 27 Calc., 285.
(3) (1912) 14 Bom. L.R., 1204. (4) (1912) I.L.R., 36 Bom., 638.
(5) (1907) I.L.R., 29 All., 301 at p. 302. (6) (1882) I.L.R., 5 Mad., 141.

ABDUL KADER BOWTHER v. KRISHNAN MALAVAL NAIR.

SADASIVA AYYAR, J.

the next subsequent application in execution instead of the date on which the proceedings in the previous application for execution *terminated*, and I should be glad if the Limitation Act is amended so as to fix the latter date. But the harshness is mitigated to some extent by allowing the date of applying to take a step in aid to be also a starting point and I think that if even an oral application is really for an order which will be a step in aid (and not merely for an order which will be indifferent or retarding) a liberal interpretation should be put on the article 179 so as to enable a decree-holder to obtain the fruits of his decree.

In the result I would dismiss the appeal with costs.

SPENCER, J.

SPENCER, J.—I concur.

APPELLATE CIVIL.

Before Mr. Justice Sankaran Nair and Mr. Justice Tyabji.

1913 November 7 and 28 and December 23.

KRISHNAMMAL AND ANOTHER (DEFENDANTS NOS. 1 AND 2), APPELLANTS,

v.

M. SOUNDARARAJA AIYAR (PLAINTIFF), RESPONDENT.*

Civil Procedure Code (Act V of 1908), O. II, r. 2—Previous suit for specific performance of an agreement to sell—Decree for specific performance—Deed of conveyance obtained in execution—Subsequent suit for recovery of possession against the vendors—Suit not barred.

Where the plaintiff, who had obtained in a previous suit a decree against the defendants for specific performance of an agreement to sell certain immoveable property to the plaintiff and had got a sale deed in his favour in execution of the decree, instituted the present suit for the recovery of possession of the lands from the defendants,

Held, that the suit was not barred by Order II, rule 2 of the Civil Procedure Code (Act V of 1908).

At the time the plaintiff brought the previous suit, the right to possession of the lands was not vested in him, as he acquired that right only on the execution of the deed of conveyance.

Narayana Kavirayan v. Kandasami Goundan (1898) I.L.R., 22 Mad., 24 disapproved.

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* Second Appeal No. 1125 of 1912.

KRISHNAMMAL v. SOUNDARARAJA AIYAR.

Rangayya Goundan v. *Nanjappa Rao* (1901) I.L.R., 24 Mad., 491 (P.C.), explained.

Nathu valad Pandu v. *Budhu valad Bhika* (1893) I.L.R., 18 Bom., 537, followed.

SECOND APPEAL against the decree of J. S GNANIYAR NADAR, the Temporary Subordinate Judge of Negapatam in Appeal No. 800 of 1911, preferred against the decree of T. K. SUBBA AYYAR, the District Munsif, Negapatam, in Original Suit No. 299 of 1910.

The facts of the case appear from the judgment of TYABJI, J.

K. V. L. Narasimham and *T V. Gopalaswami Mudaliyar* for the appellants.

T. R. Venkatarama Sastriyar for the respondent.

SANKARAN NAIR, J.

SANKARAN NAIR, J.—The question is whether the suit is barred by Order II, rule 2 of the Civil Procedure Code. The plaintiff obtained a decree in his favour for the execution of the deed of sale in accordance with an agreement to sell property to him. Having obtained the sale deed in execution of the decree he now sues for possession on the strength of the sale deed. The defendant's contention is that having failed to claim possession also in the previous suit, the present suit is barred and they rely on *Narayana Kavirayan* v. *Kandasami Goundan*(1) It is true that it was open to the plaintiff to sue not only for the execution of a deed of sale but also for possession in the previous suit. But was he bound to do so? At the time he brought that suit the right to possession was not vested in him. He would acquire that right only on the execution of the deed of conveyance. Possession is not merely an incident or subsidiary to the sale deed. In a suit for a specific performance the parties to the contract alone need be parties. In a suit for possession all persons in possession are proper parties. I am therefore of opinion that the suit is not barred.

We dismiss the Second Appeal with costs

TYABJI, J.

TYABJI, J.—The plaintiff is the purchaser from the defendants Nos. 1 and 2 of the land referred to in the plaint. He sues for possession of the land on the strength of a conveyance executed in his favour by his vendors, the first and second defendants.

The claim is resisted on the ground that the plaintiff had not included a prayer for possession in a previous suit which the plaintiff had instituted against his vendors, and in which he had

(1) (1898) I.L.R., 22 Mad., 24.

KRISHNAMMAL v. SOUNDARARAJA AIYAR.

TYABJI, J.

merely claimed specific performance of the agreement to convey the land, without claiming possession. It is argued for the defendants that in that suit the plaintiff ought to have claimed possession also, and having failed to do so, he is debarred under Order II, rule 2, from now claiming possession.

The plaintiff's reply to this contention is that the rule referred to can only apply if the cause of action in the earlier suit is the same as the cause of action in the later suit; and that in the present case the cause of action arises on the execution of the conveyance, whereas in the previous suit the cause of action arose on the agreement to execute the conveyance.

In answer to this contention, the defendants rely upon *Narayana Kavirayan* v. *Kandasami Goundan*(1), where SHEPHARD and BODDAM, JJ., held that the right to possession arose coincidently with the right to obtain the conveyance. With great respect, I am unable to follow their train of reasoning. If two rights arise coincidently, neither can be the cause nor the effect of the other. They must both result independently from some other cause: that other cause for the present purposes can only be either the agreement or the general law. If it had been meant that in accordance with the terms of the particular agreement, with which the learned Judges who decided *Narayana Kavirayan* v. *Kandasami Goundan*(1) were dealing, the purchaser was entitled on the one hand to claim execution of the conveyance (*i.e.*, transfer of the ownership of the property) and on the other hand to obtain possession, that the transfer of ownership and of possession were agreed to be made independently of each other, and that the right to claim each happened (under the terms of the agreement) to arise at the same moment—then I could have understood that the claims arose coincidently. It does not appear that the judges considered that any such special agreement existed in *Narayana Kavirayan* v. *Kandasami Goundan*(1). They proceeded on a proposition of general law that (apparently by operation of section 55 of the Transfer of Property Act) by every agreement to sell, "the right to possession arises coincidently with the right to the execution of a conveyance." But further they intended, it would appear, to hold, contrary to the opinion expressed by SARGENT, C.J., in

(1) (1900) I.L.R., 24 Mad., 26.

Nathu valad Pandu v. *Budhu valad Bhika* (1) to which I shall refer later, that the causes of action on the agreement and the conveyance are the same. With these propositions I am unable to agree.

It seems to me that the effect of section 55 (1) (*f*) of the Transfer of Property Act, when read with section 54 of the same Act, and with the Registration Act is that in the absence of any express agreement to transfer possession independently of the registered conveyance, the purchaser (or to be accurate, the person agreeing to purchase) has no right to the possession of the property until the conveyance is completed.

For section 55, clause (1) (*f*) of the Transfer of Property Act binds the "seller" of the property on being so required, to give possession to the buyer: under section 54 there is no "sale" until there is a transfer of the ownership of the property, and there is no such transfer, until there is a registered instrument. It is true that some of the clauses in section 55 (1) do not warrant its being said that there is no "seller" within the terms of that section until there is a complete "sale" as defined in section 54:—thus clause (*d*) speaks of the "seller" being bound to execute a proper conveyance to the "buyer," so that a person who has agreed to sell, but who has not completed the sale by transfer of ownership is referred to by the term "seller"—in clause (*d*). *If the expression "seller" were interpreted in the same sense* in clause (*f*) as in clause (*d*), then the person agreeing to purchase could immediately after the agreement demand possession. This would be going beyond what was held in *Narayana Kavirayan* v. *Kandasami Goundan* (2), and it is not suggested that that should be the interpretation of the clause. There seems to me to be nothing unreasonable in interpreting the various clauses of section 55, sub-section (1) so that the earlier clauses are taken to refer to the period between the agreement for sale and its completion, and clauses (*f*) and (*g*) to the time after the sale has been completed within the terms of section 54. It is difficult to hold on the other hand that the legislature intended to give the right to possession to a person who has agreed to have its ownership transferred to him, merely by reason of such agreement before or irrespective of the transfer being made.

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(1) (1893) I.L.R., 18 Bom., 537 (2) (1899) I.L.R., 22 Mad., 24

KRISHNAMMAL v. SOUNDARARAJA AIYAR.

TYABJI, J.

It may indeed be, that an agreement to sell the property contains not only a covenant to transfer the ownership of the property by a registered instrument, but also an independent and so to say, incidental, covenant to permit the vendee to take possession of the property, or to exercise other rights, which for brevity may, for the present, be referred to as obtaining possession.

Two cases were cited to us in which such independent covenants to give possession to the purchaser were alleged.

One of these cases *Rangayya Goundan* v. *Nanjappa Rao*(1), was relied upon by the appellant. There the purchaser in the first instance came into Court relying upon the agreement for sale and sued for possession under that agreement. For obtaining the relief claimed in his first suit, he had to prove the facts leading up to and including the execution of the agreement: when those facts were proved he became entitled to claim a decree for specific performance of the whole of the agreement, including the vendor's covenant to execute the conveyance; and yet after having proved the execution of the agreement—after having proved all that had to be proved for obtaining execution of the conveyance—he stopped short of claiming the latter relief, and prayed merely for one portion of his rights arising from the facts proved, viz., possession. In these circumstances it was held that he could not subsequently come into Court once more on the same cause of action (namely, proof of the execution of the agreement to convey), and ask for the execution of the conveyance, a relief which he could have asked in the previous suit, and for obtaining which he would have to prove over again the same set of facts that were proved in his earlier suit.

In the present case the circumstances are quite different. The plaintiff does not now sue for any right under the agreement to convey. In the previous suit he prayed for specific performance of the agreement; both the lower Courts have held that in the agreement there was no covenant on which the plaintiff could have sued for possession. Assuming (as was argued before us) that the agreement gave the right of possession apart from the right to obtain a conveyance, still possession under the agreement could only be for the period prior to the conveyance.

(1) (1901) I.L.R., 24 Mad., 491 (P.C.).

after which the purchaser's title would be completed, and he would then be entitled to possession not under the agreement, but on the basis of his title. The plaintiff's failure to ask for possession in the previous suit might therefore have been fatal to any claim he might have set up in the present case under the agreement. If for instance the plaintiff had alleged that he was entitled to possession under the agreement at some time previous to the conveyance, and had claimed in the present suit damages for being kept out of possession from that date, the answer might no doubt have been that the plaintiff's rights to such damages until the date of the conveyance were barred: *Venkoba* v. *Subbanna*(1). The plaintiff makes no such claim. His claim is on a distinct cause of action which had not arisen at the time when the first suit was instituted.

What I have just stated seems to me to have been the view expressed by SIR CHARLES SARGENT, C.J., in the second case to which I alluded above [*Nathu valad Pandu* v. *Budhu valad Bhika*(2)], though the very concise terms in which that great Judge has expressed the views of the Court, have perhaps prevented his judgment from having been availed of to the same extent as an expression of his opinion would otherwise be. In that case the contract for sale seems to have provided that the purchaser may take possession prior to the conveyance. This, it is true, is not explicitly stated in the judgment, or in the report. But in the first suit instituted by the purchaser he alleged that possession had actually been delivered to him at some time prior to 18th July 1889(3). At that time no conveyance had been executed. SARGENT, C.J., also refers in his judgment to the claim of possession on the contract for sale (as distinguished from the sale-deed). I take it therefore that it was conceded in that case that the purchaser could have claimed possession under the agreement for sale, even before the sale-deed was executed. The argument of Mr. Apte (who represented the vendor in the High Court) was that the right to possession could not be asserted in the second suit, inasmuch as possession could by virtue of the agreement for sale have been claimed in the first suit. The

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(1) (1887) I.L.R., 11 Mad., 151. (2) (1893) I.L.R., 18 Bom., 537.
(3) *Ibid.* at p. 539.

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purchaser's reply to this argument was twofold: *first* that possession could not have been claimed in the first suit because the purchaser had alleged that possession had already been given to him. This argument was not accepted by the Court. They held that as a matter of fact the purchaser had not been put into possession prior to the first suit and that therefore he could have sued for possession, and that his failure to do so in the first suit debarred him in the second suit from claiming such possession as he could have sued for in the first. But the Court accepted the *second* argument for the purchaser: that though possession could have been claimed in the first suit on the agreement, still the purchaser was not debarred from praying for it in the second suit on the conveyance or the deed of sale: for a new and distinct cause of action arose from the deed of sale itself: SIR CHARLES SARGENT, C.J., expressed this view quite definitely both during arguments and in his judgment. On the former occasion, he cited *Kalidhun Chuttapadhya v. Sheba Nath Chuttapadhya*(1), where GARTH, C.J., in expressing the view of himself, and PONTIFEX, MORRIS and MITTER, JJ., said: "It would indeed seem almost a mockery to empower a Civil Court to declare a plaintiff entitled to relief, and then, when the defendant refuses him that relief and disregards the Court's order, to tell the plaintiff that he is wholly without remedy, and that the Court has no power to assist him." GARTH, C.J., said this in deciding that as the law empowers the Courts to pass a merely declaratory decree without consequential relief, where such a decree has been passed, and the defendant disobeys that decree, so as to prevent the plaintiff from having the consequential relief flowing from the declaratory decree, in such a case the plaintiff may obtain in a subsequent suit the consequential relief, the right to obtain which had been declared in the earlier suit This is certainly going much further than is necessary for the present case.

I am therefore clearly of opinion that the plaintiff's suit for possession on the basis of the conveyance to him was not barred by his previous suit to obtain execution of the conveyance, and that therefore the appeal should be dismissed.

It is argued on behalf of the appellant, however, that the plaintiff should not have the costs of these proceedings on the

(1) (1882) I.L.R., 8 Calc., 483 at p. 514.

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TYABJI, J.

ground that this suit was unnecessary, because the purchaser could have obtained in the previous suit the relief which he seeks in the present suit. That the two prayers can be joined in the first suit was decided in *Ranjit Singh* v. *Kalidasi Debi*(1). I concede that a purchaser ought to be permitted for convenience to claim both reliefs at once in order to prevent disregard of his rights by a vendor as bold as the present appellant. Yet in strict form the right to sue for possession on his title does not arise until the conveyance has already been executed, and unless thereafter the vendor refuses to give possession: prior to execution of the conveyance, there being no right to obtain possession, the denial of a right that has not arisen cannot furnish a cause of action. I allude to these purely technical considerations merely for the purpose of deciding the question of costs. It would have been entirely in keeping with the vendor's conduct to have raised this technical objection if the purchaser had added a prayer for possession in his first suit. The vendor cannot be permitted after he has opposed his purchaser's just claim through three Courts to turn round and say that these proceedings are unnecessary. He cannot now contend what he might have contended if he had been ready and willing to give possession without any legal proceeding. I am therefore of opinion that the defendants should be made to pay the costs throughout.

APPELLATE CIVIL—FULL BENCH.

Before Sir Charles Arnold White, Kt., Chief Justice, Mr. Justice Miller and Mr. Justice Sadasiva Ayyar.

MUNISAMY MUDALY (SECOND DEFENDANT), APPELLANT,

v.

ABBU REDDY AND SIX OTHERS, (PLAINTIFF AND DEFENDANTS NOS 1 AND 3 TO 7), RESPONDENTS.*

1912, October 23 and 24. November 18 and 1913, January 20

Civil Procedure Code (Act V of 1908), O XLI, r 22—Cross-objections, memorandum of, by one respondent against another, maintainability of.

Under Order XLI, rule 22, Civil Procedure Code, one respondent can file a memorandum of cross-objections against another

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(1) (1909) I L R., 37 Calc., 57.

* Appeal No. 40 of 1909

MUNISAMY MUDALY v. ABBU REDDY.

Jadunandan Prosad Singh v. *Koer Kallyan Singh* (1861) 15 C.L.J., 61 not followed.

APPEAL against the decree of V. VENUGOPALA CHETTI, the District Judge of Chingleput, in Original Suit No. 17 of 1907.

The facts of the case appear sufficiently from the following ORDER OF REFERENCE MADE BY THE CHIEF JUSTICE TO THE FULL BENCH.

WHITE, C.J.

WHITE, C.J.—In this case the plaintiff sued on a mortgage. The second defendant pleaded failure of consideration to the extent of Rs. 700. The seventh defendant impeached the mortgage altogether on the ground of fraud. The District Judge held the mortgage was good, that there had been no partial failure of consideration, and gave the plaintiff a decree for the amount of his claim. The second defendant appealed. The seventh defendant did not appeal but put in a memorandum of objections in which he asked for a declaration that the mortgage was fraudulent and not binding on him.

As regards the appeal of the second defendant I think the District Judge was right for the reasons stated in the judgment of my learned brother, which I have had the advantage of reading. I think his appeal should be dismissed with costs.

Objection was taken to the memorandum of objections on the ground that the seventh defendant, not having appealed, could not in the appeal by his co-defendant, the second defendant, against the decree on the ground that there had been a partial failure of consideration, obtain relief by way of memorandum of objections on the ground that the mortgage was bad *in toto*. The further point was taken that, if it was open to the seventh defendant to put in a memorandum of objections, he could only do so on payment of the proper Court fee.

The objection which has been taken raises the question.—Can a respondent proceed by way of memorandum of objections against a party to the appeal other than the appellant?

In Calcutta the decisions under section 561 of the Civil Procedure Code of 1882 are to the effect that the procedure by way of cross-objections can, as a general rule, only be adopted where the cross-objections are raised as against the appellant. See *Bishun Churn Roy Choudhry* v. *Jogendra Nath Roy*(1). A

(1) (1899) I.L.R., 26 Calc., 114.

different view has been taken by this Court. In *Kulaikada Pillai* v. *Viswanatha Pillai*(1), SUBRAHMANIA AYYAR, J., observed (p. 235): "According to the decisions of this Court, a memorandum of objections may legally be filed even where the question arises between co-respondents only."

The wording of Order XLI, rule 22, differs from that of the section which it reproduces in certain respects. The word "cross-objection" is used instead of "objection." The words "the party who may be affected by such objection" are used instead of the word "appellant." The word "cross-objection" seems appropriate as regards a question between the appellant and a respondent; inappropriate, as regards a question between two co-respondents.

On the other hand the substitution of the words "the party who may be affected by such objections" for the word "appellant" would seem to indicate that the legislature intended to bring questions between co-respondents within the scope of the rule.

The point raises an important question of practice, and it seems desirable to have an authoritative decision in the matter.

I would refer to a Full Bench the question, whether under the Civil Procedure Code of 1908 and the Rules, a party to an appeal can claim relief against a co-respondent by way of memorandum of cross-objections.

BAKEWELL, J.—This is a suit by the assignee of a mortgage for sale of the mortgaged property, in which the second defendant (appellant) one of the mortgagors, has pleaded that Rs. 700, part of the mortgage monies, were not paid by the original mortgagee; and the seventh defendant (seventh respondent) who attached the land in execution of a decree against one of the defendants, has pleaded that the whole mortgage is void as against him. The District Judge decided both these points in favour of the plaintiff, and the second defendant has presented this appeal against this decree, and the seventh defendant has presented a memorandum of cross-objections by which he seeks to reverse the finding against his plea. The decree is the usual mortgage decree for sale. BAKEWELL, J.

(1) (1905) I.L.R., 28 Mad., 229.

MUNISAMY MUDALY v. ABBU REDDY.

[Then his lordship discussed the evidence on the question whether there was failure of consideration as pleaded by the second defendant and found it against him.]

BAKEWELL, J.

With respect to the memorandum of objections, a preliminary point has been raised that the seventh defendant should have come to this Court by way of appeal, and that it is not open to him under cover of an appeal by another party upon different grounds to attack a decree in favour of his co-respondent.

It is well settled that a Court will not ordinarily give relief to a defendant in a suit and will not travel beyond the limits of the plaint, and it seems to me that the same general principle should ordinarily be applied to appeals, to which the same rules apply as in suits (see Civil Procedure Code, section 107, clause 2). An appellate Court has now full power to do justice between the parties, although they may not have filed any appeal or objections (Order XLI, rule 33), and therefore, if it thinks fit to reverse or vary a decree, it may make any order necessary to protect the interests of all parties.

The question, therefore, appears to me to be one not of the jurisdiction of the Court, but of practice, that is, as to the manner in which a party aggrieved by a decree should ordinarily place his case before the appellate Court, and whether the legislature intended by Order XLI, rule 22, to provide that in addition to his remedy by memorandum of appeal, which is the method prescribed by Order XLI, rule 1, a respondent should have a further remedy by memorandum of cross-objections.

I think the wording of Order XLI, rule 22, shows that the legislature intended to define the position of a respondent as against the appellant and to make it clear that he can avail himself of any defence or attack in order to meet the appellant's case; thus, he can not only change front and refute his arguments in the lower Court (this is the first part of the rule) but can also deliver a counter-attack by bringing into debate a matter which the apellant has not included in his appeal. I think that the legislature had in view the case where a party has for reasons of expediency not thought fit to appeal but has been forced into Court and wishes to avail himself of all his means of offence and defence. Hence a memorandum of objections is in effect a cross appeal, and notice must be given not only to the appellant but to all parties affected, sub-rule (3)

and the former cannot defeat the attack by withdrawing from his appeal, sub-rule (4). I am unable to conjecture what object the legislature may have had, upon the seventh respondent's construction of this rule, in giving a respondent two separate remedies, one by a regular appeal and one contingent upon another party appealing on a totally different matter.

MUNISAMY MUDALY v. ABBU REDDY. BAKEWELL, J.

Turning now to the authorities, it has been held in a long series of decisions of the Calcutta High Court under section 561 of the Civil Procedure Code of 1882, that as a general rule the right of a respondent to urge cross-objections should be limited to his urging them against the appellant (see *Bishun Churn Roy Chowdhry* v. *Jogendra Nath Roy*(1), and by this Court, that that section did not contemplate such a limitation [*Timmayya* v. *Lakshmana*(2), and see *Kulaikada Pillai* v. *Viswanatha Pillai*(3) *per* SUBRAHMANYA AYYAR, J.]. Since the date of those decisions and presumably in view thereof, the legislature has amended the rule by the introduction of the word "cross" before objection; and I am of opinion that the intention was to adopt the construction of the Calcutta High Court A respondent cannot now take objection generally to a decree, but only "cross-objections," that is, objections to the appellant's case. In *In re Cavander's Trusts*(4), JESSEL, M.R., points out that an appeal on a point which does not affect the original appellant cannot be a cross appeal, and a respondent who desires to bring forward a case with which the appellant has nothing to do must give a notice of appeal. I agree with the learned Chief Justice that the question stated by him should be referred to a Full Bench.

D. V. Nilamegha Achariyar for the appellant.

V. Narasimha Ayyangar for *T. Ranga Achariyar* and *E. Duraiswami Ayyar* for *T. R. Venkatarama Sastriyar* for the first respondent.

S Subrahmanya Ayyar for the seventh respondent.

OPINION.—It seems to us that the answer to the question which has been referred to us should be in the affirmative.

WHITE, C J AND MILLER AND SADASIVA AYYAR, JJ.

This is in accordance with the practice which appears to have prevailed in this Court under section 561 of the Code of 1882 and we do not read Order XLI, rule 22, as indicating that

(1) (1899) I L R, 26 Calc., 114. (2) (1884) I.L.R., 7 Mad., 215.
(3) (1905) I L.R, 28 Mad., 229 at p. 235. (4) (1881) 16 Ch.D., 270.

MUNISAMY MUDALY v. ABBU REDDY. —— BAKEWELL, J.

[Then his lordship discussed the evidence on the question whether there was failure of consideration as pleaded by the second defendant and found it against him.]

With respect to the memorandum of objections, a preliminary point has been raised that the seventh defendant should have come to this Court by way of appeal, and that it is not open to him under cover of an appeal by another party upon different grounds to attack a decree in favour of his co-respondent.

It is well settled that a Court will not ordinarily give relief to a defendant in a suit and will not travel beyond the limits of the plaint, and it seems to me that the same general principle should ordinarily be applied to appeals, to which the same rules apply as in suits (see Civil Procedure Code, section 107, clause 2). An appellate Court has now full power to do justice between the parties, although they may not have filed any appeal or objections (Order XLI, rule 33), and therefore, if it thinks fit to reverse or vary a decree, it may make any order necessary to protect the interests of all parties.

The question, therefore, appears to me to be one not of the jurisdiction of the Court, but of practice, that is, as to the manner in which a party aggrieved by a decree should ordinarily place his case before the appellate Court, and whether the legislature intended by Order XLI, rule 22, to provide that in addition to his remedy by memorandum of appeal, which is the method prescribed by Order XLI, rule 1, a respondent should have a further remedy by memorandum of cross-objections.

I think the wording of Order XLI, rule 22, shows that the legislature intended to define the position of a respondent as against the appellant and to make it clear that he can avail himself of any defence or attack in order to meet the appellant's case; thus, he can not only change front and refute his arguments in the lower Court (this is the first part of the rule) but can also deliver a counter-attack by bringing into debate a matter which the apellant has not included in his appeal. I think that the legislature had in view the case where a party has for reasons of expediency not thought fit to appeal but has been forced into Court and wishes to avail himself of all his means of offence and defence. Hence a memorandum of objections is in effect a cross appeal, and notice must be given not only to the appellant but to all parties affected, sub-rule (3)

and the former cannot defeat the attack by withdrawing from his appeal, sub-rule (4). I am unable to conjecture what object the legislature may have had, upon the seventh respondent's construction of this rule, in giving a respondent two separate remedies, one by a regular appeal and one contingent upon another party appealing on a totally different matter.

MUNISAMY MUDALY v. ABBU REDDY. —— BAKEWELL, J.

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WHITE, C. J. AND MILLER AND SADASIVA AYYAR, JJ.

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MUNISAMY MUDALY v. ABDU REDDY.

WHITE, C.J. AND MILLER AND SADASIVA AYYAR, JJ.

the framers of the rules intended to make it clear that the practice should be otherwise.

With all respect to the learned Judges who dealt with the question in *Jadunandan Prosad Singh* v. *Koer Kallyan Singh*(1), a case which was decided under Order XLI, rule 22, it seems to us more convenient to follow a fixed rule than to decide the question with reference to the particular facts of the case in which the question is raised.

We answer in the affirmative.

APPELLATE CIVIL.

Before Sir Charles Arnold White, Kt., Chief Justice, Mr. Justice Miller and Mr. Justice Sankaran Nair.

1913 April 15 and 23.

ANGAMMAL (PLAINTIFF—APPELLANT IN ORIGINAL SIDE APPEAL No. 7 OF 1910), APPELLANT.

v.

M. M. S. ASLAMI SAHIB (DEFENDANT—RESPONDENT IN ORIGINAL SIDE APPEAL No. 7 OF 1910), RESPONDENT.*

Landlord and Tenant—Tenancy, determination of—Improvements, non-removal of, during tenancy—Right to them or their value after determination of tenancy—Transfer of Property Act (IV of 1882), sec. 108 (h).

The plaintiff's husband took a house-site on lease from the predecessor in title of the first defendant in 1883. After 1883 and before 1st May 1898 the plaintiff built a house thereon to the knowledge of the landlord, and the lease was renewed by the first defendant on 1st May 1898 in plaintiff's favour who thereby agreed to vacate the land on a month's notice. While the plaintiff was in possession under that lease, the first defendant filed a suit in ejectment, in the Small Cause Court, Madras, and though the present plaintiff then set up the claim now advanced, viz., a right to the superstructure built by her or its value, she was ordered without the determination of the right set up by her, to deliver possession of the land on or before the 26th February 1907, and on her failure to do so, the first defendant was put in possession on that date.

On the 1st August following, the first defendant gave the plaintiff, notice to remove the superstructure within a fortnight. She did not do so but in 1908 instituted the present suit for (a) a declaration that she was the owner of the house built by her and for its possession or (b) in the alternative to be paid compensation for it or (c) if that was not granted, to be allowed to remove the

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(1) (1912) 15 C.L.J., 61 at p. 63.

* Letters Patent Appeal No. 59 of 1911.

superstructure. WALLIS, J., holding that the plaintiff was not entitled to any of the reliefs, dismissed the suit.

Held, on appeal, confirming the judgment of WALLIS, J. (SANKARAN NAIR, J, dissenting), that the plaintiff was not entitled to any of the reliefs asked for.

Held by the Court, that the landlord was not estopped from disputing the plaintiff's right, if any, by the mere fact that the house was erected with his knowledge and without any protest by him

Held (WHITE, C.J, dissenting), that the tenant was, for the purpose of removing the superstructure, entitled to a reasonable time after the determination of the tenancy, whether it is by act of parties or by the order of Court.

Held by MILLER, J., that the tenant having been given ample time to remove the building after giving up possession through Court she was not entitled to any further time.

Per WHITE, C J.—Section 108, clause (*h*) of the Transfer of Property Act, governed the case and the tenant was not entitled to remove the buildings after the termination of the tenancy

Per SANKARAN NAIR, J —Section 108 of the Transfer of Property Act is only an enabling section and it did not take away the pre-existing right of the tenant to compensation or to remove the building even after the termination of the tenancy if he is not given compensation.

The new lease having recognised the tenant's ownership in the house, the plaintiff's ownership thereto cannot be defeated by her failure to remove the house within a reasonable time and as such failure cannot effect a transfer of ownership, all that the landlord was entitled to was an option to retain the building and pay compensation for it or to restore the land to its old condition by removing the building and claim damages

Per MILLER, J —The recognition by the landlord for the period of the new tenancy, of the tenant's property in the building has no other necessary effect than to prevent the landlord from treating the building as having been surrendered to him at the end of the previous term and it was only a piece of evidence of a contract to allow the removeable fixture to remain *as such* upon the land for the new term

Ismai Kani Rowthan v. Nazarali Sahib (1904) I L.R., 27 Mad, 211, referred to.

English and Indian Case Law on the subject considered

APPEAL under article 15 of the Letters Patent against the decision of WHITE, C.J., in *Angammal* v. *Aslami Sahib*(1) preferred against the decision of WALLIS, J., (1) in Civil Suit No. 16 of 1908.

The plaintiff's husband took the suit site on lease from the predecessor in title of the first defendant in 1883. After 1883 and before 1st May 1898 the plaintiff built a house thereon and the lease was renewed by the first defendant on 1st May 1898 in favour of the plaintiff. While the plaintiff was in possession under that lease, the first defendant filed a suit in ejectment

(1) (1911) 21 M.L.J, 591, s c (1915) I L.R, 38 Mad., 713

ANGAMMAL v. ASLAMI SAHIB.

(No. 146 of 1906) against her in the Small Cause Court, Madras, and though she set up the claim now advanced, viz., a right to the superstructure or its value, she was ordered without the determination of the right set up by her, to deliver possession of the land on or before the 26th February 1907; and on her failure to do so, the first defendant was put in possession on that date. Thereupon the first defendant gave the plaintiff notice on 1st August 1907 to remove the superstructure, within a fortnight; but the plaintiff without doing so filed the present suit, praying (*a*) for a declaration that she was the owner of and for possession of the house built by her or (*b*) in the alternative to be paid compensation for it or (*c*) if that is not granted to be allowed to remove it. The defence was a denial of the plaintiff's rights in law and also that the plaintiff not having removed the superstructure even after ample opportunity given had forfeited her right to the house.

WALLIS, J., dismissed the plaintiff's suit. On appeal the Chief Justice (WHITE, C.J.) who agreed with WALLIS, J., disagreed with SANKARAN NAIR, J. The result was that the appeal was dismissed, *vide* judgment of WALLIS, J., in *Angammal* v. *Aslami Sahib*(1).

The present appeal was filed therefrom by the plaintiff under clause 15 of the Letters Patent.

The renewed lease (Exhibit II) on 1st May 1898 was as follows :—

EXHIBIT II.

"I, Angamma, wife of *Arunagiri Asari*, *residing* in Madras (do hereby) agree and give a writing to Zahra Begam Sahiba and Malik Mahomed Sa-ud Aslami Sahib to this effect that I have taken up land measuring six hundred and forty cubic (square) feet belonging to the aforesaid owners, and situated at Shadi Khana attached to Chepauk, Triplicane. The stipulation is this; that I shall monthly pay annas eight and pies six, at the rate of two rupees per ground per mensem without any excuse or pretext. Should I commit a default in paying the ground-rent even for one month, it is incumbent that the aforesaid owners or their vakil should remove the superstructure of me, the deponent, from the land belonging to them and recover their

(1) (1911) 21 M.L.J., 891; s.c. (1915) I.L.R., 38 Mad., 713.

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WHITE, C.J.

where it had not been pulled down during the continuance of the tenancy, was subject to the lessee's right to compensation. This proposition, however, seems inconsistent with the statement of the law on page 216. "Thus both under the Hindu and the Muhammadan law—and it may here be observed that the parties to the present suit are Muhammadans—and the common law of the land [as laid down by the Full Bench of the Calcutta High Court in *In the matter of the petition of Thakoor Chunder Paramanick*(1)], a tenant who erects a building on land let to him can only remove the same and not claim compensation for it on eviction by the landlord. When the Transfer of Property Act was enacted, this rule was adopted by the legislature in section 108(*h*)" and also with the statement on page 217. "The rules laid down by the Transfer of Property Act thus substantially reproduce the law as it stood before the Act."

But assuming that at common law the lessor's right to take the building, after the expiration of the tenancy, was subject to the lessee's right to compensation, the law was altered by section 108(*h*) of the Transfer of Property Act. In his work on the Law of Transfer in British India, Mr. Gour observes:—(paragraph 2166, volume 3) "Formerly in cases decided before the Act, the lessee was held to be entitled to either the removal of his fixtures, or to compensation, the latter being usually awarded at the instance of the outgoing tenant in cases where the removal of materials would have materially prejudiced him. Under the terms of the clause, however, the tenant is no longer entitled to the alternative relief. He must remove or *forego the materials* which he is entitled to, unless he can establish local usage, or make out a case of estoppel against the landlord."

In SHEPHARD and BROWN's Commentaries on the Indian Transfer of Property Act, page 411, seventh edition, the learned authors observe: "A claim to remove fixtures after the expiration of the lease may be founded on contract or local usage. The section does not recognize it or the alternative right of compensation which was recognized in certain cases decided before the Act came into force."

The nature of the estoppel referred to by Mr. Gour is thus described by Lord WATSON in *Beni Ram v. Kundan Lal* (2).

(1) (1866) B.L.R., Sup. Vol (F.B.), 595 at p. 597.
(2) (1899) I.L.R., 21 All., 496 at p. 502 (P.C.).

"In order to raise the equitable estoppel which was enforced against the appellants by both the appellate Courts below, it was incumbent upon the respondents to show that the conduct of the owner, whether consisting in abstinence from interfering, or in active intervention, was sufficient to justify the legal inference that they had, by plain implication, contracted that the right of tenancy, under which the lessees originally obtained possession of the land, should be changed into a perpetual right of occupation."

I agree with WALLIS, J., that the evidence on this case is not sufficient to establish an estoppel. But, apart from the evidence, in the rental agreement of May 1st, 1898, an agreement entered into after the erection of the building, there was an express stipulation that the plaintiff might be evicted on one month's notice. In the face of this, I do not see how the lessee can rely on any plea of equitable estoppel as an answer to the claim in ejectment.

In my opinion, on the facts of this case, the position of the lessee is not improved as regards any right to compensation or to remove the building after the termination of the tenancy, on the fact that the house had been built by the plaintiff before the rental agreement of 1898 was entered into.

I also agree with WALLIS, J, that the rights of the defendant are not affected by the fact that he gave the plaintiff an opportunity of removing the building after the expiration of the lease—an opportunity of which the plaintiff did not take advantage. It is to be observed that the equity discussed in *Ramsden* v. *Dyson*(1) and *Beni Ram* v. *Kundan Lal*(2), was not an equity giving a right to compensation, but an equity giving a larger right of possession than that created by the lease, and it may be that the true view is, as I suggested, in my judgment in Appeals Nos. 197 and 174 of 1905, that unless the lessor is estopped from suing for possession no question of compensation arises, but that if the lessor is estopped, the Court can say—"You are estopped but we will not enforce this equity against you if you pay the lessee compensation."

I would dismiss this appeal with costs.

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(1) (1865) L.R., 1 E. & I.A. (H.L.) 129.
(2) (1899) I.L.R., 21 All., 496 at p. 502 (P.C.)

ANGAMMAL v. ASLAMI SAHIB.

SANKARAN NAIR, J.

SANKARAN NAIR, J.—The plaintiff brings this suit, for a declaration that she is the owner and for possession of a house mentioned in the plaint; or in the alternative to be paid *compensation for it; or, if that prayer is not granted, to be* allowed to remove the superstructure. The plaintiff's husband took the house on lease from the predecessor in title of the first defendant in 1883. That lease was renewed by the first defendant in 1898. While in possession under that lease, the first defendant filed an ejectment suit, No. 146 of 1906 on the file of the Small Cause Court, Madras, and though she set up the claim now advanced, she was ordered without the determination of the rights set up by her, to deliver possession of the land on or before the 26th February 1907; on her failure to do so, the defendant was put in possession on that date. The plaint states that the plaintiff erected a house which is stated to be of the value of Rs. 5,000 soon after she obtained the lease of 1883, and therefore the defendant is not now entitled to turn her out of the house. WALLIS, J., held that the rights of the parties are governed by Exhibit II, the lease of 1898, which creates only a monthly tenancy and that the evidence only shows that the house was erected with the knowledge of the defendant, and without any protest from him and this is not enough to create an estoppel against the defendant's claim to recover, according to the law as declared by the Judicial Committee in *Beni Ram* v. *Kundan Lal*(1), which followed *Ramsden* v. *Dyson*(2). I may state at once that, though there is some evidence to the contrary, I agree with WALLIS, J., in his appreciation of the evidence and his decision on this point.

The facts necessary for the determination of the other questions are practically admitted. Exhibit II is the lease of the year 1898. It recites that the plaintiff has been holding the land under a prior lease at a certain rent and the plantiff therein agrees to pay a higher *ground* rent for the future. Then it states that if the lessee commits default in payment, the owners "should remove the superstructure of me the deponent (the lessee) from the land belonging to them and recover the ground rent by putting up the aforesaid superstructure at auction." Then there is a further stipulation that the lessee shall not

(1) (1899) I.L.R., 21 All., 496 (P.C.). (2) (1865) L.R., 1 E. & I.A. (H.L.), 129.

alienate the superstructure without the consent and knowledge of the owners, and if she demolishes the superstructure and carries away the materials she "shall leave mud walls existing on the said land of the aforesaid owners."

Thus the following facts are clear from this lease; that in 1898 when the lease was renewed the rent was claimed only for the ground not for the building which had been already erected. It was treated as the absolute property of the plaintiff (tenant) and a charge was created on it for any rent that may remain due to the owner. The right of voluntary alienation was recognised subject to the owner's consent. The right of carrying away the materials was also recognised. Whether this last stipulation was confined to the period of the lease or not, it is not stated. From the nature of the lease, the fact that the structural alterations admittedly were made with the knowledge of the defendant, and the terms of the lease, it is clear that the building must have been constructed with the defendant's consent, otherwise his ownership would not have been recognised. But that is immaterial as the lease (Exhibit V) admits that the house continued the property of the plaintiff and the ground alone was let. It is also admitted that the plaintiff was given time after the determination of the tenancy and after decree to remove the superstructure.

WALLIS, J., held, following as he was bound to do the decision of BAHSHYAM AYYANGAR, J., concurred in by MOORE, J., in *Ismai Kani Rowthan* v. *Nazarali Sahib*(1), that under the common law of India a tenant has only a right to erect buildings and remove them during the continuance of the lease; that he is not entitled to any compensation for his improvements or to remove them after the determination of the tenancy and that it is only that right which is now recognised in section 108, clause (*h*), of the Transfer of Property Act; and, as the right to remove the buildings is thus restricted to the duration of the lease, the plaintiff cannot claim to remove the superstructure afterwards. He therefore disallowed her claim to compensation or to remove the superstructure. The question whether the ownership of the plaintiff in the house and the consent of the defendant to the erection of

(1) (1904) I.L.R., 27 Mad., 211.

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SANKARAN NAIR, J.

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(1) (1904) I.L.R., 27 Mad., 211.

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the building would make any difference is not dealt with in the judgment.

There are one or two passages in the judgment of BASHYAM AYYANGAR, J., which may make one hesitate to accept the above statement of the law as his final conclusion. But on the whole, I think that WALLIS, J., is right in the view he took of that judgment.

A decision that a tenant is bound to remove any building that he may have erected on the land during the continuance of the lease and that if he fails to remove it within that time he is not entitled either to compensation or to remove them afterwards, is in my opinion so entirely opposed to the usage in this Presidency and so disastrous in its results that I am not prepared to follow that view without a further and more careful consideration of the question than it seems to have received in that judgment. If the Transfer of Property Act declares the law to that effect, no other question remains for consideration. The section 108 (*h*) itself however only enables a tenant to remove his building during the term of the tenancy. But it is contended that it thereby impliedly negatives the right to receive any compensation or to remove the same afterwards. It is true that the Act does not confer this right on the tenant. But if he had that right before, as I shall show later, the Act does not in my opinion take it away.

Under the Muhammadan Law, as the Judicial Committee pointed out in *Secretary of State for Foreign Affairs* v. *Charlesworth, Pilling & Co.*(1), "If a person usurp land" and erect a building he must be directed to clear the land and restore and an option is given to the landlord to purchase it because in that case "there is an advantage to both and the injury to both is obviated." It is quite clear from the fact that the "usurper" is given a right of removal, such right is quite independent of any tenancy and after the tenancy has expired the building may be removed by a person who has ceased to be a tenant.

The Hindu Law also is not against the tenants' right in this respect. The Hindu Law texts that are always referred to with

(1) (1902) I.L.R., 26 Bom., 1.

reference to the question are Naradasmrithi, Chapter VI, slokas 20 and 21.

"If a man has built a house on the ground of a stranger and lives in it, paying rent for it, he may take with him, when he leaves the house, the thatch, the timber, the bricks, and other (building materials).

"But if he has been residing on the ground of a stranger, without paying rent and against that man's wish, he shall by no means take with him, on leaving it, the thatch and the timber."

The slokas have been quoted in various Sanskrit works as laying down the law When a person lives on another's land without paying rent, the reason for the delivery of the materials to the owner of the ground is stated to be that it is to be regarded as a compensation for the ground having been used without authorization from the owner—see "Sacred Books of the East," volume 33, page 143, footnote It is clear therefore that in any event, even in the case of a trespasser who builds a house, it is to be treated as the property of the man who built it.

I will now refer to the law as declared in Southern India. As the cases refer not only to the claim to remove the buildings after the tenancy but also to the right to receive compensation, both the questions will be dealt with together. It is still the law of the Laccadive Islands that the person who plants the trees is the owner thereof, though they are planted on another's land. In Malabar, it is well known that not only tenants but even others who are in possession of the property except by criminal trespass get the value of their improvements. There has never been at any time any doubt entertained on this matter. In South Canara in *Daramma* v. *Mariamma*(1), a question was raised whether a usufructuary mortgagee was entitled to the value of his improvements, and after evidence was taken as to custom, the High Court (SUBRAHMANYA AYYAR AND DAVIES, JJ.) held that the mortgagees are entitled to it and they added "By improvements we understand any work beneficial to the property, or, in other words, to which a reasonable owner would have consented." In all these cases from South Canara, so far as I am aware, and from Malabar, before the recent legislation on

(1) Second Appeal No. 742 of 1894.

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the question, whenever buildings had to be removed by the tenants on account of their unsuitability to the holding, and therefore not being improvements, the tenants were allowed to do so after the decree, *i.e.*, after the determination of the tenancy and a time was always fixed by the decree within which they had to be removed. The first reported case dealing with the claim for improvements elsewhere that I am aware of is the decision in *Appa Pillai* v. *Gopalaswami Reddi*(1). The Sudder Court consisting of three Judges laid down law in these terms :—"It appears that the first defendant's family have been in occupation of the land in issue for three generations, and have constructed on it substantial buildings, tiled and terraced. The Court are of opinion that in exercising his right to eject, the plaintiff is bound to offer the first defendant compensation for these buildings which he has thus suffered him to construct and occupy." They accordingly directed the plaintiff to pay the defendant the value of the buildings as estimated at the time that possession may be given. The right to remove the building even after the suit was *not* denied and the Lower Court allowed the defendant to remove them. It will be observed that the right to compensation is rested on the fact that the buildings were raised with the implied consent of the plaintiff (landlord), long possession being an element in the consideration of the question and not upon the nature of the particular tenancy. In *Mahalatchmi Ammal* v. *Palani Chetti*(2), the plaintiff landlord in seeking to recover possession of property let to the tenant prayed not that he might recover the lands *with* the buildings thereon constructed by the tenant but that the tenant might be directed *to remove* the buildings. There was a decree by the Munsif directing the removal of the building. On appeal that decree was modified by the Principal Suddar Amin directing the payment of compensation to the defendant. On Second Appeal the decree was confirmed by HOLLOWAY, J., on the ground that where eviction is not in the contemplation of parties and the improvement is permanent precedents are in favour of allowing compensation ; by INNES, J., also on the ground that such should be presumed to have been

(1) (1860) Sudder Reports 41, Second Appeal No. 156 of 1859.
(2) (1871) 6 M.H.C.R., 245.

the intention of the parties and the fact that the construction of the house was contemplated by the agreement itself support the view. It will be observed that this was also the reason assigned by the Sudder Court Judges. INNES, J., further observed that if this were not so all that the tenant could do was to pull his houses to pieces and remove the materials which would not of course realize anything like the value of the building. It seems to me the principle deducible from these cases is that when permission is given to construct the permanent building in question, such consent being deducible from the terms of the instrument, the duration of the tenancy then in the contemplation of the parties, or the purpose of the letting, the Court will imply an agreement between the parties to pay compensation. In *Theaga Nayaka* v. *Surappa*(1) the law was thus laid down—"It is certainly the customary law of Malabar and we are disposed from a number of precedents to believe it to be that of Canara also that the evicting landlord shall pay the value of the permanent improvements to the tenant." In *Blake* v. *Savundarathammal*(2) the facts were these —The lands belonged to the Society for the Propagation of the Gospel and they were originally held under them by a Kasavargam tenant. It was contended that the defendant was not entitled to compensation as he was a purchaser of the defendant's right only on 25th June 1885, the date the tenancy was put an end to. But this contention was disallowed and his claim for compensation was allowed. In dealing with the tenant's right to compensation, it was pointed out by the High Court that the Kasavargam tenant has a proprietary right to his house and referred to the Sudder Court's ruling above cited to support his right for the value of the improvements. The ownership of the tenant in the house built is the reason assigned for awarding compensation. It is remarkable that there was no prayer for the recovery of possession of the land *and building* but the plaintiffs claimed a decree for possession of the site only and a direction to the defendants to *remove* the buildings · and the purchase by the defendant on the determination of the tenancy was only advanced as a reason for not giving compensation but not for denying the defendant's claim to remove the building.

(1) Second Appeal No. 452 of 1870 (2) (1899) I.L.R., 22 Mad., 116

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The next decision that may be referred to is the one which overrules *Mahalatchmi Ammal* v. *Palani Chetti*(1) [viz., *Ismai Kani Rowthan* v. *Nazarali Sahib*(2). Ed.] There also the land was leased for constructing a building. There also the suit was for possession "*after removal* of the buildings erected thereon by the defendants." The decrees of the lower Courts allowed defendant one month to remove the building and surrender possession. The defendants claimed compensation for them in Second Appeal. It was conceded that the case is governed by the rule of justice, equity and good conscience. It was held that under the Hindu Law as well as the Muhammadan Law, the right of the tenant is the same as that adopted in section 108 (*h*) of the Transfer of Property Act. The decision in *Mahalatchmi Ammal* v. *Palani Chetti*(1) was dissented from and as the plaintiff did not claim that the defendant cannot be allowed to remove the building after the determination of the tenancy the decree was allowed to stand and compensation to the defendant for the buildings was refused. I have already pointed out that, in the series of cases before this decision, the only question was whether the tenant was not entitled to claim compensation and there was no doubt at any time entertained about his right to remove the buildings for which a time was generally fixed in the decree itself. This implies of course that the tenant has the right to remove the buildings after the determination of the tenancy as the suit in ejectment will only be after such determination. In another case which was heard at the same time [*Lakshmana Padayachi* v. *Ramanathan Chettiar*(3)], the landlord prayed for a decree for possession against Purakudis, agricultural tenants, after the removal of the building. Even after that decision the practice was the same. The landlords only prayed that the defendants may be directed to remove the buildings, not that they might recover the land with them. In certain Second Appeals which came before this Court after the present case was argued, the prayer of the landlord was only to recover the sites from the defendants—Purakudis, etc., agricultural tenants—after the removal of the superstructures thereon. [See *Muthusami Padayachi* v. *Krishnaswamy Iyer*(4), *Gurusami*

(1) (1871) 6 H.M.C.R., 245. (2) (1904) I.L.R., 27 Mad., 211.
(3) (1904) I.L.R., 27 Mad., 517. (4) Second Appeal No. 558 of 1909.

v. *Saminatha*(1) and *Velusami Thevar* v. *Souri Ammal*(2).] The ruling therefore in *Ismai Kani Rowthan* v. *Nazarali Sahib*(3) that a tenant is bound to remove the materials during the continuance of the tenancy, seems to be opposed to the rulings of this Court and to the usage, so far as I am aware, in this Presidency including this Presidency town and has not been followed since. I may also point out that the decision in *Ismai Kani Rowthan* v. *Nazarali Sahib*(3) does not seem to be consistent with the rule of English common law either, as it appears that in that case the tenant took a lease of the land for constructing a building thereon for carrying on trade and such cases in English law, as I shall point out, generally formed an exception.

I shall briefly refer to the cases decided by the other High Courts. In *In the matter of the petition of Thakoor Chunder Paramanick*(4), it is distinctly laid down that the tenant is entitled either to remove the materials during the tenancy, or if allowed to remain after tenancy, to get compensation or remove them, at the option of the landlord. That this was so understood by the Calcutta High Court is clear from the judgment of WILSON, J., in *Russickloll Mudduck* v. *Lokenath Kurmokar*(5), which is similar to the case before us. There a tenant who was ejected after the determination of the tenancy sued to recover compensation or be allowed to remove the building at the option of the owner and WILSON, J., held that under the decision above cited "any one who has built on land which he occupies under any *bonâ fide* claim of title, is entitled to remove the materials or be paid for them." In *Juggut Mohinee Dossee* v. *Dwarka Nath Bysack*(6), the same learned Judge applied the strict English Common Law rule as the case before them was not one of tenancy and the Hindu Law was not applicable. His judgment was confirmed in appeal. In *Ismail Khan Mahomed* v *Jaigun Bibi*(7), the section 108 (*h*) of the Transfer of Property Act, is stated to lay down the same rule as in the Full Bench case. The Advocate-General in that case however did not dispute the right of the tenant to remove the building and six months' time was

(1) Second Appeal No 558 of 1909.
(2) Second Appeals Nos. 996 and 697 of 1908.
(3) (1904) I L R., 27 Mad, 211
(4) (1866) B L.R., Sup Vol (F B.), 595
(5) (1880) I.L.R , 5 Calc., 688.
(6) (1882) I.L R., 8 Calc., 582 at p. 590.
(7) (1900) I.L R., 27 Calc., 570 at p. 580.

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given him by the decree. Thus, so far as the Bengal High Court is concerned, the right of the tenant to get compensation or remove the building in cases where the English law has not to be applied, after the determination of the tenancy and even after ejectment, has been expressly affirmed. No decided case deals with the rights of a tenant who has built a house with the consent of the landlord or whose ownership has been recognised by the landlord. According to WILSON, J., he would probably be entitled to compensation.

In the only Allahabad case *Beni Ram* v. *Kundan Lal*(1), that was referred to in argument about the tenants' right to remove buildings or to claim compensation, the tenant was allowed to remove the buildings after decree. In fact the plaintiff did not claim a higher right, though it is true that the Judicial Committee refer to section 108 (*h*) of the Transfer of Property Act as the rule established in India. The question before them however was the right to receive compensation and the observation was not made with reference to the right to remove after the tenancy had expired. In that case the owner knew of the construction of the buildings and did not object, but there was no consent, nor is there any case of consent in the Allahabad Reports.

In Bombay the law was thus laid down by COUCH, C.J., in *Narayan Raghoji* v. *Bholagiri Garu Mangu*(2): "We cannot . . . apply to cases arising in India the doctrine of the English law as to buildings, viz, that they should belong to the owner of the land. The only doctrine which we can apply is the doctrine established in India, that the party so building on another's land should be allowed to remove the materials" and in that case the defendant who was not a tenant and had notice of the plaintiff's claim while building, was allowed time to remove the superstructure. In *Shaik Husain* v. *Govardhandas Parmanandas*(3), this decision is cited with approval and it is said that "the same law . . . is as applicable to a tenant building on his landlord's land during his tenancy as to a *stranger* building on the land of another," and the reason given is that the tenant must be taken to have known the terms of the lease as well as the landlord.

(1) (1899) I.L.R., 21 All., 496 (P.C.) (2) (1869) 6 Bom., H.C.R., 80 (A.C.J.).
(3) (1896) I.L.R., 20 Bom., 1 at p. 6.

This obviously refers to a tenant who has not got permission to build as then alone he would be in the position of a stranger. In *Shaik Husain* v. *Govardhandas Parmanandas*(1), the Chief Justice says that the tenant did not ask for leave to remove the materials. If a stranger is entitled to remove the building it is clear that the right to remove has nothing to do with the tenancy and a person whose tenancy has expired does not certainly stand on a worse footing than a stranger. I am not aware of any case in which the question of a tenant with right to erect the particular building or whose ownership of the same is recognized has been discussed in Bombay.

The English law is thus briefly stated in Goodeve's Law of Real Property, 5th Edition, pp. 24 and 25 :—"By the ancient rule of the Common Law, expressed in the maxim *Quicquid plantatur solo, solo cedit,* whatever is planted or built in the soil or freehold becomes, in point of law, part of the freehold or inheritance. Thus, . . . a house becomes part of the land on which it stands. In like manner anything annexed or affixed to any building (and not merely laid upon or brought into contact with the building) was, by the old Common Law rule, treated as an addition to the property of the owner of the inheritance in the soil, and was termed a 'fixture'."

There is another rule of common law which, as Lord CAIRNS states in *Bain* v. *Brand*(2), "is quite a different and a separate rule :—whatever once becomes part of the inheritance cannot be severed by a limited owner, whether he be owner for life or for years, without the commission of that which, in the law of *England,* is called waste, and which, according to the law both of *England* and *Scotland,* is undoubtedly an offence which can be restrained. Those . . . are two rules, not one by way of exception to the other, but two rules standing consistently together."

Lord CAIRNS proceeds to state that to the first rule, that which is fixed to the inheritance becomes a part of the inheritance there is no exception but to the second rule it has been found necessary to engraft exceptions.

The most important exception, stated to be almost as old as the rule itself, is the right to the removal of fixtures put up for

(1) (1896) I.L.R., 20 Bom., 1 at p. 6. (2) (1877) 1 A.C., 762 at p. 767.

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purposes of trade by a tenant. The Courts admitted an innovation in this instance that the "commercial interests of the country might be advanced by the encouragement given to tenants to employ their capital in making improvements for carrying on trade with the certainty of having the benefit of their expenditure secured them at the end of their terms. The *benefit of the public* may be regarded as the principal object of the law in bestowing this indulgence" (see Woodfall on Landlord and Tenant, 18th Edition, page 717). Similarly articles put up for ornament and convenience though falling within the rule as above stated have been allowed to be taken away. The principle upon which this exception is founded is that otherwise it would greatly incommode the tenants in the enjoyment of their property. Attempts were made to extend the above rule, which was laid down with reference to trade fixtures, to improvements effected for agricultural purposes only. But in *Elwes* v. *Maw*(1) which has become the leading case, Lord ELLENBOROUGH held that though the improvements were made for purposes of agriculture and for better enjoying the immediate profits of the land, they cannot be removed, though he admitted in his judgment in that case that Lord KENYON had held that "buildings erected by tenants for the purposes of farming, were, or rather *ought to be* governed by the same rules which had been so long judiciously holden to apply in the case of buildings for the purposes of trade." This judgment has been strongly criticised, as pointed out in page 212 of Smith's Leading cases, on the ground that it confines the privilege of the tenant within narrower limits than are designated by the policy to which it owes its existence and that there is no good reason for conferring it on trade to the exclusion of husbandry, a pursuit equally advantageous to the community and which is now like manufactures often carried on with the aid of valuable machinery. Even if the privilege be confined to trade, still many of the occupations of the agriculturists are trades, using that word in its extended sense, not in the narrow and technical one which it expresses in the old Bankruptcy Acts. And then the learned editors refer to the cases which show that the word *trade* with reference to the subject now under consideration ought to bear its more extended sense. To meet the

(1) (1802) 2 Sm. L C., 189 at p. 203; s.c., 6 R.R., 523.

growing necessities of the situation various Statutes were passed in 1851, 1875, 1876, 1883, 1895, and 1900 which gave agricultural tenants the right to remove fixtures including buildings permanently fixed to the soil which they had not before and the right to receive compensation in the numerous cases therein mentioned. It is clear from this summary that the rule of English common law has been always held to be inequitable, that Judges have been introducing innovations so far as they could without destroying the rule itself and that the statute law of England has interfered largely with the operation of the rule of common law in public interests. In these circumstances it appears to me that it can scarcely be contended with any show of reason that the rule of English common law is a rule of justice, equity and good conscience which we ought to administer in this country. There is no more reason for adopting the old common law rules than the statute law which naturally is more consonant with justice and equity.

As to the period of time within which in English common law the fixtures have to be removed, the law is not clear. The earlier cases lay down the rule that they must be removed during the term and after the term they belong to the lessor. In *Weeton* v. *Woodcock*(1), "The rule" said ALDERSON, B., "to be collected from the several cases" is "that the tenants' right to remove fixtures continues during his original term, and during such further period of possession by him, as he holds the premises under a right still to consider himself as tenant." In *Penton* v. *Robart*(2), Lord KENYON said: "Where the tenant has by law a *right to carry* away *any erections, or other things, on* the premises which he has quitted, the inclination of my mind is, that he has a right to come on the premises, for the purpose of taking them away."

Let us now consider the Transfer of Property Act. Section 108 of that Act, in so far as it is material to this question runs thus :—

"In the absence of a contract or local usage to the contrary . . . the lessee may remove, at any time during the continuance of the lease, all things which he has attached to the earth ; *provided he leaves the property in the state in which he* received it."

(1) (1840) 7 M. & W., 14 at p. 19 (2) (1801) 4 Esp., 33.

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It is clear to my mind that this is only an enabling provision. It gives the lessee a right, whether he had it before or not, under the law of the land, to remove the building during the continuance of the lease in the absence of a contract or local usage to the contrary If there is any such contract or local usage, he has not that right. Such contract or local usage is therefore one to be proved by the lessor to displace this right which is given under the Act. I am therefore unable to agree with what is said in *Ismai Kani Rowthan* v. *Nazarali Sahib*(1), that a local usage to remove the building after the term or to claim compensation is a usage to the contrary and has to be proved to entitle a tenant to compensation or removal. This has been subsequently declared by a Full Bench of this Court to be not right. A right to claim compensation or to removal after the determination of the tenancy if the building is not removed during the term is not inconsistent with a right to remove during the tenancy. See *Vasudevan Nambudripad* v. *Valia Chathu Achan*(2). There the landlord claimed the improvement and contended that the tenant had only a right to compensation. It was held the tenant had both the rights. The admitted right to receive compensation was not considered contrary to the right to remove. The same argument applies to the right to remove after the term. The section therefore in conferring a right to remove a building during the tenancy does not take away or negative any right which a tenant had, before the passing of this Act, to claim compensation or remove the building after the expiry of the period. A claim to remove fixtures after the expiration of the lease or to claim compensation may no doubt be founded upon local usage as under the general law of the land, but that has nothing to do with the Transfer of Property Act, and the contract or local usage referred to in that section has only reference to the claim of the lessor to cut down the right. It leaves untouched any rights a lessee may have otherwise than under that section. In many cases it is generally stated that section 108, clause (*b*) only reproduces the law as laid down by the decisions. But as I have already pointed out, those opinions were stated with reference to the claim for compensation and were meant only to show that

(1) (1904) I.L.R., 27 Mad., 211. (2) (1901) I.L.R., 24 Mad., 47.

the right of the tenant was only to remove the building. They were not, I believe, intended to deal with the question whether he had any right to remove after the expiration of the tenancy: and if they are, with all respect, I am unable to agree with that view.

The rights of tenants throughout India were not uniform. The Madras High Court had, when the Transfer of Property Act was passed, recognised their right to compensation—*Mahalatchmi Ammal* v. *Palani Chetti*(1); the Calcutta High Court, the right to remove the building—*In the matter of the petition of Thakoor Chunder Paramanick*(2) and *Russickloll Mudduck* v. *Lokenath Kurmokar*(3); the strict English law of irremovability, had also been enforced—*Juggut Mohinee Dossee* v. *Dwarka Nath Bysack*(4). The legislature therefore allowed the tenant the minimum which it considered he should have and a rule was enacted getting rid of the distinctions in English law as to the things which a tenant may or may not remove during the tenancy and substituting one general rule enabling him to remove during the tenancy buildings of all sorts erected by him An enabling section in a code intended to apply to all India conferring certain limited rights on a tenant cannot be construed to take away impliedly or to negative any right which the general law may have recognized in his favour in some provinces The tendency of Anglo-Indian legislation has always been to strengthen the position of tenants against landlords and, without words to that effect, I am not prepared to hold that any recognised rights are taken away. If the section is construed to have that operation in cases of tenancies of uncertain duration—see section 111 (*a*), (*b*), (*c*), on forfeiture (*g*)—the tenant will generally be deprived of his fixtures as he may not know the date of the determination of his tenancy. In cases of tenants to whom the right is for the first time conceded, this may not inflict hardship. It is of course otherwise with others.

As to the decisions in *Ismai Kani Rowthan* v. *Nazarali Sahib*(5), it was unnecessary to decide that question as the right was conceded by the landlord No decision except the one in

(1) (1871) 6 M.H.C.R., 245. (2) (1866) B L R., Sup. Vol (F B), 595.
(3) (1880) I L R., 5 Calc. 688. (4) (1882) I L.R., 8 Calc., 552 at p. 590.
(5) (1904) I.L.R., 27 Mad., 211.

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Juggut Mohinee Dossee v. *Dwarka Nath Bysack*(1), negatives the right of removal, and that decision was expressly based on the ground that it has to be decided according to English law and the same learned Judge who decided this case on the original side decided the other way in *Russickloll Mudduck* v. *Lokenath Kurmokar*(2), when he was free to decide otherwise than under English law. Other decisions in all three presidencies recognise the right of removal after decree or determination of tenancy. In this presidency, the law recognised the right of compensation in some cases; in others, of removal, before that decision and that decision has not been followed in practice—not so far as my experience goes even in the Presidency town. I am therefore of opinion that a tenant has got the right to remove the building even after the determination of tenancy, if he is not given compensation. It was further argued that as the plaintiff failed to remove the building within a reasonable time he cannot do so now. I agree with the contention that the right of removal should ordinarily be exercised before the tenant surrenders possession. But in this case I arrive at the conclusion that the plaintiff should be given some time, if necessary. In the leading case which established the right of removing trade fixtures, Lord HOLT says that after the term "they became a gift in law to the reversion and are not removable," *Pool's case*(3). The plaintiff's surrender of possession was involuntary and a presumption of gift ought not to be raised. He had a *bonâ fide* claim to compensation. WILSON, J., in the Calcutta case above cited, *Russickloll Mudduck* v. *Lokenath Kurmokar*(2), allowed such a claim. Lord KENYON in *Penton* v. *Robart*(4), recognised it, and the plaintiff in this case was not an ordinary tenant but one whose ownership in the house was recognised. If he is the owner of the house it stands to reason he must be allowed to remove it, irrespective of his tenancy.

The claim to receive compensation now remains for consideration. It is a matter for observation that the right to receive the value of improvements has been established in districts which have very little in common with one another so far as land tenures are concerned. Once it is conceded that the

(1) (1882) I.L.R., 8 Calc., 582.
(2) (1880) I.L.R., 5 Calc., 688.
(3) (1705) 1 Salk., 368, s.c., 91 E.R., 320.
(4) (1801) 4 Esp., 33.

tenant has a right both under the common and statute law to remove any building he might construct, it follows that he need not seek the permission of the landlord to erect a building. When therefore he obtains such permission or recognition of his ownership to the building to be, or which has been, constructed, and in particular a permanent building which cannot be removed without material loss to him, what is the inference? It is that the tenancy is permanent or that compensation will be paid to him. In England where the right to remove is not recognised by the common law, it may be that the inference is only an implied agreement to allow it to be removed. But in India it is different. It has been repeatedly held that where nothing else appears there is a presumption of the grant of a perpetual tenancy when a tenant with permission given constructs a permanent structure. Where such presumption cannot be raised then you imply an agreement to pay compensation as it would be otherwise inequitable to turn out the tenant. This is really the basis of the Madras judgments. The conditions are that the structure must be permanent, which cannot be removed without material loss; the owner must have consented expressly, or circumstances from which his consent may be implied must be proved; or the tenant's ownership must be recognised which comes to the same thing. It will be seen at once that these conditions cannot be complied with by a trespasser, a tenant who has not got the leave of the landlord either expressly or by implication to build.

If the theory that what is attached to a man's freehold must remain there is abandoned—otherwise the tenant's right to remove during or after the period of tenancy cannot be recognised—then the case is only one of justice and equity between the owner of the ground and the owner of the house standing thereon. In the case before us the defendant has clearly admitted the plaintiff's ownership, and it is also clear that the house was built with the landlord's consent. In *Wood* v. *Hewett*(1), it was decided that a jury may infer from the circumstances an agreement between the parties that the original owner is at liberty to take away the chattel. It follows that a promise to pay compensation may be inferred if the circumstances

(1) (1846) 8 Q.B., 913; s.c., 115 E.R., 1118.

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justify it. The same principle is recognised in *Lancaster* v. *Eve*(1), that where the building could be demolished and the materials removed without injury to the land or substantial loss to the defendant, the landlord may be allowed the option as the outgoing tenant cannot materially suffer. But when the house is of brick and the foundations are a few feet deep in the ground as probably in this case, the demolition of the building, digging up and the removal of the foundation will be costly to the tenant, and will tend to keep the landlord out of his property many months and the materials will be only of trifling value to the tenant: perhaps not even sufficient to pay the cost of removal. If it is shown that the landlord agreed to the construction of such a building, it appears to me not only that the Court will be justified in presuming, in the absence of any circumstances to the contrary, that the landlord agreed to compensate the tenant in case of eviction but his consent ought to be implied. The fact that it is a building lease is not by itself enough to imply consent to the particular building in question. The nature of the building itself may rebut any presumption of consent. The question whether it has been given is one of fact, but where consent has been proved and it is not shown for what purpose it has been given—for removal his consent is not necessary—agreement to compensate may be well implied as otherwise it would enable the landlord to derive any unfair profit by an act authorised by him. Consent is a recognition of the tenant's ownership. The rule now enacted in England by statute directing compensation if the consent is given in writing in lieu of the old common law rule shows that this is in accordance with justice and equity, according to English jurisprudence. The same principle is recognised in the case of mortgagees—see section 63, Transfer of Property Act. The 'Hedaya' declares that by payment of compensation "there is an advantage to both and the injury to both is obviated." See Privy Council judgment in *Secretary of State for Foreign Affairs* v. *Charlesworth, Pilling & Co.*(2). In *Venkatavaragappa* v. *Tirumalai*(3), there was nothing on the land in which the tenant could claim any property, therefore there was no compensation to be paid. The wells in that case were not built-up wells.

(1) (1859) 5 C.B.N.S., 717. (2) (1902) I.L.R., 26 Bom. 1 (P.C.).
(3) (1887) I.L.R., 10 Mad., 112.

The fact that a rule will work injustice in scarcely any case and in majority of cases it will prevent hardship is the foundation of English Equity Jurisprudence. I am not prepared for the above reasons to depart from a rule of real property law laid down by the Sudder Court and the High Court more than thirty years ago. The reasons in *Ismai Kani Rowthan* v. *Nazarali Sahib*(1), are in my opinion utterly insufficient for that purpose. The question is asked whether the duration of the lease would make any difference in the implication to be drawn and it is replied that a distinction cannot be drawn. I can easily conceive circumstances where it might make a distinction. It is further questioned whether a tenant could claim improvements if he surrenders possession. In that case justice does not require the implication of an agreement. I am therefore of opinion that when a building is constructed with the consent of the owner, we ought to imply an agreement to pay compensation to the tenant.

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On general grounds I have come to the conclusion that the plaintiff is entitled to the relief claimed. But there is a short ground on which this case might be disposed of.

The rights of these parties must depend upon the terms of Exhibit II. The tenancy which is now determined is the tenancy created by that instrument. The plaintiff did not build the house while holding as a tenant under Exhibit II. The old tenancy was at an end, and, if the defendant's contention is right, the house became his property when plaintiff failed to remove it. Section 108(*h*) has obviously no application therefore so far as that tenancy is concerned. But under Exhibit II she was holding the house as owner and the ground as a tenant. Therefore he cannot recover the house which has not been let and not been subsequently attached to the ground All those arguments which proceed on the basis of a tenant building on the landlord's land, have no application and if the defendant wants the building he must pay for it. For these reasons I would modify the decree of WALLIS, J , and direct compensation to be ascertained and paid to the plaintiff.

WHITE, C J.—The result will be the appeal is dismissed with costs. WHITE, C J.

(1) (1904) I.L.R., 27 Mad , 211.

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justify it. The same principle is recognised in *Lancaster* v. *Eve*(1), that where the building could be demolished and the materials removed without injury to the land or substantial loss to the defendant, the landlord may be allowed the option as the outgoing tenant cannot materially suffer. But when the house is of brick and the foundations are a few feet deep in the ground as probably in this case, the demolition of the building, digging up and the removal of the foundation will be costly to the tenant, and will tend to keep the landlord out of his property many months and the materials will be only of trifling value to the tenant: perhaps not even sufficient to pay the cost of removal. If it is shown that the landlord agreed to the construction of such a building, it appears to me not only that the Court will be justified in presuming, in the absence of any circumstances to the contrary, that the landlord agreed to compensate the tenant in case of eviction but his consent ought to be implied. The fact that it is a building lease is not by itself enough to imply consent to the particular building in question. The nature of the building itself may rebut any presumption of consent. The question whether it has been given is one of fact, but where consent has been proved and it is not shown for what purpose it has been given—for removal his consent is not necessary—agreement to compensate may be well implied as otherwise it would enable the landlord to derive any unfair profit by an act authorised by him Consent is a recognition of the tenant's ownership. The rule now enacted in England by statute directing compensation if the consent is given in writing in lieu of the old common law rule shows that this is in accordance with justice and equity, according to English jurisprudence. The same principle is recognised in the case of mortgagees—see section 63, Transfer of Property Act. The 'Hedaya' declares that by payment of compensation "there is an advantage to both and the injury to both is obviated." See Privy Council judgment in *Secretary of State for Foreign Affairs* v. *Charlesworth, Pilling & Co.*(2). In *Venkatavaragappa* v. *Tirumalai*(3), there was nothing on the land in which the tenant could claim any property, therefore there was no compensation to be paid. The wells in that case were not built-up wells.

(1) (1859) 5 C.B.N.S., 717. (2) (1902) I.L.R., 26 Bom. 1 (P.C.).
(3) (1887) I.L.R., 10 Mad., 112.

The fact that a rule will work injustice in scarcely any case and in majority of cases it will prevent hardship is the foundation of English Equity Jurisprudence. I am not prepared for the above reasons to depart from a rule of real property law laid down by the Sudder Court and the High Court more than thirty years ago. The reasons in *Ismai Kani Rowthan* v. *Nazarali Sahib*(1), are in my opinion utterly insufficient for that purpose. The question is asked whether the duration of the lease would make any difference in the implication to be drawn and it is replied that a distinction cannot be drawn. I can easily conceive circumstances where it might make a distinction. It is further questioned whether a tenant could claim improvements if he surrenders possession. In that case justice does not require the implication of an agreement. I am therefore of opinion that when a building is constructed with the consent of the owner, we ought to imply an agreement to pay compensation to the tenant.

On general grounds I have come to the conclusion that the plaintiff is entitled to the relief claimed. But there is a short ground on which this case might be disposed of.

The rights of these parties must depend upon the terms of Exhibit II. The tenancy which is now determined is the tenancy created by that instrument. The plaintiff did not build the house while holding as a tenant under Exhibit II. The old tenancy was at an end, and, if the defendant's contention is right, the house became his property when plaintiff failed to remove it. Section 108(*h*) has obviously no application therefore so far as that tenancy is concerned. But under Exhibit II she was holding the house as owner and the ground as a tenant. Therefore he cannot recover the house which has not been let and not been subsequently attached to the ground. All those arguments which proceed on the basis of a tenant building on the landlord's land, have no application and if the defendant wants the building he must pay for it. For these reasons I would modify the decree of WALLIS, J., and direct compensation to be ascertained and paid to the plaintiff.

WHITE, C.J.—The result will be the appeal is dismissed with costs.

(1) (1904) I.L.R., 27 Mad., 211.

not seriously attacked in the argument addressed to us on behalf of the appellant.

He finds that there is no trustworthy evidence of an express consent on the part of the original landlord to the erection of the house—but that it is clear that the first defendant, the original landlord's successor, knew of the additions made to it—I agree with him that, this being the state of the evidence and having regard to the conditions of the tenancy, there is no room for a presumption that there was any undertaking by the landlord to pay for the house if the tenant did not remove it. Even if it can be presumed that the house was originally built with the knowledge of the then landlord, that will not be enough ; and I venture to think that recognition of ownership is of no effect at all, the law gives the tenant ownership during the term, and the landlord's recognition of that will not estop him or be evidence of an agreement.

There remains the question whether the tenant's right of removal ceases with the expiration or determination of the tenancy, or if not then, when.

This question is dealt with in *Ismai Kani Rowthan* v. *Nazarali Sahib*(1). It is there pointed out that in section 108 (*h*) of the Transfer of Property Act "nothing is said as to the rights of parties in respect of such things after the determination of the lease, if they have not been already removed by the tenant. The question may arise whether the tenant forfeits all his rights in such things it he has not so removed them ; and in the absence of any contract on that point, the question will have to be solved with reference to 'local usage,' whatever may be the precise sense in which that expression is used in section 108." This last sentence no doubt suggests a misreading of the section by the learned Judge, but that does not, I think, affect the following passage which, as I understand it, contains his solution of the question. "According to the customary or common law of the land as laid down *In the matter of petition of Thakoor Chunder Paramanick*(2), the option will be with the lessor either to take the building on paying compensation, or, if he is unwilling to pay compensation, to allow the tenant to remove the building." And this solution seems to be in accordance with the cases in India.

(1) (1904) I.L.R., 27 Mad., 211 at p. 217.
(2) (1866) B.L.R., Sup. Vol., 595 at p. 597.

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MILLER, J.

Inasmuch then as the lessor's right of election comes into operation only after the expiration or determination of the tenancy, for till then he has no right to interfere—it follows that, if he elects to allow the tenant to remove the buildings, he must allow him a reasonable time after the determination of the tenancy, in which to effect the removal, and accordingly the Courts in India, as is pointed out by SANKARAN NAIR, J., have been in the habit, when making decrees in ejectment suits, of postponing execution for a period of sufficient duration to enable the tenant to remove his buildings, if he so desires, before surrendering possession and in *Beni Ram* v. *Kundan Lal*(1), the Privy Council took a similar course and making a decree for ejectment allowed the tenant to remove his buildings.

It is for the landlord to give a reasonable time, but the Courts will not count the time against the tenant so long as the landlord's right to demand possession is in dispute. It would be inequitable to require the tenant to pull down his buildings before the question of his liability to give up possession is decided. Hence the time is counted from the date of the decree.

But there is nothing in any of the cases, or in the texts of the Hindu and of the Muhammadan law-givers cited in the cases, to suggest that, after possession had been given up to the lessor, the lessee retains any right to remove the buildings or to demand compensation for them. If he has had time after the determination of the lease to remove the buildings and has not done so before he gives up possession, then I am satisfied he has no further right to do so. It is not necessary in this case to decide whether the buildings are to be held to be "a gift in law to him in reversion," or to be forfeited or abandoned, or whether it is only the right of recovery from the lessor that is barred. The result is the same so far as we are concerned with it.

Now in the present case possession was obtained by means of an ejectment order of the Presidency Court of Small Causes, and the procedure of that Court does not, we are told, admit of the postponement of execution which in other cases is effected by the decree. Nevertheless the tenant is by law entitled to a reasonable time and opportunity to remove his buildings, and

(1) (1899) I.L.R., 21 All., 496 (P.C.).

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MILLER, J.

as I have above pointed out, that time must generally at any rate be dated from the ejectment order and not from the termination of the tenancy. The question is therefore, has the tenant been given that reasonable time and opportunity by the landlord. If not, the Court will give it now or make the landlord pay compensation. If so, the tenant has no further right to remove the building.

There can be no doubt, I think, that the answer must be that the tenant has been given ample time and ample opportunity of removing the building after he gave up possession in February 1907, and that being so his suit was rightly dismissed and this appeal must be dismissed with costs.

SANKARAN NAIR, J.

SANKARAN NAIR, J.—I have read the judgment of MILLER, J. For the reasons already given by me I agree with the view that the improvement, the building in this case, belongs to the tenant, the appellant, and that he is entitled to remove it, if the defendant is not willing to pay him its value. I am unable to agree, however, with the view that ownership is lost if not exercised within a reasonable time. The tenant is bound to remove the building within a reasonable time or before he surrenders possession. If he does not do so, I fail to see how it has the effect of transfer of ownership. The landlord may restore the land to its old condition and claim damages.

The law as to right to compensation laid down by my learned colleagues following the decision in *Ismai Kani Rowthan* v. *Nazarali Sahib*(1), is undoubtedly the English law. The English common law has been harsh and oppressive to tenants and is not a law of justice, equity, and good conscience. Indian agricultural property is built on tenant's labour. Indian legislation both local and imperial has been steadily directed towards getting rid of the consequences that followed the application of the English law of landlord and tenant based on contract to India where such relation is regulated by custom. In the Madras Presidency the Sudder Court in 1859 and eminent Judges of great experience like HOLLOWAY and INNES laid down a different principle which I followed in my judgment under appeal. As between the two I have little hesitation in making up my mind to follow their decision in *Mahalatchmi Ammal* v. *Palani Chetti*(2).

(1) (1904) I.L.R., 27 Mad., 211. (2) (1871) 6 M.H.C.R., 245.

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It is true that the question that the building was not attached during the tenancy was not raised in the Court below. But Exhibit II was a part of the plaintiff's case and it was for the defendant to raise any plea that may get rid of the inference to be drawn from Exhibit II.

APPELLATE CIVIL.

Before Mr. Justice Sadasiva Ayyar and Mr. Justice Tyabji.

1913. July 15 and 21 and August 12.

MAHARAJAH SRI RAJAH VELUGOTI SRI RAJA G. K. YACHENDRA BAHADUR VARU, K.C.I.E., PANCHA-HAZAR-MANSUBDAR, RAJAH OF VENKATAGIRI (PLAINTIFF), APPELLANT,

v.

J. AYYAPAREDDI AND TWO OTHERS (DEFENDANTS), RESPONDENTS.*

Madras Estates Land Act (I of 1908), sec. 3—'Ryoti land'—'Ryot'—Rent—Pasture land not ryoti land—Rent for pasturing not 'rent' under the Act—Sections 189 and 77 of the Act—Suit for ejectment and recovery of pasture rent, cognisable, only by Civil Courts.

Land usually fit only for pasturing cattle and not for cultivation, i.e., ploughing and raising agricultural crops is not 'ryoti' land, though it may have been 'old waste' and a tenant of such land is not a 'ryot' and any amount agreed to be paid for pasturing cattle is not 'rent' within the definitions of section 3 of the Madras Estates Land Act (I of 1908): hence a suit to eject such a tenant from the land or to recover the amount due for pasturage is cognisable only by a Civil Court and not by a Revenue Court, as the jurisdiction of Civil Courts exists in all cases where it has not been expressly taken away.

SECOND APPEAL against the decree of E. L. VAUGHAN, the District Judge of Nellore, in Appeal No. 163 of 1910, preferred against the decree of J. RAMAYYA PANTULU, the Special Deputy Collector of Nellore in Regular Suit No. 886 of 1910 transferred from the Court of District Munsif of Nellore where the suit was filed as Original Suit No. 285 of 1909.

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* Second Appeal No. 1487 of 1911.

The facts appear fully from the judgment of SADASIVA AYYAR, J.

RAJA OF VENKATAGIRI v. AYYAPAREDDI.

S. Subrahmanya Ayyar for the appellant.

P. Nagabhushanam for the respondent.

SADASIVA AYYAR, J.—The plaintiff, the Raja of Venkatagiri, is the appellant in this Second Appeal. The defendants are the tenants of certain lands in the Venkatagiri Estate.

SADASIVA AYYAR, J.

The said lands according to the third paragraph of the plaint are waste lands which have been always used for the pasturing of cattle. Pasture rent is alleged to have been collected from the defendants for the use of these lands till fasli 1317 at the rate of 5 annas 1 pie per acre for about 40 years. In the muchilikas for faslis 1317 and 1318, however, the defendants agreed to pay rent for the lands at a higher rate if any person applied for the grant of lands on darkhast for purposes of cultivation. They further agreed by these muchilikas to quit possession of the lands on demand if they refused to take up the lands at the higher rate. The suit was brought, claiming three reliefs :—

(a) Ejectment of the defendants, because on the 3rd August 1907 the defendants, when notice was issued to them to take up the lands themselves at the higher rate failed to take them up.

(b) For recovery of rent for faslis 1317 and 1318 at the rates offered by a person who applied for grant of the lands on darkhast in April 1907.

(c) For mesne profits subsequent to date of suit till delivery, that is, mesne profits for fasli 1319, etc. There was first the question whether this suit, which was originally filed in the Munsif's Court, was cognisable by the said Court. The Munsif returned the plaint to be presented to the Revenue Court. The Revenue Court again returned it to be presented to the Munsif's Court. There was an appeal against this order of the Revenue Court to the District Court, which set aside the Revenue Court's order and directed it to try the suit. The question as to which Court has jurisdiction to try this case depends, it need hardly be said, upon the allegations in the plaint and upon the case set up by the plaintiff in the plaint. Assuming for this purpose that the allegations in the plaint, supplemented by the plaintiff's documents, are correct, it seems to us clear that the lands in dispute are within the definition of "old waste" in section 3, clause 7, of the Madras

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Estates Land Act. "Old waste" includes according to that definition, any land which, *not being private land*, has continuously remained uncultivated and in the possession of the Zamindar for 10 years or has at the time of any letting by the landholder after the passing of the Act remained without any occupancy rights being held therein within a continuous period of not less than 10 years immediately prior to such letting. The plaint lands are therefore old waste lands. But old waste lands might be of two kinds. They might be old waste lands which are also ryoti lands or they might be old waste lands which are not ryoti lands. But, a ryoti land in order to come under the definition of old waste should be land in respect of which before the passing of the Act "the landlord had obtained the final decree of a competent Civil Court establishing that the ryot has no occupancy right." See the last paragraph of clause 7, section 3; ryoti land is described in section 3, clause 16, as cultivated land other than private land, communal land or service tenure land. It is clear from the muchilikas filed in this case that the plaint land is pasture waste and is not permanently cultivable. When ryoti land is defined as cultivable land, we think it means land permanently cultivable for all practical purposes and not land which might be occasionally cultivated. This is made clear by section 6, clause 4, of the Act, which says that waste land let under a contract for the pasturage of cattle, any reserve forest land let under a contract for the temporary cultivation of agricultural crops shall not, by reason only of such letting for pasturage or for temporary cultivation, become ryoti land. Hence land fit usually only for pasturing cattle and not for ploughing and raising agricultural crops is not ryoti land. The land in dispute in this case according to the allegations in the plaint and according to the terms of the muchilikas is not cultivable land, though it might be occasionally capable of cultivation under extraordinary and unusual circumstances and hence it is not ryoti land. No doubt, the usual presumption under section 23 of the Act is that a land is ryoti land other than old waste, but in this case, such presumption has no place as the land is clearly ordinary old waste which is not ryoti land.

Then the next question is whether the tenant of such old waste let for pasture is a ryot. A ryot is defined in section 3, clause 15, as a person who holds (*a*) for the purpose of agriculture ryoti land. The tenant of an old waste which is not ryoti land does not

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therefore come under the definition of ryot. On another ground also, the tenants of the plaint land are not ryots, because they do not hold land for the purpose of agriculture. 'Agriculture' is defined in the Act as including 'horticulture,' see section 3, clause 1. The ordinary meaning of 'agriculture' is the raising of annual or periodical grain crops through the operation of ploughing, sowing, etc. In *Soman Gope* v. *Raghubir Ojha*(1), it was held under the Bengal Tenancy Act that to turn land let for agricultural purposes into an orchard was to render it unfit for the purpose of the tenancy. In *Lakshmana* v. *Ramachandra*(2), the same principle was laid down. See also *Murugesa Chetti* v. *Chinnathambi Goundan*(3). While 'agriculture' is by a special definition made to include 'Horticulture' in the Estates Land Act, it has not been made to include 'silviculture' and 'pasturing.' This clearly shows that the legislature did not intend pasturage of cattle to be included within the meaning of the term 'agriculture.' The matter seems to be finally clinched by the select committee's report (see Duraiswami Ayangar's book, appendix IV, page XCII) where the select committee make the following statements: "1. (i) 'Agriculture'; from the definition, we have omitted 'silviculture' and 'pasturing.' The general right of a ryot to use the land in his holding in any manner which does not materially impair its value for agricultural purposes is declared in clause 10 (11); and ordinarily, neither silviculture nor pasturing would be inconsistent with such use; but we recognise that the former cannot always be exercised as an unrestricted right, and that both silviculture and pasturing may be undertaken in circumstances which do not give a person admitted to use public cultivable land for those purposes alone any claim to the status of a ryot [clause 6, 16 (1)]. For 'pasturing' we have made special provision in clause 6 (*d*). As to 'silviculture' the limitations of a ryot's right to plant trees has been declared in clause 22 (12)." It being thus clear that the defendants in this case according to the plaintiff's allegations do not come under the designation of ryots, the next question is whether a suit for ejectment of these tenants of old waste who are not ryots is cognisable by the Revenue Court or by the Civil Court. Section

(1) (1897) I.L.R., 24 Calc., 160. (2) (1887) I.L.R., 10 Mad., 351.
(3) (1901) I.L.R., 24 Mad., 421.

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189, clause 1, is the section which bars the jurisdiction of Civil Courts in certain specified cases, and it is unnecessary to state that, where the general jurisdiction of the Civil Courts is specially taken away only in particular classes of cases, the Civil Courts retain their jurisdiction as regards all other classes of cases not so excluded. Now section 189 (i) excludes the Civil Courts' jurisdiction (investing the Collector or other Revenue officer with that jurisdiction) only in respect of suits and applications of the nature specified in parts A and B of the schedule to the Act. Turning to parts A and B of the schedule, suits triable by a Collector, so far as the question of ejectment is concerned, are suits coming under sections 153, 48 (ii) and 158 of the Act. Section 153 relates to the ejectment of a non-occupancy *ryot*. But, as the defendants in this case are not *ryots*, that section does not apply. Section 48 (ii) also relates to the ejectment of a *ryot* who fails to make a certain declaration. Section 158 relates to a tenant of *private land*. It is thus clear that the present suit so far as it prays for ejectment of a tenant *not being a ryot* of old waste *not being ryoti land*, let for pasture purposes and *not agriculture* is not cognisable by a Collector but only by a Civil Court. The Munsif's original order returning the plaint to be presented to the Revenue Court and the District Court's order on appeal from the Revenue Courts deciding that the Revenue Court alone had jurisdiction are erroneous so far as the claim relates to the ejectment of the defendants and the recovery of mesne profits from fasli 1319 downwards is concerned. As regards the rent claimed for faslis 1317 and 1318, the plaintiff, if his allegations are true, is entitled on the muchilikas for faslis 1317 and 1318 to recover under the fourth paragraph of muchilika rent at the sagubadi dry rate of the nearest piece of land in the village, though he may not be entitled to the higher wet cultivation rent at the rate offered by the alleged darkhastdar. The Lower Courts have not gone into the question whether there was an application by a darkhastdar in April 1907, whether defendants were asked to take up the land for temporary cultivation as provided in the muchilika for faslis 1316 to 1318 and to what rate of rent the plaintiff is entitled in faslis 1317 and 1318.

Even as regards the suit for what is called pasturage rent for faslis 1317 and 1318, the suit cannot lie in the Revenue

Court because section 77 of the Act relates to arrears of *rent* as defined in the Act and the definition of *rent* in the Act confines the expression to whatever is payable for the use of land for the purposes of agriculture (with its appurtenances like cesses, water-rate, etc.) and sums payable by a *ryot* as such on account of pasturage fees and fishery rent. Sums payable by a *ryot* as such on account of pasturage fees can only refer to sums payable by *agricultural* tenants for the use of communal pasture lands. It was ingeniously argued that even a tenant who holds waste lands (which are not ryoti lands) for purposes of pasture under section 6, clause 4, is a ryot, because such a tenant is treated as a non-occupancy ryot in section 46 of the Act, though the benefit of the provisions of that section given to non-occupancy ryots as a class is withheld from such a tenant. We think that this ingenious argument cannot prevail against the clear definition of '*ryot*' *found in section 3, clause 15, and that the involved* grammatical implications derived from the language of section 46 should not be allowed to override the express declaration and definition found in section 3.

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It therefore follows that even as regards the pasturage rent due by tenants who are not ryots, the jurisdiction of the ordinary Courts is not taken away. We accordingly set aside the original order of the Munsif dated the 10th January 1910 and the original order of the District Court passed in appeal against the Revenue Court's original order returning the plaint to be presented to District Munsif and we direct the plaint to be received by District Munsif if presented to him within two weeks of the return of same by this Court to the plaintiff and we direct District Munsif to dispose of suit according to law. Costs hitherto incurred will abide the result.

TYABJI, J.

TYABJI, J.—I agree in the judgment of my learned brother which I have had the benefit of reading.

The question involved in this appeal is, whether the special Deputy Collector of Nellore presiding in the Revenue Courts, had jurisdiction to try the suit out of which the appeal arises, in which the plaintiff claims to be put into possession of the property referred to in the plaint, removing the defendants therefrom; the plaintiff also claims "mesne profits" and other incidental reliefs. The plaint was in the first instance presented in the Munsif's Court but the Munsif held that he had no

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jurisdiction to try the suit. The Special Deputy Collector also held that he had no power to order the defendants to be ejected from the land, and dismissed the suit.

The jurisdiction of the Revenue Courts, so far as is material, for the present case is derived from section 189 of the Madras Estates Land Act (Madras Act I of 1908), and the jurisdiction of Civil Courts is by the same section taken away to the same extent to which it is granted to the Revenue Courts. It would therefore seem that in regard to any matter in which Civil Courts ordinarily have jurisdiction, they retain that jurisdiction, unless it is acquired by the Revenue Courts, and that the ordinary jurisdiction of the Civil Courts is now apportioned between the Civil and the Revenue Courts. It seems necessary to make this remark as in the course of the arguments before us it was suggested on the one hand and apprehended on the other, that it may happen that neither the Civil Courts nor the Revenue Courts might have jurisdiction to eject the defendants.

The question that arises before us now is whether the Revenue Courts have jurisdiction to try a suit in which the above-referred to reliefs are sought.

Section 189 of the Estates Land Act gives jurisdiction to the Revenue Courts over all suits and applications of a nature specified in Parts A and B of the schedule. Hence, in order to determine whether the Revenue Courts have jurisdiction to try a suit of this nature we have to turn to the various items in the schedule. The schedule refers to ejectment suits in items 17 and 19 of Part A, corresponding to sections 151 (1) and 153 and items 9 and 27 of Part B, corresponding to sections 48 (2) and 158 respectively. These sections refer to the nature of the land itself, and to the tenant's rights therein. Sections 151 and 153 and 48 refer respectively to suits for ejecting occupancy and non-occupancy ryots; section 158 refers to a suit against a tenant of private land. It follows therefore that unless the plaintiff can make out that the defendant is either a ryot or a tenant of private land, he cannot establish his right to sue for ejectment in a Revenue Court.

It was argued before us that the use of the land for pasturage purposes itself makes it ryoti land. 'Ryoti land' is defined in section 3 (so far as is at present material), as cultivable land in an estate other than private land. Therefore, land must be

cultivable before it can be termed ryoti land. It was argued that pasturage must be taken to be included in the term cultivation as used in the Madras Estates Land Act. But pasturage is something different from cultivation. Cultivation implies some kind of labor on the land, generally consisting of breaking up the soil; whereas pasturage has reference to a particular mode of using the natural growth on the land without its being cultivated. Land used for pasture therefore cannot ordinarily be styled as cultivated land, and on the facts of this case it is clear that the land as a matter of fact is not cultivable That the legislature did not intend pasturage to be included in the term 'cultivation' as it is employed in the Madras Estates Land Act seems also to be indicated by a consideration of section 6, clauses 1 and 4; the latter clause expressly provides that "admission to waste land under a contract for the pasturage of cattle . . . shall not by itself confer upon the person so admitted a permanent right of occupancy." At the same time it is provided in section 6 (1) that "every ryot in possession . . . of ryoti land not being old waste . . shall have a permanent right of occupancy in his holding." As the fourth sub-section of the same section provides that admission to waste land under contract for the pasturage of cattle . . . does not by itself confer upon the person so admitted a permanent right of occupancy," it would appear that the legislature did not contemplate pasture land as being considered ryoti land. The tenant of such lands equally does not come under the definition of a 'ryot' in section 3 (15), which requires the land to be ryoti land and to be held for the purpose of agriculture, in order that the tenant may be termed a ryot. It was argued before us that this land falls within the definition of 'old waste' in section 3 (7) and that therefore it must fall under the category of ryoti land. It is true that the expression "ryoti land not being old waste" in section 6 and in other portions of the Act shows that 'old waste,' may be ryoti land, but there is nothing to show that all 'old waste' is ryoti land; 'old waste' which is not cultivable and which consequently does not fall within section 3 (16) cannot, it would seem, be styled ryoti land.

Finally it was not contended before us that this land was private land so as to make section 158 applicable.

RAJA OF VENKATAGIRI v. AYYAPAREDDI.

TYABJI, J.

The question still remains to be considered whether the Revenue Courts had jurisdiction to try the suit so far as it relates to the recovery of *mesne* profits for *fasli* years 1317 and 1318. What is described as *mesne* profits in the plaint is nothing else than the rent due under the *muchilikas* which are now on the record before us. The section which gives to the Revenue Courts jurisdiction to order the recovery of arrears of rent by the landlord is section 77—see Schedule, Part A, item 8. The word 'rent' in the section must be understood in the sense in which it is defined in section 3 (11). It must therefore refer only to what is lawfully payable to a landlord for the use or occupation of the land in the estate for the purpose of agriculture. The land in this case, as already stated, has been used, not for agriculture, but for pasturage. Section 77 therefore does not give the Revenue Courts jurisdiction to decree the recovery of arrears of rent claimed in the plaint.

For these reasons I agree with the order proposed by my learned brother.

APPELLATE CIVIL.

Before Sir Charles Arnold White, Kt., the Chief Justice and Mr. Justice Oldfield.

1913. August 20, 21 and 27.

LAKSHMAMMAL (PLAINTIFF), APPELLANT,

v.

NARASIMHARAGHAVA AIYANGAR AND TWO OTHERS (DEFENDANTS), RESPONDENTS.*

Deed—Material alteration of—Destruction of right of suit—Negotiable Instruments Act (XXVI of 1881), sec. 87.

An alteration in a document which has the effect of enabling the payee to sue on the document in a Court where he could not have sued on it in its original form is a material alteration and as such destroys the right of action on the document.

Altering a negotiable instrument by causing the words "or order" to disappear and making it non-negotiable is a material alteration, under ordinary

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* Original Side Appeal No. 52 of 1912.

law and also under section 87 of the Negotiable Instruments Act (XXVI of 1861) The facts that the payee eventually filed the suit in another Court different from the one intended at the time of the alteration and that it was not necessary for him to rely on the altered state of document to enable him to succeed therein do not make the alteration any the less material.

Gour Chandra Das v Prasanna Kumar Chandra (1906) I.L.R., 33 Calc., 812, followed.

Decroix, Verley et Cie. v. Meyer & Co. (1890) 25 Q.B.D., 343, distinguished.

APPEAL from the judgment of WALLIS, J., in Civil Suit No. 184 of 1910 in the exercise of the ordinary original civil jurisdiction of this High Court.

The following is one of the two mutilated documents sued upon :—

EXHIBIT A.

Pro-note executed on the 5th day of August 1900, by Andapura Narasimha Ayyangar, residing in Kempananjamamba Agraharam, Mysore, to Lakshmamma wife—(torn)—Sowcar Ranga—(torn)—residing in the ditto Agraharam. The sum which I have this day received from you in cash, is Government Rupees nine thousand which—(torn)—on the next day after the expiry of seven years from this day forward—(torn) I shall add interest at the rate of seven Rupees per year and pay off the interest alone of each and every year on the pro-note kalavadhi of each year. To this effect is the pro-note executed and it is correct.

A. Narasimha Ayyangar.

Written with (his) own hand.

The following is a portion of the judgment of WALLIS, J. in the original Court :—

"This is a suit brought by the plaintiff upon two documents "which were executed in Mysore by the father of the defendants "who was at one time an Advocate and afterwards a District "Munsif in Mysore in favor of the plaintiff, who with her hus- "band is also an inhabitant of Mysore, and the suit has been "brought here merely owing to the accident that the defendants "are at present, residing in Madras for the purpose of prosecu "ting their studies. In the plaint these documents are de- "scribed as bonds, but in the documents themselves they are "described as promissory notes. It now turns out that these "documents have been torn in several places and have been "pieced together again, but in such a way that the parts where

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"the name of the payee and the words "or order" would "ordinarily appear are missing with the result that they can be "described as bonds as they have been described in the plaint.

"Now it also turns out from an inspection of these documents that according to the Stamp Law of Mysore which is "regulation 2 of 1900 and which admittedly is identical in terms "with our own Stamp Law, these documents, being made pay-"able more than a year after execution, under article 13 (C) of "the first schedule require to be stamped in the same way as "bonds; and have not been so stamped with the result that "under section 35, if promissory notes, they could neither be "received in evidence, nor acted upon in Mysore and they would "therefore be entirely invalid in Mysore, which, in the ordinary "course of things, would be the place where they could be sued "upon, because the executant and his family were Mysorians, "resident in Mysore.

"Now the first question which arises on that state of things "is whether there has been a material alteration in these documents since their execution. I am driven to the conclusion "that there has been material alteration in these documents— "an alteration made with the obvious purpose of enabling these "documents which could not be sued upon, to be sued upon "where it was expected that they would have to be sued upon, "namely in Mysore.

"Having come to that conclusion, there really is an end of "the case, because the result inevitably follows that this suit "must be dismissed. In my opinion the suit clearly fails on the "ground of material alteration of the suit notes and therefore "must be dismissed with costs."

The other facts appear from the judgment of WHITE, C.J.

S. Srinivasa Ayyangar and *K. Bashyam Ayyangar* for the appellant.

R. Sadagopachariar and *C. Narasimhachariar* for the respondents.

WHITE, C.J.

WHITE, C.J.—This is an appeal from a decree given by Mr. Justice WALLIS dismissing the plaintiff's suit on the ground that the two documents on which he relied had been materially altered and that for that reason the defendants were not liable thereon. The suit was brought on two instruments executed in Mysore by the father of the defendants, the father being a

resident in Mysore, in favour of the plaintiff who with her husband was also an inhabitant of Mysore. When the documents were put in evidence it was found that they had been torn and mutilated. The learned Judge declined to believe the story put forward by the plaintiff to account for the mutilation of the documents. I agree with the learned Judge that this story could not be accepted. The effect of the mutilation was to cause the words "or order" to disappear from the two documents. There is very little direct evidence on this point, but the learned Judge holds in effect that the missing words were "or order" or words to that effect and I take the same view. This was not in fact seriously contested by the plaintiff and Mr S. Srinivasa Ayyangar's argument proceeded on the assumption that the words "or order" were contained in the two documents as they were originally executed Mr. JUSTICE WALLIS held that the alterations were made with the obvious purpose of enabling these documents, which could not be sued upon, to be sued upon where it was expected that they would have to be sued upon, namely in Mysore. There was some discussion as to whether the documents in their original form were bonds or promissory notes. In the plaint they are described as bonds; but in the documents themselves they are described as promissory notes. As promissory notes they are insufficiently stamped, and whether or not in this state of things they could be sued on in their original form in Madras, it seems clear that the insufficiency of stamp would have been a fatal obstacle to their being sued on in Mysore.

I should be prepared to take the same view as the learned Judge and to hold that the alterations were made in order that these documents could be sued upon in Mysore If this is so, it seems to me to be absolutely clear that the alterations were material alterations since they were made for the purpose of enabling the plaintiff to sue in a Court in which if the alterations had not been made, she would not have been able to sue They appear to me to be none the less material alterations because, the defendants at the time the suit was instituted being, as events turned out, residents in Madras for educational purposes, the plaintiff was able to institute her suit in this Court. In the view that alterations were made with the object of enabling the plaintiff to institute her suit in this Court, I am of opinion that

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"the name of the payee and the words "or order" would "ordinarily appear are missing with the result that they can be "described as bonds as they have been described in the plaint.

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I should be prepared to take the same view as the learned Judge and to hold that the alterations were made in order that these documents could be sued upon in Mysore If this is so, it seems to me to be absolutely clear that the alterations were material alterations since they were made for the purpose of enabling the plaintiff to sue in a Court in which if the alterations had not been made, she would not have been able to sue. They appear to me to be none the less material alterations because, the defendants at the time the suit was instituted being, as events turned out, residents in Madras for educational purposes, the plaintiff was able to institute her suit in this Court. In the view that alterations were made with the object of enabling the plaintiff to institute her suit in this Court, I am of opinion that

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the alterations are material and that the defendants are not liable on the documents.

In connection with this part of the case Mr. Srinivasa Ayyangar relied on a decision of this Court in *Mahomed Rowthan* v. *Mahomed Husin Rowthan* (1), in which it was held that there was no provision of law which required a promissory note executed out of British India to be stamped before it was sued on or used when the holder of the note had not done any of the acts referred to in sections 5 and 18 of the Stamp Act, and in consequence, the obligation to stamp had not arisen. Mr. Srinivasa Ayyangar's argument was that in as much as the defendant could be sued on the original documents in this Court without being met by the stamp objection the alteration made in the document for the purpose of enabling the plaintiff to sue in this Court was unnecessary, was made under a misapprehension, and that therefore the alteration of the documents was immaterial since a suit could have been brought in this Court either under the documents as they originally stood or in their altered form. It seems to me that alterations made in these circumstances clearly come within the "mischief" of the rule of law with reference to the alteration of instruments.

The cases are discussed in the notes to *Master* v. *Miller*(2). I do not propose to refer to those cases because I find what appears to me to be an accurate exposition of the law in *Gour Chandra Das* v. *Prasanna Kumar Chandra*(3). "Any change in an instrument, which causes it to speak a different language in legal effect from that which it originally spoke, which changes the legal identity or character of the instrument either in its terms or the relation of the parties to it, is a material change, or technically, an alteration, and such a change will invalidate the instrument against all parties not consenting to the change. This is a wholesome rule founded on sound policy and may be defended on two grounds, namely, *first*, that no man shall be permitted, on grounds of public policy, to take the chance of committing a fraud without running any risk of loss by the event when it is detected, and, *secondly*, that by the alteration, the identity of the instrument is destroyed, and to hold one of

(1) (1899) I.L.R. 22 Mad., 337. (2) (1791) 1 Sm.L.C., 767 ; s.c., 2 R.R., 399.
(3) (1906) I.L.R., 33 Calc., 812 at pp. 816 and 817.

the parties liable under such circumstances would be to make for him a contract, to which he never agreed [See *Lee* v. *Butler*(1).] The question, to what extent the identity of an instrument must be changed in order that its legal effect will be altered so as to bring the case within the terms of material alteration vitiating the instrument, must depend upon the nature of the alteration in each particular case. The test is not necessarily, however, whether the pecuniary liability of one of the parties has been increased by the change; it is of no consequence, whether the alteration would be beneficial or detrimental to the party sought to be charged on the contract. The important question is whether the integrity and identity of the contract have been changed. It is to prevent and punish such tampering as changes the identity of the contract that the law does not permit the plaintiff to fall back upon the contract as it was originally, or in the language of SWAYNE, J. (and) "in pursuance of a stern but wise policy, the law annuls instrument as to the party sought to be wronged"

The decision upon which Mr. Srinivasa Ayyangar relied as an authority for his proposition that on the findings of the fact, to which I have referred, the alteration of the documents in this case was immaterial was the judgment of the Court of Appeal in *Decroix, Verley et Cie.*, v. *Meyer & Co* (2). That case, it seems to me, has really no bearing on the question we are now considering. In that case a bill of exchange being drawn by one L. D. Flips payable "to order L. D. Flips," the drawyees struck through the word "order" and accepted the bill "in favour of L. D. Flips only, payable at the Alliance Bank, London." In an action upon the bill by endorsees for value against the acceptors it was held that the acceptance did not vary the effect of the bill as drawn, and that it was therefore a general acceptance of a negotiable bill, and the action was maintainable. The ground of decision in that case was that, although the drawees intended to restrict the negotiability of the bill and struck out the word "order" for that purpose, their acceptance was in law a general acceptance and the suit by the endorsees as against them as acceptors was maintainable. Notwithstanding what the acceptors did in that case the bill continued to be a

(1) (1897) 167 Mass., 426, s.c., 57 Am. St. Rep., 466. (2) (1890) 25 Q.B.D., 343.

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negotiable instrument by virtue of section 8, sub-section 4, of the Bills of Exchange Act of 1882. As BOWEN, L. J., put it in his judgment on page 350, "The bill itself was originally drawn payable to order. The word 'order' was, it is true, struck through; but the effect of the 4th sub-section of the 8th section of the Bills of Exchange Act is to put it in again." In Bills of Exchange cases, where the question of material alteration has arisen, there is no case so far as I know in which it has been suggested that an alteration which gave a man a right of action which he would not otherwise have is not a material alteration.

Mr. Srinivasa Ayyangar did not argue that if the plaintiff could not have sued in this Court on the original documents, the alteration was not material. I am of opinion that, assuming he could have sued in this Court on the original documents, the alterations made in the circumstances in which in this case they were made were material alterations. This being my view, I do not think it necessary to discuss the question whether the plaintiff could have sued in this Court on the documents as they stood in the form in which they were drawn in the first instance. I do not see how Mr. Srinivasa Ayyangar could well rely on any case with reference to what is a material alteration within the meaning of section 87 of the Indian Negotiable Instruments Act since on the findings of fact in this case the object of the alterations was to convert the two documents which were originally negotiable instruments into non-negotiable instruments.

But even if it is open to him to rely on any decision in connection with this branch of the law of bills of exchange, he has certainly not called our attention to any case, as it seems to me, which supports his proposition.

I am of opinion that the alterations made in these two documents in the circumstances in which they were made would be material alterations for the purposes of section 87 of the Negotiable Instruments Act, if we had to consider the question in connection with that enactment, and that they are material alterations within the general rule of law to which I have referred. I am therefore of opinion that Mr. Justice WALLIS was right and I would dismiss this appeal with costs.

OLDFIELD, J.

OLDFIELD, J.—I concur.

APPELLATE CIVIL.

Before Mr. Justice Ayling and Mr. Justice Tyabji.

A. R. ISWARAM PILLAI (PLAINTIFF), APPELLANT,

v.

SONNIVAVERU TARAGAN AND THREE OTHERS (DEFENDANTS), RESPONDENTS.*

1913. September 22 and 23.

Contract—Stranger to the contract—No right of suit, on the contract, generally.

A mortgaged his lands to *B*, part of the consideration therefor, being *B's* promise to discharge a debt of *A* to *C*.

Held, that *C* who was a stranger to the contract cannot sue *B* for the payment of his debt without joining *A* as a party.

Per curiam.—The following are some of the circumstances under which a stranger to a contract can sue the promisor:—

(*a*) the creation of a trust in favour of the plaintiff in respect of the amount sued for, (but a direction to pay, as in the present case, does not of itself create an express or constructive trust, owing to the absence of the elements necessary to constitute a trust);

(*b*) the creation of a charge on immoveable property by the promisor or allocation by the promisor of the specific money in suit in favour of the plaintiff;

(*c*) the creation of a settlement on marriage, in which the plaintiff may be beneficially entitled, as provided by section 23 of the Specific Relief Act, and

(*d*) estoppel as against the promisor, owing to transactions between the plaintiff and the promisor

Khwaja Muhammad Khan v. *Husaini Begam* (1910) I L R, 32 All, 410 (P C) and *Debnarain* v. *Ramsadhan* (1913) 17 C W N, 1143 distinguished.

SECOND APPEAL against the decree of F D. P. OLDFIELD, the District Judge of Tinnevelly, in Appeal No. 406 of 1911, preferred against the decree of N. SUNDARAM AYYAR, the District Munsif of Ambasamudram, in Original Suit No. 582 of 1910

The necessary facts are given in the judgment of TYABJI, J.

B. Narasimha Rao for *T. M Krishnaswami Ayyar* and *E. S. Chidambaram Pillai* for the appellant

S. Ramaswami Ayyar for the respondents.

TYABJI, J.—The plaintiff sues for a decree for a sum of Rs. 610 which includes the principal sum of Rs. 450 and interest. This sum is claimed as due on a hypothecation bond purporting to be executed on the 27th August 1907 to which the TYABJI, J.

* Second Appeal No. 938 of 1912.

ISWARAN PILLAI v. SONNIVAYERU TARAGAN.

TYABJI, J.

plaintiff was not a party, but which was executed by one Saheb Sheik Uduman Tharagan in favour of the first and second defendants and of the father of the third and fourth defendants, to whom I shall refer for brevity as the defendants. Sheik Uduman Tharagan, the executant of that bond, was a debtor of the plaintiff, and he asked the defendants (in terms to which I shall immediately refer) to pay off the sum of Rs. 450 which was due from Sheik Uduman Tharagan himself to the plaintiff.

The material portions of the hypothecation bond are as follows:—"The hypothecation bond executed on the 29th August 1907 *to" the defendants* . . . "The *sum received on* the hypothecation to you of the following properties belonging to me . . . "; then the particulars of the Rs. 2,000 are given, which includes the following item: "a sum *of Rs. 450* is kept with you in order to be paid to and get a receipt from" . . . the plaintiff "on account of the balance due to him in respect of the purchase of yarn."

It will thus be seen that the plaintiff claims to have a contract enforced to which he was not a party, but which was entered into between his debtor and the defendants. *A* and *B* agree that *B* will pay a sum of money to *Z*: *Z* brings the suit against *B* without joining *A* as a party.

The defence is first that the plaintiff being a stranger to the contract could not sue on it; and secondly that, though the *consideration for the hypothecation bond* was originally fixed at Rs. 2,000 (including the payment of the sum now in question), yet that that agreement was modified by a notice given *by the* defendants' vakil 24 days after the date of the *hypothecation* bond, that subsequent to that notice even as between the said Sheik Uduman and the defendants, there was no contract by which the defendants were bound to pay the said *sum to* the plaintiff, and that the charge created by the hypothecation in favour of the defendants was effective only in so far as the consideration had actually passed between the parties *thereto* at the date of the said notice, viz., for Rs. 1,250. The endorsements on the hypothecation bond and a decree, Exhibit IV, which refers to it are relied upon as evidence of this modification of *the terms* of the hypothecation bond.

Both the Lower Courts have dismissed the suit and the learned District Judge in doing so said, "The *only* question

argued is whether there was privity of contract between the plaintiff" and the defendants.

It was argued before us that the plaintiff was entitled to sue on the contract notwithstanding that he was not a party to it and mainly on two grounds.

The first argument was that by the terms of the hypothecation bond it was agreed that a trust should be created in favour of the plaintiff and that if this was so the plaintiff could enforce the agreement.

In the second place it was argued that the general rule of law, that a person who is not a party to a contract cannot become entitled by that contract to demand the performance of any duty under it, was no more applicable in India after the decision of the Privy Council in *Khwaja Muhammad Khan* v. *Husaini Begam*(1) especially as that decision is explained and applied in *Debnarain* v. *Ramsadhan*(2) a decision of Sir LAWRENCE JENKINS and Sir ASHUTOSH MUKERJI.

It seems to me however that what were put forward as two distinct heads of argument were in the circumstances of the present case indistinguishable, and that both depend upon the consideration of the same question. For it is admitted that, if the terms of the hypothecation deed are given effect to in their entirety, the plaintiff would receive the money from the defendants The consideration of the question whether the plaintiff is entitled to have the terms of the hypothecation deed enforced, is not, it appears to me, materially advanced by determining whether, if they were enforced, the money would be payable to the plaintiff through a trust or otherwise, or, to use the terms of the Indian Trusts Act, by determining whether the defendants agreed to annex to their ownership of the money the obligation of paying it to the plaintiff, or they merely agreed to pay it to the plaintiff.

Assuming that the money would be payable through a trust, the question would still remain whether the plaintiff can require that the trust should be completed Assuming, in other words, that, by their agreement to pay to the plaintiff the sum claimed, the defendants agreed to hold a certain sum as trustees for the plaintiff, the question still remains whether that agreement can be enforced by the plaintiff

(1) (1910) I.L.R., 32 All., 410 (P.C.) (2) (1913) 17 C.W.N., 1143.

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TYABJI, J.

Every trust requires at its creation an agreement between the trustee and the author of the trust (see Trusts Act, section 10). From this point of view whenever a trust is enforced at the instance of a beneficiary it may be said that a contract (viz., that between the author of the trust and the trustee) is enforced at the instance of a stranger to the contract. And the question may be whether a contract in the performance of which a third party is interested partakes sufficiently of the nature of a trust to permit of its being performed at the instance of the third party A contract (other than a trust) is ostensibly and primarily for the benefit of the parties contracting; a trust is exclusively for the benefit of the *cestui qui trust* who, as such, are strangers to the agreement between the author and the trustee.

It is true that the agreement which is required for the creation of a trust is not always express; it is often implied in the case of constructive trusts; it may be imposed upon a person against his will. Here it is evident that the trust is sought to be imposed against the will of the alleged trustee.

It is necessary to mention that in the present case the alleged trust can be imposed only by enforcing the agreement at the instance of the plaintiff, for here there is no property transferred to the defendants of which they agreed to become trustees and which can be followed by the plaintiff; all the defendants agreed to do was at the most to allocate a certain sum in their own hands and to make that sum the trust fund and what is in truth sought in this case is to make the defendants—against their will—not merely the trustees but the authors of the trust.

The principle of constructive trusts can have no bearing for it cannot be contended that if A agrees with B to become a trustee for C, the mere agreement between A and B, even if there is a failure of consideration and B afterwards repudiates, the agreement (and even if A consents to such repudiation) will make B a constructive trustee for C.

An agreement to become a trustee is not, in the circumstances of cases like the present, distinguishable in respect of its enforcibility from an agreement to pay a sum of money In such cases the trust can arise only after the contract has been performed; until the trust arises it is merely a contract to create a trust, and so long as the trust is not complete, it is what in another connection is called an executory trust as distinguished

from an executed trust; until the trust is executed there will be no trustee, but only some person possibly "in progress towards being a trustee" [in the words used by SIR THOMAS PLUMER in *Wall* v. *Bright*(1)] and there will be no trust property. Even after he has completed his progress of being a trustee and the trust property has come into existence the trustee may occupy a position such as the vendor in *Shaw* v. *Foster*(2), was held to occupy. That position is thus described by EARL CAIRNES: "The trustee was not a mere dormant trustee, he was a trustee having a personal and substantial interest in the property, a right to protect that interest, and an active right to assert that interest if anything should be done in derogation of it. The relation, therefore, of trustee and *cestui qui trust* subsisted, but subsisted subject to the paramount right of the vendor and trustee to protect his own interest as vendor of the property" (page 338).

The present case for these reasons seems to me to be quite different from one where a trust has already been created and the beneficiary seeks to enforce it.

I come therefore to consider whether on the authority of the cases relied upon the agreement referred to can be enforced at the instance of the plaintiff In the decision of the Privy Council in *Khwaja Muhammad Khan* v. *Husaini Begam*(3), the parents of a bride and bridegroom (who were both minors) entered into an agreement which the bride sought to enforce by suit. The marriage was recited as the cause leading up to the agreement. Their Lordships allowed the suit on the following grounds:—(1) that *Tweddle* v. *Atkinson*(4) "was an action of assumpsit and that the rule of common law on the basis of which it was dismissed was not applicable to the facts and circumstances" of the case. They state, apparently, as the reasons why *Tweddle* v. *Atkinson*(4), did not apply, (2) that the agreement executed by the defendant specifically charged immoveable property for the allowance which he bound himself to pay to the plaintiff; (3) that the plaintiff was the only person beneficially interested under it, and from this they draw the conclusion, (4) that "although no party to the document, she was clearly entitled to proceed in equity to enforce her claim." After this they remark

(1) (1820) 1 Jac. & W., 494 at p. 503 (2) (1872) L.R., 5 H.L., 321 at p. 338.
(3) (1910) I.L.R., 32 All., 410 (P.C.) (4) (1861) 1 B. & S., 393.

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(5) "in India and among communities circumstanced as the Muhammadans, among whom marriages are contracted for minors by parents and guardians it might occasion serious injustice if the common law doctrine were applied to agreements or arrangements entered into in connection with such contracts." Their Lordships do not refer to section 23 (c) of the Specific Relief Act which provides that "where a contract is a settlement on marriage . . . any person beneficially entitled thereunder" may obtain specific performance of the contract.

It seems to me that none of the circumstances on which their Lordships based their decision are present in the case now before us.

The facts in *Debnarain* v. *Ramsadhan*(1) were somewhat similar to the facts of the case with which we are dealing; but there were present in that case certain very material circumstances which are not present here: (1) all the parties to the contract sued upon were on the record; (2) the contract was communicated to the plaintiff and he accepted the arrangement; (3) in consideration of such acceptance the plaintiff handed over a pattah which had been deposited with him under the impression, that by so depositing it a charge was created on the property in his favour; (4) by the agreement sued upon the plaintiff's debtors had parted with the whole of their property, moveable and immoveable, to the fifth defendant; (5) the sum sued for "was allocated and held by defendant No. 5 for the benefit of the plaintiff, so that in a sense the money was verified and ear-marked for this purpose."

Sir LAWRENCE JENKINS with reference to these facts states: "we have here then a position in which it would be in accordance with the principles of justice, equity and good conscience, the abiding rule in these Courts, that the plaintiff should be entitled to enforce this claim against defendant No. 5." Then he states that *Tweddle* v. *Atkinson*(2), does not bind the Indian Courts because (1) that decision was on a form of action peculiar to the Common Law Courts in England, and was influenced by the fact that no action in assumpsit could be maintained upon a promise unless the consideration moved from

(1) (1913) 16 I.L.J., 629; s.c., 17 C.W.N., 1113.
(2) (1861) 1 B. & S., 393.

the party to whom it was made," whereas under the Indian Contract Act, section 2 (*d*), "we have a definition of consideration, which is wider than the requirement of English law" (2) Sir LAWRENCE JENKINS's second reason is stated in the following terms: "We have now ample authority for saying that the administration of Justice in these Courts is not to be in any way hampered by the doctrine laid down in *Tweddle* v *Atkinson*(1). That I take to be the result of the decision of the Privy Council in a recent case *Khwaja Muhammad Khan* v. *Husaini Begum*(2). In the report of *Nawab Khwaja Muhammad Khan* v. *Nawab Husaini Begam* (3) there is an interlocutory remark of Lord MACNAGHTEN which indicates the limits imposed on Court of Common Law There he says "supposing she (that is the plaintiff) were an English woman, it is true she could not bring an action in the King's Bench Division, but could she not bring a suit in equity?" The answer of the learned counsel was 'yes' . . . . The bar then in the way of an action by the person not a direct party to the contract was probably one of procedure and not of substance. In India we are free from these trammels and are guided in matters of procedure by the rule of justice, equity and good conscience. (3) After that Sir LAWRENCE JENKINS refers to three cases *Gregory* v. *Williams*(4), *Touche* v. *Metropolitan Railway Warehousing Company*(5), and *Gandy* v. *Gandy*(6). (4) And finally he concludes by saying "there is a valuable exposition of the law by Lord HATHERLEY. . . . 'The case comes within the by A.B. authority that where a sum is payable for the benefit of C.D., C.D. can claim under the contract as if it had been made with himself.' That appears to me to be a principle which is of distinct use in the consideration of this case."

It was urged before us mainly on the authority of the ruling to which I have just referred, that the doctrine that a stranger to a contract cannot sue on it was no more applicable in India. With reference to this contention it is necessary to consider some of the remarks in the decision This will result in the true rule that is applicable to such cases as the present becoming clear.

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(1) (1861) 1 B. & S., 393. (2) (1910) I.L.R., 32 All., 410 (P.C.)
(3) (1910) 14 C W N , 865 at p. 868
(4) (1817) 3 Merivale, 582, s.c., 36 E.R. 224.
(5) (1871) L R , 6 Ch. A., 671 at p. 677. (6) (1884) 30 Ch.D , 57.

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TYABJI, J

It must be observed that the statement of Lord HATHERLEY in *Touche* v. *Metropolitan Railway Warehousing Company*(1), cited by Sir LAWRENCE JENKINS, cannot be said to have been accepted by the Courts of Equity in England as a sufficient exposition of the law. See per Lord BOWEN, *Gandy* v. *Gandy*(2) Sir FREDERICK POLLOCK refers to it (Contracts 6th Ed., page 202) as having been overruled by the Court of Appeal in England and he cites *In re Rotherham Alum and Chemical Company*(3). Lord JUSTICE LINDLEY says, in that case, "An agreement between *A* and *B* that *B* shall pay *C*, gives *C* no right of action against *B*. I cannot say that there is in such a case any difference between Equity and Common Law, it is a mere question of contract. It is said that Mr. *Peace* has an equity against the company because the company has had the benefit of his labour. What does that mean? If I order a coat and receive it, I get the benefit of the labour of the cloth manufacturer; but does any one dream that I am under any liability to him? *It is a mere fallacy to say that because a person gets the benefit of work done for somebody else he is liable to pay the person who did the work*". See also *In re Empress Engineering Company*(4), per JESSEL, M. R. in the course of the arguments: and LINDLEY on Companies, page 148 cited by POLLOCK *op. cit.* Sir GEORGE JESSEL says in the case last cited "I know of no case, where, when *A* simply contracts with *B* to pay money to *C*, *C* has been held entitled to sue *A* in equity."

These decisions also show that this doctrine is not one merely based on the technicalities of Common Law Procedure in England, but that it finds a place in the equitable principles *which* Sir GEORGE JESSEL, M. R., and other eminent exponents *of equity were not reluctant to enforce.*

This agreement between the rule of Common Law and Equity is brought out also in the remarks of BRETT, L. J., in *Wilson* v. *Lord Bury*(5)—while the point where Equity and Common Law differ is indicated by COTTON, L.J., in *Gandy* v. *Gandy*(2), and by BOWEN, L.J., *ib* pp. 69 and 70.

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(1) (1871) L.R., 6 Ch. A., 67. (2) (1884) 30 Ch.D., 57 at pp. 66, 67, 73 and 74.
(3) (1884) 25 Ch.D., 103 at p. 111. (4) (1880) 16 Ch.D., 125 at p. 127.
(5) (1880) 5 Q.B.D., 518 at pp. 526, 527.

The latter points out that if the true intent and effect of a contract is to give to third parties a beneficial right under it, that is to say, to give them a right to have the covenants in the contract performed—and this can only happen, as pointed out by Sir GEORGE JESSEL in *In re Empress Engineering Company*(1), "when the parties have no power of coming to a new agreement the next day, releasing the old one" then the stranger may be allowed in a Court of Equity to enforce his rights under the contract: but that the whole application of this doctrine depends upon its being made out that upon the true construction of the contract such a beneficial right is given. This seems to be the true rule of substantive law applicable to such cases. I shall refer later to matters which may be considered more procedural—the parties that ought to be before the Court.

COTTON, L J, makes the substantive rule very clear where he says: "Now of course as a general rule, a contract cannot be enforced except by a party to the contract; and either of two persons contracting together can sue the other if the other is guilty of a breach of or does not perform the obligations of that contract. But a third person—a person who is not a party to the contract—cannot do so. That rule however is subject to this exception: if the contract, although in form it is with A, is intended to secure a benefit to B, so that B is entitled to say he has a beneficial right as *cestui qui trust* under that contract; then B would, in a Court of Equity, be allowed to insist upon and enforce the contract," *Gandy* v. *Gandy*(2). The distinction between Courts of Equity and Common Law does not exist in India. But the exception referred to by COTTON, L.J., necessarily pre-supposes that the trust has already been created; that the trust property is in being: that the progress towards being a trustee has been completed, as I have already pointed out.

It would therefore appear that some of Sir LAWRENCE JENKIN'S remarks in *Debnarain* v. *Ramsadhan*(3), might be misleading if they are not read in connection with the facts of the particular case. That decision is expressly based on equity and good conscience. It cannot be so interpreted as to work inequitably. The English cases show with what limitations the rule is to be applied to prevent inequitable results following.

(1) (1880) 16 Ch D., 125 at p 130. (2) (1884) 30 Ch.D., 57 at pp. 66, 67, 73 and 74.
(3) (1913) 18 I.L.J., 669; s.c., 17 C.W.N., 1143.

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In connection with the law as enforced by the Courts of Equity in England it may be well to refer now to the cases relating to the parties that ought to be before the Court. *In re Empress Engineering Company*(1), contains the following comment by JAMES, L. J., on *Gregory* v *Williams*(2), the case most nearly approaching to the contention put forward on behalf of the appellant:—"In *Gregory* v. *Williams*(2), the man with whom the contract was made was one of the plaintiffs and the only defence there would have been misjoinder of plaintiffs,—and that is a defence which the Court was not likely to view with much favour." In *Debnarain* v. *Ramsadhan*(3), the original promisee was not a plaintiff but he was one of the parties to the suit.

The result may therefore be shortly stated that no case has been cited to us in which, unless the contract is in its substance such as I have stated above and has been partly or fully performed, so that a trust has been already created, a suit on a contract has, under circumstances similar to those with which we have to deal, been allowed to be maintained without the presence on the record of all the parties to the contract. And no English case has been cited in which one of such parties is not a plaintiff The plaintiff's suit fails both in substance and form. The contract was not for the benefit of the plaintiffs. The pleadings show that the object of the contracting parties was that the liability existing on one of them should be paid off. Their object was not to benefit a stranger but to discharge an obligation existing on one of the parties. The suit fails also in form because the parties to the contract are not before the Court.

It has been pressed upon us however that we are not bound necessarily to follow the law as laid down by the English Courts; that in the absence of legislative provisions the law of our Courts is that indicated by justice, equity and good conscience. One of the circumstances owing to which it has been suggested that the rule that ought to be followed by us must be different from that which prevails in England is that the definition of consideration contained in the Indian Contract Act, section 2 (d)

(1) (1880) 16 Ch.D., 125 at p. 130.
(2) (1817) 3 Mer., 582 at p. 589; s.c., 36 E.R., 24.
(3) (1913) 16 I.L.J., 663; s.c., 17 W.N., 1143

does not require that consideration should necessarily move from the party seeking to enforce the contract. This circumstance may not be so relevant to the point under consideration as might at first appear; for the definition of consideration in the Indian Contract Act has direct reference in its very terms to the parties to the contract, who are referred to in the Act as the promisor and promisee. The effect of section 2 (*d*) is that, if a promisee wishes to have the contract enforced, his promisor cannot object that the consideration proceeded from a third party, and not from the promisee seeking to enforce the contract. It does not seem to me to be equally clear that the definition can affect the question whether a third party (who is neither the promisor nor the promisee) can enforce the contract. If *A* and *B* agree that in consideration of *X* paying to *B* Rs. 100, *B* will repair *A*'s house, it is true that *A* can enforce the contract against *B*, who cannot object that he received the money from *X* and not from *A* (though if *X* does not pay, there may be a failure of consideration, and *B* may be entitled to rescind the contract on that account). On this point the English law does not seem to be different *Davanport* v. *Bishopp*(1) and *Gandy* v. *Gandy*(2). But is the definition of any assistance in considering whether *X* can sue on a contract by which *A* promises *B* that *A* will pay to *X* Rs. 100? The definition refers to the third party (*X*) as the person from whom the consideration moves; not as the person (being neither the promisor nor the promisee) for whose benefit the contract is made. The definition can therefore have only a remote bearing on the totally distinct question—whether a person who benefits by a contract but who is not the promisee can sue on the contract.

Finally it has been contended that the rule against a stranger to a contract being allowed to sue is one merely of procedure and that we should not hesitate to disregard it in order to do justice. It is indeed described as a rule of procedure by WILLES, J., in *Gray* v. *Pearson*(3), but in terms which are far from implying that therefore the rule is opposed to justice and should be disregarded He says, "I am of opinion that this action

(1) (1843) 1 Ph., 698 at p 704. (2) (1884) 30 Ch.D., 57.
(3) (1870) L R., 5 C.P., 568.

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cannot be maintained and for simple reason—a reason not applicable merely to the procedure of this country but one affecting *all sound procedure, that the proper person to bring an action* is the person whose right has been violated. Though there are certain exceptions to the general rule, for instance in the case of agents, auctioneers, or factors those exceptions are in truth *more apparent than real.*"

It is necessary to bear in mind that in any case a person who is not a party to the contract cannot be permitted to enforce it without being subject to all the equities which would be present between the *parties themselves,* and this would almost invariably necessitate that all the parties to the contract should be impleaded in the suit. the questions whether the contract is revocable at the option of either of the parties or whether it has been altered by mutual consent or been performed in part; whether the parties can be restored to their original position; and other similar questions would have to be considered and would affect the third party's claim. These are not questions of *procedure*: and it is in order that these questions may be considered that all the parties to the contract have to be before the Court; *cf., In re Empress Engineering Company*(1), and the interlocutory remarks of JESSEL, M. R, during arguments; and per GRANT, M. R., in *Gregory* v. *Williams*(2).

It was pressed before us however that the Privy Council have definitely stated that *Tweddle* v. *Atkinson*(3), was not applicable to the facts and circumstances of the case before them, and that serious injustice might result if the common law doctrine were applied thereto and that this supplied, in the words used in *Debnarain* v. *Ramsadhan*(4), "ample authority for saying that the administration of justice in these Courts is not to be in any way hampered by the doctrine laid down in *Tweddle* v. *Atkinson*(3)." It seems to me with great respect that this argument is based on a misapprehension of the Privy Council decision. Their Lordships only say that the common law doctrine did not apply to the facts and circumstances of the case before them; but that doctrine would not, it seems to me, be applicable in England in a case where immovable property is

(1) (1880) 16 Ch D, 125 at p. 130. (2) (1817) 3 Mer., 582 at p. 589.
(3) (1861) 1 B. & S., 393. (4) (1913) 17 C.W.N., 1143, s.c., 16 I.L.J., 609.

specifically charged for the sole benefit of a third party in consideration of her marriage and where she is a minor whose natural guardian is a party to the contract and where the marriage has already taken place and everything done to complete the creation of the trust.

Their Lordships of the Privy Council do not purport to go beyond what the Courts of Equity would have done in England. This is expressly stated by them. Assuming however that they intended to say that the law prevailing in England should not be applied in disregard of the circumstances in India—and that would not be any new proposition. I have pointed out the several respects in which the plaintiff's case is different

I am therefore of opinion that the principle that the proper person to bring an action is the person, whose right has been violated [see per WILLES, J., *Gray* v *Pearson*(1)]—a principle recognized both by common law and equity—[(see per Lord LINDLEY). *In re Rotherham Alum and Chemical Company*(2)], applies in India no less than in England—and that, except in cases which are not material at present, the person who acquires a right to enforce a contract of such a nature as we have to deal with is the promisee and not a stranger to the contract, who may benefit under the contract. The lower Courts were therefore right in dismissing the plaintiff's suit.

The appeal is dismissed with costs.

AYLING, J.—I agree. AYLING, J.

(1) (1870) L R., 5 C.P., 568. (2) (1884) 25 Ch D., 103 at p 112.

APPELLATE CIVIL.

Before Mr. Justice Sadasiva Ayyar and Mr. Justice Spencer.

1913. November 20 and 26.

RAMANATHAN CHETTY AND FIVE OTHERS (PETITIONERS), APPELLANTS,

v.

ARUNACHELLAM CHETTY (RESPONDENT, ASSIGNEE—DECREE-HOLDER), RESPONDENT.*

Execution, stay of—Order of, by Appellate Court—No communication to Lower Court, effect of—When order takes effect.

An order of an Appellate Court staying further proceedings in the Lower Court, such as holding a sale, etc., takes effect from the time it is pronounced and not from the time it is officially communicated to the lower Court and a sale held contrary to such an order whether with or without knowledge of it is liable to be set aside as having been held without jurisdiction.

Per SPENCER, J.—The Lower Court should have postponed the sale when having itself had no official information of the order of the Appellate Court it was moved by the party on the ground of such an order.

Per SADASIVA AYYAR, J.—The sale under such circumstances is so gravely irregular that it must be set aside even without proof of injury.

Muthukumarasami Rowther Minda Nayinar v. Kuppusami Aiyangar (1910) I.L.R., 33 Mad., 74, dissented from by SADASIVA AYYAR, J., and distinguished by SPENCER, J.

Hem Chandra Kar v. Mathura Santhal (1912) 16 C.W.N., 1031 and *Sati Nath Sirdar v. Ratanmani Naiker* (1912) 15 C.L.J., 335, followed.

APPEAL against the orders of S. RAMASWAMI AYYANGAR, the Subordinate Judge of Ramnad, in Civil Miscellaneous Petitions Nos. 322 and 323 of 1911 in Execution Petition No. 31 of 1911 (in Original Suit No. 125 of 1908) of the Chief Court of Lower Burmah.

The facts are given in the judgment of SPENCER, J., and the other facts connected with the case are given in the judgment of SADASIVA AYYAR, J.

The Honourable *Mr. L. A. Govindaraghava Ayyar* and *A. Viswanatha Ayyar* for the appellants.

S. T. Srinivasa Gopalachariar for the respondent.

SADASIVA AYYAR, J.

SADASIVA AYYAR, J.—The facts have been set out in the judgment of my learned brother, and it is unnecessary for me

* Civil Miscellaneous Appeals Nos. 210 and 211 of 1911.

to repeat them. The petition put in by the first defendant's sons to set aside the Court auction sale is filed by them not on the ground that they are also parties to the decree (in which the sale was held), as represented by their father, the first defendant, but as independent persons who owned shares in the property sold and who are entitled in consequence to file a petition under Order XXI, rule 90 (old, section 311) to set aside the sale on the ground of material irregularity and consequent substantial injury. I agree with the Lower Court in its conclusion that there was no material irregularity in publishing and conducting the sale except that the sale was conducted and concluded after the High Court's order of stay (which is of course a very material irregularity). No substantial injury is proved to have been caused by any such material irregularity. The property was estimated by the Amin as worth only 56,000 and odd rupees and it was sold for 68,000 and odd rupees.

The first defendant from his conduct in these execution proceedings has clearly proved himself to be a cunning litigant, and the affidavit produced on his behalf is not reliable even though supported by a telegram from one Palaniappa Chetty, who has not been examined. The want of bidders, I am inclined to hold, was due to the litigious nature of the first defendant who had set up his mother-in-law to file claim petitions on behalf of his (the first defendant's) sons, to bring a suit on their behalf, to put in a revision petition on their behalf against the claim order and to do several other acts, more in order to delay and defeat the decree-holder than with the *bonâ fide* object of prosecuting any tenable claim. Purchasers will naturally be chary of making bids for the property belonging to the first defendant and his sons, as they are sure to purchase a protracted litigation along with the property Appeal Against Order No. 210 of 1911 in which the first defendant's sons are the appellants must therefore in my opinion be dismissed The parties will bear their respective costs.

Coming to Appeal Against Order No 211 of 1911, this appeal arises out of a petition filed under section 47, Civil Procedure Code, and also under Order XXI, rule 90, by the first defendant himself. So far as his application to set aside the sale is grounded on irregularity and substantial injury under Order XXI, rule 90, it cannot be granted for the reasons already set out by

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me in Appeal Against Order No. 210 of 1911. The contention under section 47 of the Civil Procedure Code is based on the following facts:—

The first defendant's sons put in a claim petition for release of their shares in the attached houses. The Subordinate Judge dismissed the claim petition on the 15th July 1911. On the 20th July 1911 Civil Revision Petition No. 378 of 1911 was filed in the High Court to revise the Subordinate Judge's order dismissing the claim petition. On that same date (the 20th July 1911) an *ex parte* order was obtained from a Judge of this Court stopping all further proceedings in the matter of bringing the attached houses to sale in execution of the decree. Notwithstanding the stay-order, the sale of the properties was concluded on the 21st July 1911. The question is whether such a sale is not wholly illegal as having been conducted by the Subordinate Judge's Court in violation of an order from a superior Court staying the sale. In *Muthukumarasami Rowther Minda Nayinar* v. *Kuppusami Aiyangar*(1), it was held following *Bessesswari Chowdhurany* v *Horro Sundar Mozumdar*(2), that the stay-order passed by a superior Court does not become effective till it is communicated to the inferior Court, and that an execution sale made by the inferior Court in ignorance of the stay-order is a legally valid sale. With the greatest respect, I am unable to agree with this decision though it is in accordance with *Bessesswari Chowdhurany* v. *Horro Sundar Mozumdar*(2). It seems to me that, unless the order of stay or order of injunction passed by the superior Court made it a condition that that order shall take effect only from the date of its communication to the Lower Court, or to the party enjoined (as the case may be) such an order suspends the power and jurisdiction of the Lower Court to conduct further proceedings *from the moment when the order of superior Court* was passed. I do not think that I could put the reasons for this view better than they have been enunciated in the judgments in *Sati Nath Sikdar* v. *Ratanmani Naskar*(3) and *Hem Chandra Kar* v. *Mathura Santhal*(4), and I shall therefore not attempt it. In the result, I would set aside the sales concluded on the 21st July 1911, by the Subordinate

(1) (1910) I.L.R., 33 Mad., 74.
(2) (1892) 1 C.W.N., 226.
(3) (1912) 15 C.L.J., 335.
(4) (1912) 16 C.W.N., 1031.

Judge's Court of Ramnad as having been held without jurisdiction after the passing of the order of this Court staying the sale, which order was dated the 20th July 1911, and I would direct that a fresh sale be held after fresh proclamation. A sale held without jurisdiction may, in a sense be said to be a sale vitiated by material irregularity, but it is unnecessary to rely on section 311 (Order XXI, rule 90) in order to set aside such a sale, that is, it is unnecessary to prove substantial injury also; but the irregularity is so grave that, in the words of their Lordships of the Privy Council in *Mallarjun* v. *Narhari*(1) "it is sufficient *by itself*, to entitle" the judgment-debtor "to vacate the sale." *Parties will bear their respective costs in both Courts.* I might be permitted to remark that in respect of a stay order passed by an appellate Court, it seems to me advisable, in order to avoid future complicated litigation to provide *usually that the order shall take effect only from when the* order is communicated to the lower Court which has to guide itself in accordance with such order.

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SADASIVA AYYAR, J.

SPENCER, J.—The facts, which are not denied, are that a sale of the appellant's immoveable properties in execution of decrees was commenced on July 17 and concluded on July 21, 1911

SPENCER, J.

On July 20 an order was passed in the High Court directing an *ad interim* stay of the sale. A telegram was sent by the vakil in Madras to the vakil in Madura informing him of the result of the petition in the High Court, and it reached Madura soon after noon the same day. The Subordinate Court of Ramnad was thereupon moved by a petition accompanied by affidavit to stay the sale.

The Subordinate Judge refused to act on the telegram when he had not received official confirmation of the information, rejected the application and directed the sale to proceed. The sale was completed on the following day and was subsequently confirmed on September 2 after the High Court's stay order had been received. Meanwhile, the stay order having proved ineffective was cancelled by the High Court on August 3. Applications to set aside the sale were dismissed by the Subordinate Judge on August 29, and the judgment-debtor and his sons now appeal

(1) (1902) I.L.R., 25 Bom., 337 at p. 348 (P.C.).

"and others maintaining that, the court for the time being "having no power to issue the execution, the writ is void."

I consider that there is much force in the observation of WOODROFFE, J., in *Hukum Chand Boid* v. *Kamalanand Singh*(1) that there is no reason why the operation of an order of the High Court should be made contingent, say, upon the due performance of the duties of the Post Office.

To adapt the words of that learned Judge to the circumstance of the present case, before the lower Court completed the sale, this Court had ordered that it should not be done. In the same case, MOOKERJEE, J., observed that the moment that the High Court has made an unconditional order for stay of execution, it becomes an operative order and suspends the power of the Subordinate Court to carry on further the execution proceeding.

The same idea found expression in the words of Westbury Lord Chancellor in *In re the Risca Coal and Iron Company*(2): "I shall abide by a rule of convenience; certainty in the matter is "convenience; certainty you attain by abiding by the date of the "order; uncertainty you introduce when you depart from that "date. A variation from the common rule of abiding by the "record is introduced by a departure from that date. Great "laxity of practice would be introduced and encouraged by a "departure from that date."

It is not necessary in these proceedings that we should go to the length of deciding whether the view taken in *Muthukumarasami Rowther Minda Naynar* v. *Kuppusami Aiyangar*(3), that the order only became effective when communicated to the Subordinate Court was right or wrong. The circumstances of that case were sufficiently dissimilar to distinguish it from the present case. In that case there was no communication of the order received at all when the sale took place In this case the Court had information, though of an unauthenticated character, and it was moved to stay the sale.

In *Bessesswari Chowdhurany* v. *Horo Sundar Mozumdar*(4), it was held that a sale was not void in law if held under circumstances in which there was nothing to fix the decree-holder with any knowledge that the sale was ordered to be

(1) (1906) I.L.R., 33 Calc., 927.
(2) (1861) 31 L.J. Ch., 429.
(3) (1910) I.L.R., 33 Mad., 74.
(4) (189.) 1 C.W.N., 126.

postponed; the Court executing the decree knew nothing of it, there was a valid subsisting order for sale and the sale took place in pursuance of that order. It is implied that it would not be so if the Court and the decree-holder were aware of the order of postponement. As stated in Mr. Freeman's book at page 125 "The plaintiff and the officer charged with the execution of a "writ, on being informed of a stay of execution, whether result-"ing from an order of Court or from such a compliance with the "law as to create such a stay, should discontinue their proceed-"ings. If they persist in disregarding the stay and in acting "under the execution, they are no longer entitled to its protec-"tion."

I am decidedly of opinion that the Lower Court in the present instance acted injudiciously in not postponing the sale in order to ascertain the truth of the information brought to its notice that the High Court had directed the sale to be stopped, if any doubt was felt as to the authenticity of the telegram.

This was the view taken by the Calcutta High Court in *Hem Chandra Kar* v. *Mathura Santhal*(1), a case where a Subordinate Court refused to take any notice of a telegram from the petitioners' vakil in the High Court intimating the orders of the High Court. Similarly in *Sati Nath Sikdar* v. *Ratanmani Naskar*(2), where a District Munsif refused to act on an affidavit accompanied by a letter written by a vakil of the High Court that the High Court had ordered an *ad interim* stay of proceedings for the ascertainment of mesne profits, it was held that the act of the Munsif amounted to a contempt of the authority of the High Court, and that the arm of the High Court was long enough to reach any person who behaved in such a manner, and that the order was wholly without jurisdiction and should be cancelled.

In *Mian Jan* v. *Man Singh*(3), it was held that a sale held notwithstanding an order of postponement was unlawful and invalid and should not have been confirmed seeing that it was wholly illegal. In *Nonidh Singh* v. *Mussumat Sohun Koer*(4) the sale was not treated as void but was set aside by the Court treating the order for postponement as invalidating the sale

(1) (1912) 16 C.W.N., 1031.
(2) (1912) 15 C.L.J., 335.
(3) (1880) I.L.R., 2 All., 686.
(4) (1872) 4 N.W.P.H.C.R., 135.

notification, in the publication of which there was consequently considered to be an irregularity. This course must be adopted here. There can be no doubt that a substantial rumour that the High Court had ordered that the sale should not proceed was calculated to affect the freedom with which intending bidders would be tempted to come forward and offer bids, if they possessed a knowledge that the whole proceedings were likely to be rendered infructuous in consequence of the order already made.

In this case also the auction lists printed in Civil Miscellaneous Appeal No. 211 of 1911 show that the plaintiff's vakil was the only bidder on the 20th and 21st July. I therefore think that there is ground to suppose that the judgment-debtors sustained substantial injury by the properties sold on these two days being knocked down to the plaintiff. The Subordinate Court may also be treated as having acted without jurisdiction when it continued a sale which the High Court had ordered to be stopped. I would allow both these appeals to the extent of setting aside the sales held on July 20th and 21st, and I would order the parties in these appeals to bear their respective costs in both Courts in consideration of the obstructive attitude of the judgment-debtors throughout the execution proceedings.

APPELLATE CRIMINAL.

Before Mr. Justice Sadasiva Ayyar.

Re K. R. LEWIS (SECOND ACCUSED), PETITIONER.*

1913 December 12.

Indian Penal Code (XLV of 1860), ss. 40 and 79—Madras Forest Act (V of 1882), offence under—Justification, plea of, not available.

The plea of justification provided by section 79 of the Indian Penal Code (XLV of 1860) is available only for an offence punishable by the Penal Code and not for offences punishable by any special or local law and hence the belief of the accused that he was justified in his act does not exculpate him from punishment for his guilt under section 21 of the Madras Forest Act.

Emperor v. *Kassim Isub* (1912) 14 Bom. L.R., 365, dissented from.

In re *Penchul Reddi* (1899) 9 M.L.T., 216, followed.

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* Criminal Revision Case No. 274 of 1913.

Re LEWIS.

PETITION under sections 435 and 439 of the Criminal Procedure Code (Act V of 1898), praying the High Court to revise the judgment of G. W. WELLS, the Acting First-class Joint Magistrate of Coondapoor division, in Criminal Appeal No. 51 of 1912, preferred against the conviction and sentence passed by D. VASUDEVA RAO, the Stationary Second-class Magistrate of Coondapoor taluk.

The first accused applied for darkhast of certain forest land but did not actually obtain the lands on dharkhast. Believing he obtained them he assigned to the second accused for valuable consideration the right to cut the trees in the forest. The second accused then got the trees cut by means of coolies. The second accused was charged under section 21 of the Madras Forest Act and convicted of cutting, without permit, the trees and the first accused was charged and convicted of having abetted the same and the convictions and sentences were confirmed, though both the accused pleaded that they believed that the land was assigned to the first accused on darkhast.

The second accused preferred this revision petition.

K. Ramanatha Shenai and *K. Sundara Rao* for the petitioner.

C. Sidney Smith for the public prosecutor for the Crown.

SADASIVA AYYAR, J.

ORDER.—I do not think that the principle of section 79 of the Indian Penal Code should be applied to an offence created by the Forest Act for the protection of the Government Revenue and of property belonging to Government. Section 79 itself cannot apply as the definition of offence in section 40 covers only "a thing made punishable" by the Indian Penal Code, except when the word is used in certain sections which do not include section 79.

I therefore dissent from *Emperor* v. *Kassim Isub*(1) and hold following *In re Penchul Reddi*(2), that the belief of the accused that he was justified in his act cannot exculpate him from punishment for any of the offences created by section 21 of the Madras Forest Act.

As regards the second accused's having been guilty of only the abetment of the offence charged against him because those who actually cut the forest trees were coolies, the second accused admitted that he was wholly responsible for the cutting and he

(1) (1912) 14 Bom. L.R., 365. (2) (1898) 8 M.L.T., 216.

did not deny that he was present at the cutting though he did not wield an axe himself (see section 114, Indian Penal Code). I am not disposed in revision to allow him for the first time to raise this plea on the allegation that he made a mistake in not raising it before. Even if he is allowed to raise such a technical plea, it would only necessitate a fresh prosecution for abetment and a conviction for that offence.

As regards the sentence, the records clearly show that second accused (petitioner) had no dishonest intention and he had even parted with a large sum of money to the first accused to acquire the right of cutting the trees. I therefore think that a nominal sentence is sufficient (my authority is the same case *In re Penchul Reddi*(1) already quoted by me) and I reduce the sentence on him to a fine of Rs. 5 and order the refund of the balance of whatever amount (if any) has been levied from him.

APPELLATE CIVIL.

Before Mr. Justice Sadasiva Ayyar and Mr. Justice Spencer.

A. SUBBARAYUDU AND TWO OTHERS (DEFENDANTS), PETITIONERS,

v.

T. LAKSHMINARASAMMA (DIED) AND ANOTHER (PLAINTIFF AND HER LEGAL REPRESENTATIVE), RESPONDENTS.*

1913. December 16.

Civil Procedure Code (Act V of 1908), O. XXI, r. 89—Sale of immoveable property in Court auction—Subsequent private sale by judgment-debtor—Application by judgment-debtor to set aside auction sale—No locus standi *to apply—Order rejecting application—Revision petition to High Court under Civil Procedure Code (Act V of 1908), sec. 115—Not maintainable though order erroneous.*

Where after a sale in Court auction of certain immoveable property, the judgment-debtor sold all his rights in the same property to a stranger by a private sale, and subsequently applied under Order XXI, rule 89, of the Code of Civil Procedure (Act V of 1908) to set aside the auction sale.

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(1) (1899) 9 M.L.T., 216

* Civil Revision Petition No 1026 of 1912

SUBBA-RAYUDU v. LAKSHMI-NARASAMMA.

Held, that the judgment-debtor had no *locus standi* to apply under Order XXI, rule 89, to have the sale set aside.

Anantha Lakshmi Ammall v. *Kunnanchankarath Sankaran Nair* (1913) M.W.N., 101, referred to.

Ishar Das v. *Asaf Ali Khan* (1912) I.L.R., 34 All., 186, followed.

Per SADASIVA AYYAR, J.—A Civil Revision Petition under section 115 of the Code of Civil Procedure does not lie against an order of the Lower Court rejecting an application under Order XXI, rule 89, though the order was erroneous in law, as the Lower Court did not act illegally or beyond its jurisdiction or with material irregularity in arriving at the decision.

Per SPENCER, J.—Neither an amendment of the petition nor the presentation of a fresh petition by the private purchaser could be allowed by the High Court to be made, as he was not a party to the proceedings in the Lower Court and more than one year had expired after the time allowed by article 166 of the Limitation Act (IX of 1908) for filing a petition in the Lower Court.

PETITION under section 115 of the Civil Procedure Code (Act V of 1908), praying the High Court to revise the order of G. KOTHANDA RAMANJULU NAYUDU, the Temporary Subordinate Judge of Kistna at Masulipatam, in Appeal No. 18 of 1912.

The material facts appear from the judgment of the High Court.

V. Ramadoss for the petitioners.

B. Narasimha Rao for the respondents.

SADASIVA AIYAR, J.

SADASIVA AYYAR, J.—This is a petition by the judgment-debtor under Order XXI, rule 89 of the Civil Procedure Code (corresponding to but differing substantially in its wording from the old section 310-A) to have the Court auction sale of a property (which belonged to him on the date of such auction sale) set aside.

After the Court auction sale, however, he sold away all his rights to a stranger and on the date of this application made by him under Order XXI, rule 89, he had no title in the property. Could such a person be allowed to make an application under the new Code to set aside the sale?

Now, an elementary principle of the law is that unless a statute clearly allowed it, a man who has no right in a property on the date of filing a suit or making an application in respect of that property cannot be allowed to file that suit or make that application. The natural meaning, therefore, of the words in Order XXI, rule 89, "any person either owning such property or holding an interest therein, etc.," is "any person owning such property or holding an interest therein on the date of making

the application." The judgment-debtor would continue to own the property sold in Court auction on the date of the application under Order XXI, rule 89, if both of the following conditions are fulfilled, (1) that the Court auction sale has not been confirmed and he has not therefore ceased to be the owner (this condition would be usually fulfilled as the application under Order XXI, rule 89, should be made within thirty days and the sale is confirmed only after thirty days) and (2) that the judgment-debtor has not before the date of the application conveyed away all his rights to a stranger. The judgment-debtor in the present case did not own the property and had no interest in it on the date of the application and hence his petition was rightly (it seems to me) dismissed by the Appellate Court.

Reliance is however placed on *Narain Mandal* v. *Sourindra Mohan Tagore*(1), *Maganlal* v. *Doshi Mulji*(2) and other similar cases for the petitioner. In the first place, those cases were decided under the old Code. The judgment-debtor was held in those cases to continue to come within the meaning of the words (in section 310-A of the old Code) "person whose immoveable property has been sold" in Court auction even after he had himself voluntarily sold away his properties. It is unnecessary to say whether those cases were rightly decided (I beg leave, with great respect, to express some doubt as to their correctness) because we have to construe the different words in the new Code.

I think that we ought to follow the ruling of this Court in *Anantha Lakshmi Ammall* v. *Kunnanchankarath Sankaran Nair*(3) which shows that the subsequent purchaser from the judgment-debtor is entitled to apply under Order XXI, rule 89. If the subsequent purchaser is so entitled, why should the judgment-debtor who has no interest be also permitted to apply in disregard of the plain rule of jurisprudence already referred to by me?

Ishar Das v. *Asaf Ali Khan*(4) shows that such a judgment-debtor cannot apply under Order XXI, rule 89, though I am not prepared to agree (with great respect) with Mr. Justice CHAMIER that even the subsequent purchaser cannot come in under

(1) (1905) I.L.R., 32 Calc., 107.
(2) (1901) I.L.R., 25 Bom., 631.
(3) (1913) M.W.N., 101.
(4) (1912) I.L.R., 34 All., 180.

SUBBA-RAYUDU v. LAKSHMI-NARASAMMA.

SADASIVA AYYAR, J.

Order XXI, rule 89, as that opinion is opposed to the ruling in *Anantha Lakshmi Ammall* v. *Kunnanchankarath Sankaran Nair*(1).

Even if I am wrong in the above view, I am clearly of opinion that the lower Court did not act illegally or beyond its jurisdiction or act with material irregularity in arriving at the above conclusion and hence that we are not entitled to interfere under section 115 of the Civil Procedure Code. This view of mine, as regards the applicability of section 115 is, no doubt, opposed to the view held in 1913 Madras Weekly Notes, 101. I am unable (with great respect) to hold that because a Court by falling into an error of law dismisses a suit or an application on the ground that the particular plaintiff or particular applicant has not got the right of suit or right of application claimed by him, therefore, that Court has declined to exercise jurisdiction over the suit or application. I therefore respectfully differ from *Anantha Lakshmi Ammall* v. *Kunnanchankarath Sankaran Nair*(1), so far as that case decides that the High Court could interfere under section 115 of the Civil Procedure Code.

In the result, this revision petition is dismissed but as we have allowed costs to the respondent in the connected appeal we make no order as to costs in this petition.

SPENCER, J.

SPENCER, J.—I feel no doubt whatever that a judgment-debtor who, after a Court auction of his immoveable property has been held but before it has been confirmed, parts with his entire interest in such property in favour of a private purchaser is not a person "either owning such property or holding an interest therein by virtue of a title acquired before such sale" at the time of his applying to have the sale set aside, although he may be a "person whose immoveable property has been sold under this chapter" within the meaning of section 310-A of the Code of 1882 [see *Maganlal* v. *Doshi Mulji*(2)].

In this respect I consider that *Ishar Das* v. *Asaf Ali Khan*(3) was rightly decided. I would follow that decision so far as it decides that a judgment-debtor who has divested himself of all his interest in the property has no *locus standi* to apply under Order XXI, rule 89, to have the sale set aside.

(1) (1913) M.W.N., 101. (2) (1901) I.L.R., 25 Bom., 631.
(3) (1912) I.L.R., 34 All., 180.

SUBBARAYUDU v. LAKSHMI-NARASAMMA.

SPENCER, J.

On the question whether the purchaser under the private sale is a person owning such property and can come in under this section the above decision is in conflict with a later decision of a Bench of this High Court in *Anantha Lakshmi Ammall* v. *Kunnanchankarath Sankaran Nair*(1) but I find it unnecessary to express any view about the purchaser's rights in the present case as he is not a party to the present proceedings, and I am satisfied that we should not as a Court acting in revision under section 115 of the Civil Procedure Code allow any amendment of the petition at this stage or any presentation of a fresh petition by a person not a party to the proceedings in the Lower Court, more than one year after the time allowed by article 166 of the Limitation Act has expired

I would therefore dismiss the Revision Petition but without costs as costs have been allowed in the appeal against order which the petitioners took as an alternative remedy.

APPELLATE CRIMINAL.

Before Mr. Justice Sadasiva Ayyar and Mr. Justice Spencer.

1914 February 2, 3 and 10.

THE ASSISTANT SESSIONS JUDGE, NORTH ARCOT, PETITIONER,

v

RAMASWAMI ASARI, ACCUSED.*

Criminal Procedure Code (Act V of 1898), ss. 179 to 188—*Entrustment to native Indian subject in India—Conversion outside British India—Loss in India—Jurisdiction of Indian Courts to charge and try without certificate under section 188.*

A entrusted three jewels at Vellore to the accused, a native Indian subject, for sale The accused pledged two of them in Bangalore and misappropriated the third at Madras, contrary to the arrangement that he should return the jewels or their price to *A* at Vellore

Held, that the British Court at Vellore had jurisdiction to try the accused for breach of trust or dishonest misappropriation without a certificate under section 188, Criminal Procedure Code

Sessions Judge, Tanjore v *Sundara Singh* (1910) M W N, 143 and *Imperator* v. *Tribhun* (1912) 13 Cr L J, 530, dissented from

(1) (1913) M W.N., 101

* Criminal Miscellaneous Petition No. 546 of 1914.

THE ASSISTANT SESSIONS JUDGE, NORTH ARCOT v. RAMASWAMI ASARI.

PETITION praying that in the circumstances stated by K. KRISHNAMACHARIAR, the Assistant Sessions Judge of North Arcot, in his Order of Reference, the High Court will be pleased to quash the sentence of commitment of the accused in Sessions Case No. 96 of 1913 (Preliminary Enquiry No. 1 of 1913) on the file of S. N. SALDANHA, the Sub-Divisional First-class Magistrate of Tiruvannamalai.

The facts of the case appear from the order of SPENCER, J.

Dr. *S. Swaminadhan* for the *Public Prosecutor* for the Crown.

R. N. Ayyangar instructed by Messrs. Grant and Greatorex, Attorneys, for the accused.

SPENCER, J.

SPENCER, J.—We think that the Assistant Sessions Judge is mistaken in supposing that the Deputy Magistrate had no jurisdiction to commit the accused for trial before him for want of a certificate under section 188, Criminal Procedure Code. The complainant is alleged to have entrusted certain jewels at Vellore to the accused, a native Indian subject of His Majesty, for sale on commission for him and the accused is alleged to have dishonestly converted the jewels concerned with the first two counts to his own use by pledging them at Bangalore City and to have dishonestly misappropriated the jewel concerned in the third count at Madras. It was apparently part of the arrangement that the accused should account for the jewels to the complainant at Vellore, or return them or their price to Vellore. His failure to account for the property was a part of the offence, acts including illegal omissions. The loss which was the consequence which ensued, occurred at Vellore and this is sufficient under section 179, Criminal Procedure Code, to give jurisdiction to the Sub-Divisional Magistrate of Tiruvannamalai to commit the case to the Sessions as directed by this Court in *Subbaraya Achari* v. *Ramasamy Asari*(1). See *Queen-Empress* v. *O'Brien*(2), and *Langridge* v. *Atkins*(3), which explains *Sirdar* v. *Jethabhai*(4).

The illustration (*d*) to this section is an instance of a criminal act done outside British India and the consequence of the offence ensuing in British Territory.

(1) Criminal Revision Case No. 191 of 1913.
(2) (1897) I.L.R., 19 All., 111. (3) (1913) I.L.R., 35 All., 29.
(4) (1906) 8 Bom. L.R., 513.

The decision of *Reg.* v. *Adivigadu*(1) based on the Code X of 1872 and relied on by the Assistant Sessions Judge has been superseded by the amendment of section 410 of the Indian Penal Code by Act VIII of 1882. The same remark applies to *Empress* v. *Moorga Chetty*(2). In *Imperator* v. *Tribhun*(3), certain observations are made by two Judges of the Sind Judicial Commissioner's Court to the effect that section 181(2) applies only as between Courts of local jurisdiction in British India and is governed by the provisions of section 188, Criminal Procedure Code. A similar observation was made by a single Judge of this Court as regards section 180 in *Sessions Judge, Tanjore* v. *Sundara Singh*(4) but our attention has not been drawn to any decision to the effect that section 179 must be read as subject to section 188; and the illustration to the section is against such a theory. Even as regards sections 180 and 181 the decision in *Emperor* v. *Baldewa*(5) shows that a British subject who commits a robbery in a Native State and dishonestly retains stolen property in British India can be tried in a British Court even without a certificate under section 188 and thus throws doubt on the correctness of the observations in *Imperator* v. *Tribhun*(3) and *Sessions Judge, Tanjore* v. *Sundara Singh*(4). Moreover the words "or the offence was committed" in section 181(2) and the words "when a native Indian subject . . . commits an offence" in section 188 seem to indicate that the latter section is exclusive of the rule as to jurisdiction arising out of the receipt or retention of misappropriated property.

In *Queen Empress* v. *Kathaperumal*(6) and *Emperor* v. *Kali Charan*(7), it does not appear that there was any retention of stolen property in British India.

In *Re the Sessions Judge, Trichinopoly*(8) a native Indian subject of His Majesty was charged with abetment of an offence which was committed in British India and the commitment was quashed for want of a certificate under section 188 In this case the only act for which the accused could have been tried was the act of instigation and that took place wholly outside the

(1) (1876) I L R, 1 Mad, 171
(2) (1881) I.L.R., 5 Bom., 338.
(3) (1912) 13 Cr L J, 530
(4) (1910) M W.N, 143
(5) (1906) I.L.R., 28 All, 372.
(6) (1890) I.L R, 13 Mad., 423.
(7) (1902) I.L.R., 24 All, 256.
(8) Civil Miscellaneous Petition No. 97 of 1911.

THE ASSISTANT SESSIONS JUDGE, NORTH ARCOT v. RAMASWAMI ASARI.

SPENCER, J.

jurisdication of British Courts. This decision to some extent supports the theory that section 180 is governed by section 188 as it declares that the object of the former section is to give jurisdiction to a Court when the offence is not committed within its limits but within the limits of some other British Indian Court. While doubting the correctness of this view when the words of the two sections do not contain anything directly to that effect, I prefer to base my decision upon section 179, Criminal Procedure Code.

I must therefore decline to interfere with the order of commitment in this case.

SADASIVA AYYAR, J.

SADASIVA AYYAR, J.—I agree entirely. The scheme of chapter 15, sub-chapter (A) in which sections 177 to 189 appear seems to me to be intended to enlarge as much as possible the ambit of the sites in which the trial of an offence might be held and to minimize as much as possible the inconvenience which would be caused to the prosecution, by the success of a technical plea that the offence was not committed within the local limits of the jurisdiction of the trying Court. Sections 178 to 184 all confer more extended powers and larger jurisdiction to Courts than would belong to them if the ordinary rule found in section 177, (namely, that the enquiry and trial shall take place in the Court within the local limits of whose jurisdiction the offence was committed), if that rule were carried to its strict logical conclusions. Section 188 comes in (almost at the end of the sub-chapter A) *to make three further encroachments on the general rule* of section 177 by enacting that (*a*) where the criminal is a native Indian subject of His Majesty and he commits any offence even beyond British India, (*b*) where the criminal is a British subject and he commits an offence in a Native State; and (*c*) where a servant of the King Emperor (whether a British subject or not) commits an offence in a Native State, the offender in all these three cases can be tried *at any place where he is found in British India* provided that the Political Agent certifies that the charge ought to be inquired into in British India or the local Government sanctions such inquiry. Surely, the proviso to section 188 (which section comes in after sections 178 to 187) could not have been intended to restrict the enlarged liberties and privileges as regards jurisdiction given to the Courts by the previous sections. I should rather think that section 188 (which follows sections 179 to 187)

THE ASSISTANT SESSIONS JUDGE, NORTH ARCOT v. RAMASWAMI ASARI.

SADASIVA AYYAR, J.

was intended rather to draw into the net of the jurisdiction of the British Indian Courts cases, which *notwithstanding the full use of sections* 179 *to* 184, could not be brought within the jurisdiction of any British Indian Court than to restrict by its first proviso the extended jurisdictional privileges conferred by sections 178 to 184 on Courts which according to the ordinary rule of section 177 would not have had jurisdiction. The proviso to section 188 will come into operation only when the British Indian Court cannot get jurisdiction under sections 179 to 184 and has to depend on the first part of section 188 to get such jurisdiction. I therefore, with great respect, dissent from the dicisions in *Imperator* v. *Tribhun*(1) and *Sessions Judge, Tanjore* v. *Sundara Singh*(2). As regards the decision in *Re the Sessions Judge, Trichinopoly*(3) while it could be distinguished (as pointed out by my learned brother) as affecting only section 180 of the group of sections 179 to 184, I feel loath to make any such distinction as no difference in principle can be made between the extended jurisdiction conferred by section 180 and the extended jurisdiction given by the other sections

I therefore respectfully dissent from that decision also and refuse to accept the Sessions Judge's reference.

APPELLATE CIVIL.

Before Mr. Justice Seshagiri Ayyar.

1914 February 12 and 13.

SESHAPPIER (THIRD DEFENDANT), PETITIONER

v.

SUBRAMANIA CHETTIAR AND TWO OTHERS (PLAINTIFF AND DEFENDANTS NOS. 1 AND 2), RESPONDENTS.*

Limitation Act (IX of 1908), *arts.* 48 *and* 49—*Suit for goods misappropriated—Indian Contract Act (IX of* 1872), *ss.* 108 *and* 178.

One *K* took a jewel of the plaintiff in May 1907, to find a purchaser for it, stating that he would settle the price in the presence of the plaintiff, but instead of doing so, *K* in June 1907 pledged it with the third defendant who

(1) (1912) 13 Cr. L.J., 530 (2) (1910) M.W.N., 142

(3) Civil Miscellaneous Petition No 97 of 1911

* Civil Revision Petition No. 122 of 1912.

SESHAPPIER v. SUBRAMANIA CHETTIAR.

bonâ fide lent, on its security, Rs. 175. Plaintiff came to know of *K*'s conversion in 1909 and sued in 1911 for the jewel or its value, the third defendant and the widow and son of *K* who died at the end of 1907.

Held that article 48 and not 49 of the Limitation Act (IX of 1908) was applicable and that the suit was not barred by limitation.

Held, also that the *bonâ fides* of the third defendant does not preclude the plaintiff from recovering the jewel without paying the third defendant the amount of loan.

Effect of sections 108 and 178 of the Indian Contract Act, considered.

PETITION under section 25 of the Provincial Small Cause Courts Act (IX of 1887), praying the High Court to revise the decree of J. S. GNANIYAR NADAR, the temporary Subordinate Judge of Negapatam, in Small Cause Suit No. 1023 of 1911.

One Kolandaswami took a jewel of the plaintiff in May 1907 to find a purchaser for it, stating that he would settle the price in the presence of the plaintiff; but instead of doing so, Kolandaswami, *in June 1907, pledged it with the third defendant* who *bonâ fide* lent, on its security, Rs. 175. The plaintiff came to know of Kolandaiswami's conversion in 1909 and sued in 1911 for the jewel or its value, the third defendant and the widow and the son of Kolandaswami who died at the end of 1907.

The Subordinate Judge allowed the suit but without costs. The third defendant preferred this revision petition and the plaintiff filed a memorandum of objections for costs.

R. Kuppuswami Ayyar and *V. Vaidhyanatha Ayyar* for the petitioner.

T. V. Gopalaswami Mudaliar for the Respondents.

SESHAGIRI AYYAR, J.

JUDGMENT.—The plaintiff's case is that he gave the jewel in dispute to one Kolandaswami Pathar, the husband of the first defendant and the father of the second defendant, on the 19th May 1907, on the representation of Kolandaswami that "there was a demand for the said jewel, that he would show it and bring it back and that if the purchaser liked the jewel he would settle the price in the presence of the plaintiff." Kolandaswami did not act up to his representations; on the 20th June 1907, he pledged it with the third defendant and received from him a sum of Rs. 175. Kolandaswami not having redeemed the jewel from the third defendant, the latter asked the plaintiff to sell this jewel for him. The plaintiff then came to know that it was his own jewel and asked the third defendant to restore it to him. The third defendant refused. Hence the suit. I ought to

mention that Kolandaswami died two or three months after the jewel was given to him.

The plea of the third defendant is that the suit is barred by limitation, in as much as the pledge to him was on the 20th June 1907; the present suit was instituted in 1911. His second plea is that under any circumstances he is entitled to be repaid the money given by him to Kolandaswami with interest, before the plaintiff can claim to recover the jewel.

The Subordinate Judge came to the conclusion that the suit was not barred by limitation. He held that article 48 of the Limitation Act was applicable to the suit and that, as the suit was brought within three years of the plaintiff's knowledge that the jewel was in the possession of the third defendant, it was within time. Mr. Kuppuswami Ayyar argued that the proper article applicable to the case was article 49. I cannot accede to this contention. There is no doubt that this is a case of conversion. The original undertaking which was a lawful one was to show the jewel to persons willing to purchase it. It was on the 20th June 1907 when Kolandaswami conceived the idea of treating the property as his own and of pledging it that he converted to his own use the plaintiff's jewel. *Arunachalam Pillai* v. *Alagianambia Pillai*(1) has no bearing upon this question. The observations of the learned Judges in *Ram Lal* v. *Ghulam Husain*(2) go to show that in the case of a specific moveable property which was originally obtained lawfully but has since been unlawfully retained, that the proper article applicable would be article 48. *Gopalasami Iyer* v. *Subramania Sastri*(3) is also an authority for that position. See also *Nandlal Thakersey* v. *The Bank of Bombay*(4), and *Nandlal Thakersey* v. *The Bank of Bombay*(5) I therefore agree with the Subordinate Judge that the suit was in time.

The second question is not altogether free from difficulty Mr. Kuppuswami Ayyar relied upon section 178 of the Contract Act and contended that the pawnee in this case got the jewel in good faith and that consequently he had acquired a good title for the payment of the money which Kolandaswami had taken from

(1) (1893) 3 M L J, 324.
(2) (1907) I.L.R., 29 All., 579
(3) (1912) 22 M.L.J., 152
(4) (1909) 11 Bom. L R., 926.
(5) (1910) 12 Bom L.R, 316.

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SESHAGIRI AYYAR, J.

him; he argued that the proviso to section 178 had no application to this case as the jewel was not obtained by his client or by Kolandaswami by means of an offence or fraud. Before I refer to the decided cases on the point, I may observe that sections 108 and 178 of the Contract Act, as well as section 41 of the Transfer of Property Act and the sections dealing with reputed ownership in the various Insolvency Acts, proceed upon the principle that *primâ facie* the rights of the legal owner should be protected unless he has done something to induce innocent purchasers or pledgees into the belief that the intermediate possessor is the true owner: mere *bonâ fides* on the part of the purchaser or pledgee is not enough: he will have to prove that by some act or omission the true owner has forfeited his right to recover possession. It is therefore incumbent upon the party resisting the claim of the true owner to adduce strict proof of the equities which have arisen in his favour, and of the laches on the part of the owner which have led him to advance the money. It was pointed out in *Greenwood* v. *Holquette*(1) that section 108 of the Contract Act applies only to cases where the intermediate possessor is entitled to a legal dominion over the property, and not to cases where he has simply the custody of the property; and it was further pointed out that the person in possession in order that he may give a good title must have a qualified ownership over the property, and that if the property was given to him for a particular time or for a stated purpose, such possession will not enable him to give a good title. That is also the view taken by Sir LAWRENCE JENKINS, C.J., in *Sagar* v. *Hukma Kessa*(2). The learned Chief Justice points out that, unless there is juridical possession in a person, he cannot confer any title on a third party. The only Madras case cited in argument is *Naganada Davay* v. *Bappu Chettiar*(3). That case concurs with the view taken in *Greenwood* v. *Holquette*(1). The observations in that judgment are opposed to the contention of the learned vakil for the petitioner that under section 178 all that need be proved is physical possession in the pawnor and *bonâ fides* on the part of the pawnee; whereas under section 108, it is necessary to show further that the pawnor was the ostensible owner of the article.

(1) (1873) 12 Beng. L.R., 42 (2) (1900) I.L.R., 24 Bom., 458.
(3) (1904) I.L.R., 27 Mad., 424.

Naganada Davay v. *Bappu Chettiar*(1) was no doubt one of gratuitous bailments but the principles laid down by the learned Judges apply to cases of entrustment for a particular purpose. It has been strenuously argued before me that the possession of Kolandasami was that of an agent for sale and that he had a right to retain possession of the jewel, and that therefore he cannot be said to have come into possession of the property by means of an offence or fraud. I have gone through the evidence fully and I am satisfied that the statement in the plaint that Kolandasami was given the jewel only for the purpose of showing it to intending purchasers has been established. The sale price was to be settled in the presence of the plaintiff; I cannot accede to the contention that Kolandasami was an agent for the sale of the jewel. I have, therefore, come to the conclusion that this plea of the defendant that he has got a right to be paid back his money before he can be asked to deliver the jewel is unsustainable. I hold that upon both the points the Subordinate Judge was right and I dismiss the petition with costs.

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As regards the memorandum of objections, I do not think that the plaintiff can claim any costs against the third defendant. He acted honestly throughout. As defendants Nos. 1 and 2 are not before me, I do not think it necessary to vary the order of the Subordinate Judge in this respect. The memorandum of objections is also dismissed. No costs.

(1) (1904) I.L.R., 27 Mad., 424.

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OLDFIELD, J.

duty. Secondly, in *Iswaram Pillai* v. *Taregan*(1), the finding was against the creation of any trust in the plaintiff's favour, because "there was no property transferred to the defendants, of which they agreed to become trustees, but all they agreed to do was to allocate a certain sum in their hands and to make that sum the trust fund." Here, however, Exhibit I transferred the properties divided under it from the joint ownership of the family to the several ownership of its members. Though their shares were not charged in plaintiff's favour, they were, by mutual agreement, accepted, subject to an obligation to pay her. It is not alleged that Exhibit I has not had effect or that defendants have freed themselves from the burden imposed by it by any repudiation of it or the benefit it conferred. The trust in the present case has therefore been constituted completely. In these circumstances defendants were held liable rightly.

In order, however, to obtain this decision, plaintiff has had to define the character of the transaction evidenced by Exhibit I so far as it affected her, to an extent, which was apparently unnecessary on the trial and to rely on its provisions as creating an express trust in her favour. Her suit is to enforce that trust and, that fact recognised, it is clearly covered by article 18, schedule II of Act IX of 1887. It therefore is not within the jurisdiction of a Court of Small Causes; *Krishna Ayyan* v. *Vythianatha Ayyan*(2). Without reference therefore to the other grounds for revision, which have been argued, the lower Courts decision must be set aside and the suit must be remanded with a direction to return the plaint for presentation to the proper Court. The objection to the lower Court's jurisdiction was not taken before it or in the Civil Revision Petition and was mentioned here only after plaintiff's contention had been stated. The parties will therefore bear their own costs to date.

(1) (1913) I.L.R., 38 Mad., 753, s.c., 26 M.L.J., 127.
(2) (1895) I.L.R., 18 Mad., 252.

APPELLATE CIVIL.

Before Mr. Justice Wallis and Mr. Justice Ayling.

RAMALINGATHUDAYAR (DEFENDANT), APPELLANT,

1914, March 9, 10 and 16.

v.

UNNAMALAI ACHI (PLAINTIFF), RESPONDENT.*

Contract to pay plaintiff, breach of—Attachment of plaintiff's property in consequence—Right of suit without actual damage.

The defendant having agreed with the plaintiff as one of the terms of a compromise of a suit *in forma pauperis*, to pay part of the Court fee if subsequently levied, and having failed to do so, in consequence of which the plaintiff's properties were attached,

Held, that on the defendant's failure to pay the plaintiff according to his contract, the plaintiff was entitled to sue at once and to recover substantial damages.

APPEAL against the Order of A. S. BALASUBRAHMANYA AYYAR, the Subordinate Judge of Kumbakonam, in Appeal No 33 of 1913 preferred against the decree of S. C. RAMASWAMI AYYAR, the District Munsif of Valangiman, in Original Suit No. 342 of 1911.

The following is the judgment of the lower Appellate Court:—

"This appeal arises out of a suit for a recovery of money due "under an agreement that if Court fees had to be paid to Government in a certain suit settled out of Court between the plaintiff "and the defendant, the defendant should pay the amount of the "Court fees less Rs. 250 to be paid by plaintiff. The plaintiff "alleges that defendant failed to pay the amount as agreed and that "order for payment of the same has been made by Court against "the plaintiff. On these allegations, the District Munsif holds "that as plaintiff has not paid the amount actually prior to the "institution of the suit the plaintiff has no cause of action. The "Court's order, Exhibit A, passed prior to the suit directs the levy "by Government of the Court fees from the plaintiff to the extent "of the assets of her husband and father in-law Plaintiff's "injury is complete on this order It is mere speculation to "say that the Government may not eventually levy the Court fee

* Civil Miscellaneous Appeal No. 223 of 1913.

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"from plaintiff or execute the order, Exhibit A, against plaintiff. "Government took out attachment of plaintiff's properties for "realising the amount—see Exhibit B. The sale of the properties "is not necessary to constitute injury to plaintiff. As a matter "*of fact it is conceded that the Court fee has been subse-*"quently paid by the plaintiff herself. I am therefore unable to "agree with the District Munsif that plaint discloses no cause of "action or that the suit is premature on the allegations in the "plaint. The District Munsif has tried the issue as a preliminary "issue on demurrer and has not tried the issue on the merits as to "the factum of the agreement alleged in the plaint and denied in "the written statement. I therefore reverse the decree of the "District Munsif and remand the suit for disposal according to "law on issues other than issue II. Costs of appeal in this Court "and of the suit in the Court below will abide and will be "provided for in the revised decree."

T. Ranga Achariyar for the appellant.

P. R. Ganapathi Ayyar for the respondent.

WALLIS, J.

WALLIS, J.—A suit instituted *in forma pauperis* was settled out of Court on the terms that if a Court fee were eventually levied, Rs. 250 should be paid by the plaintiff and the balance by the defendant, the present appellant

An order was subsequently made by the Court against th present respondent who was the widow of the second plaintiff i: that suit, for payment of the Court fee out of the assets in her hand belonging to the deceased first plaintiff and his son, the second plaintiff, and as the Court fee was not paid the property of the first plaintiff in her hands as legal representative of his son, the second plaintiff, was attached in execution of the order. The respondent then filed this suit against the appellant to recover the balance of the Court fee which he failed to pay under the award, *and subsequently before trial paid the Court fee.* The District Munsif dismissed the suit as premature, but the Subordinate Judge has set aside the decree and remanded the suit. We think the Subordinate Judge was right. Assuming in favour of the defendant that his agreement was to pay the balance of the Court fee to the Court and not to the plaintiff, at the date of suit the defendant had committed a breach of his contract and the plaintiff had suffered damage by having her property attached. There was therefore sufficient to give her a cause of action,

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and *Doraisami Tever* v. *Lakshmanan Chetty*(1) is clearly distinguishable.

Further the English cases which were not referred to in the argument before us show that in a case of this kind the defendant's failure to pay according to his contract at once gives rise to a cause of action in which substantial damages are recoverable; Mayne on Damages, page 334, 6th Edition; "Where the defendant's promise is an absolute one to do a particular thing, as to discharge or acquit the plaintiff from such a bond, an action may be brought the moment he has failed to perform his contract and a plea of *non damnificatus* (he sustained no damages) would be bad. Therefore where a party entered into a covenant to pay off encumbrances by a particular day, or to take up a note, it was held that an action might be brought and damages to the extent of the encumbrances and note respectively might be obtained though no actual injury had been sustained." *Lethbridge* v *Mylton*(2) and *Loosemore* v. *Radford*(3). These cases were followed in *In Re Allen*(4).

The appeal is dismissed with costs.

AYLING, J.—I agree.

AYLING, J.

APPELLATE CRIMINAL.

Before Mr. Justice Tyabji.

Re SIVANUPANDIA THEVAN *alias* APPAVU THEVAN (ACCUSED), PETITIONER.*

1914. March 23.

Indian Penal Code (Act XLV of 1860), sec 424—Conviction of a ryot under Madras Estates Land Act (I of 1908), for dishonest concealment and removal of crops, legality of—Madras Estates Land Act (I of 1908), ss. 73 and 212, no bar to conviction.

The accused who was a ryot under the Madras Estates Land Act and who was bound under the conditions of his tenure to share the produce of his land with the landholder in a certain proportion, dishonestly concealed and removed the produce, thus preventing the landholder from taking his due share

Held, that the provisions of sections 73 and 212 of the Madras Estates Land Act were no bar to a conviction of the ryot under section 424, Indian Penal Code, for the dishonest concealment and removal.

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(1) (1904) 14 M.L.J., 285. (2) (1831) 2 B. & Ad., 772, s.c., 109 E.R., 1332
(3) (1842) 9 M. & W., 657. (4) (1898) 2 Ch., 345

* Criminal Revision Case No. 85 of 1914.

Re Sivanupandia Thevan.

PETITION under sections 435 and 439 of the Code of Criminal Procedure (Act V of 1898), praying the High Court to revise the judgment of K. S. SRINIVASA ACHARIYAR, the Sub-Divisional Magistrate of Koilpatti, in Criminal Appeal No. 68 of 1913, preferred against the judgment of T. S. PIRAVIPERUMAL PILLAI, Second Class Magistrate of Sankaranayinārkōyil, in Calendar Case No. 365 of 1913.

The facts of the case appear from the judgment of the Lower Appellate Court, which is as follows:—

"Appellant was convicted for dishonest concealment and "removal of certain paddy which as a ryot he ought to have shared "with the Malavan Cottai Estate. . . . Besides the general "grounds that the prosecution story is false and that of the defence, "true, the appellant's vakil urges that the fraudulent removal even "if true is not an offence under section 424, Indian Penal Code; as "the (Madras) Estates Land Act lays down that in such a case of "removal the produce may be deemed to have been as full as the "fullest crop of the same description in the neighbourhood on similar "land for that harvest. Please *vide* section 74 (4).

"It is also urged that the only provisions of the Act are contained "in section 212 and nothing is an offence (as between landlord and "tenant) which is not covered by this section. I do not agree with "this contention. The provisions of the Penal Code which are "general cannot be overridden by the Estates Land Act unless such "an intention is expressed by the legislature itself. The penal "provisions of section 212 are in addition to those contained in the "general law, the Penal Code, and are not exclusive of the latter.

"The defence no doubt alleged that there was no such conceal- "ment or removal of paddy as is spoken to by the prosecution "witnesses. But I agree with the Lower Court that this evidence "which is discrepant in essential particulars is not credible.

"I accordingly confirm the conviction and sentence."

G. S. Ramachandra Ayyar for the petitioner.

TYABJI, J.

TYABJI, J.—It is argued that sections 73 and 212 of the Estates Land Act prevent the applicability of section 424 of the Indian Penal Code, because, it is argued, the Estates Land Act must be construed as a complete Code relating to offences between landlord and tenant in cases where the latter Act applies. I am unable to accede to the contention. It seems to me that the proper construction of these sections is that certain acts which might not come within the definition of any offence referred to

in the Indian Penal Code are also made punishable; and that the penal provisions of the Estates Land Act leave the provisions of the Indian Penal Code intact. I am of opinion, therefore, that this case must be dismissed.

APPELLATE CIVIL.

Before Mr. Justice Ayling.

1914. April 16, 17 and 20.

V. SESHAGIRI ROW AND OTHERS (DEFENDANTS), PETITIONERS,

v.

G. NARAYANASWAMI NAIDU, RECEIVER, MEDUR ESTATE OF ELLORE (PLAINTIFF), RESPONDENT.*

Jurisdiction—The Suits Valuation Act (VII of 1887), sec. 8—Suit to eject a tenant holding over—Court Fees Act (VII of 1870), sec. 7, cl. (xi) (cc)—Madras Civil Courts Act (III of 1873), sec. 14.

The effect of amendment of section 7 of the Court Fees Act (VII of 1870) by adding to it clause (xi) (*cc*) is that a suit to recover immoveable property from a tenant is governed for purposes of jurisdiction by section 8 of the Suits Valuation Act (VII of 1887) and not by section 14 of the Madras Civil Courts Act (III of 1873); so that in the case of such suits the valuation for purposes of jurisdiction is the same as for Court-fees

Chalasawmy Ramiah v. *Chalasawmy Ramaswami* (1891) 11 M.L.J., 155, distinguished.

PETITIONS under section 115 of the Code of Civil Procedure (Act V of 1908), praying the High Court to revise the order of F. A. COLERIDGE, the acting District Judge of Masulipatam, in Miscellaneous Appeals Nos. 6 and 7 of 1912, preferred against the order of V. C. MASCARENHAS, the Subordinate Judge of Ellore, in Original Suits Nos. 18 and 19 of 1911, respectively.

These are two suits by a zamindar to recover his private lands from his tenants who were holding over after the expiry of the period of their one year's lease. Each suit was valued for purposes of jurisdiction at more than Rs 2,500 made up of the market value of the lands and one year's mesne profits, and for purposes of court fees valued at less than Rs. 2,500 made up of one year's rental as per section 7, clause (xi) (*cc*) of the Court Fees

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* Civil Revision Petitions Nos. 312 and 313 of 1913.

SESHAGIRI ROW v. NARAYANASWAMI NAIDU.

Act (VII of 1870) and one year's mesne profits. Both the suits were filed in the Subordinate Judge's Court of Ellore who returned them for presentation to the Munsif's Court holding that for purposes of jurisdiction the suits were governed by section 8 of the Suits Valuation Act and that the valuation for both purposes was the same.

On appeal the District Judge holding otherwise reversed the order of the Subordinate Judge and remanded the suits for trial by the Sub-Court. Thereupon the defendant preferred these revision petitions to the High Court.

The Honourable Mr. *B. N. Sarma* for the petitioners.

P. Nagabhushanam for the respondent.

AYLING, J.

AYLING, J.—The only question for disposal is as to the correct valuation of the suit for purposes of jurisdiction. The District Judge has held that it is governed by section 14 of the Madras Civil Courts Act: for the petitioner it is argued that the Subordinate Judge was right in applying section 8 of the Suits Valuation Act (VII of 1887).

The ruling relied on by the District Judge [*Chalasawmy Ramiah v. Chalasawmy Ramaswami*(1)] does not in my opinion afford any support for his view that the present suit is one of which the subject-matter is land *so as to bring* it within the scope of section 14 of the Madras Civil Courts Act (III of 1873) and that this section governs the valuation for purposes of jurisdiction. At the time when the latter Act was passed, the wording and arrangement of section 7 of the Court Fees Act was such that it was at any rate open to argument that a suit of this kind brought by a landlord to evict a tenant was for the possession of land and fell under clause (v). If so it was probably meant to be covered by section 14 of Act III of 1873. Assuming that this was so and that a suit like the present one fell under clause (v) of section 7 as that section originally stood, the enactment of Act VII of 1887 made no difference, for such a suit would be excluded from section 8 of the same. But a very important change was effected by Act VI of 1905. This Act amended the Court Fees Act by introducing in clause (xi) of section 7 a new category of suit "(cc) for the recovery of immoveable property from a tenant."

(1) (1921) 11 M.L.J. 135.

The present suit undoubtedly falls under this category, and although respondent's vakil may be right in contending that, before the amending Act, it fell under clause (v), the effect of the amendment was clearly to take it out of clause (v) (if it were ever there) and put it into clause (xi) (*cc*). The indirect effect of the amendment would then be to enlarge the scope of section 8 of Act VII of 1887 which applies to all suits other than those referred to in section 7, clauses (v), (vi), (ix) and (x) (*d*) of the Court Fees Act. It certainly cannot be contended now that this suit is not covered by section 8 of the Suits Valuation Act. Whether this effect was intentional or due to inadvertence may be a matter of speculation but is of no importance. The Acts must be construed as they stand.

Adopting the most favourable view for respondent, viz., that section 14 of the Madras Civil Courts Act at the time of its enactment was intended to cover a case of this kind, in the event of conflict, I think preference must be given to section 8 of the Suits Valuation Act as the later enactment. Section 14 of the Madras Civil Courts Act is referred to in the Suits Valuation Act; but I find nothing to indicate that section 8 should be read subject to its provisions.

I must therefore set aside the order of the District Judge and restore that of the Subordinate Judge. The petitioner will get his costs in this and the District Court from the respondent.

APPELLATE CRIMINAL.

Before Mr. Justice Ayling and Mr. Justice Seshagiri Ayyar.

1914. April 28 and 29 and May 1.

VENKATARAMA AIYAR AND TWO OTHERS (ACCUSED), PETITIONERS,

v.

SAMINATHA AIYAR (COMPLAINANT), RESPONDENT.*

Criminal Procedure Code (Act V of 1898), sec. 15—Bench of Magistrates—Judgment and conviction by only some, legality of.

The hearing of a case of assault was commenced by six members of a Bench of Magistrates whose legal quorum was only two. On adjourned hearings of

* Criminal Revision Case No. 780 of 1913 (Criminal Revision Petition No. 651 of 1913).

VENKATARAMA AIYAR v. SAMINATHA AIYAR.

the case, sometimes four and sometimes only two took part. These two who took part in the proceedings of the case throughout, concluded the trial and delivered judgment convicting the accused:

Held, that the conviction was legal.

Karuppana Nadan v. *Chairman, Madura Municipality* (1898) I.L.R., 21 Mad., 246, followed.

There is no analogy between a trial by a Bench of Magistrates and trials by arbitrators or jurors.

PETITION under sections 435 and 439 of the Code of Criminal Procedure (Act V of 1898), praying the High Court to revise the order of R. NAGASUNDARAM AYYAR, the First-class Sub-Divisional Magistrate of Kumbakonam, in Criminal Appeals Nos. 200—202 of 1913, confirming the judgment passed by V. S. NARAYANA RAO, the President, Bench of Magistrates, Kumbakonam, in Summary Trial No. 665 of 1913.

The facts of the case appear from the judgment of SESHAGIRI AYYAR, J.

T. Arumainatham Pillai for the petitioners.

J. C. Adam for the *Public Prosecutor* for the Crown.

AYLING, J.

AYLING, J.—The sole ground on which we are asked to revise the decision of the Lower Appellate Court in this case is that all the Bench Magistrates who were present at the earlier stages of the case did not take part in the decision thereof or sign the judgment. It is not denied that the two Magistrates who did sign the judgment were present throughout all the earlier hearings and heard all the evidence or that they constituted a legal quorum.

I see no reason to differ from the view taken in *Karuppana Nadan* v. *Chairman, Madura Municipality*(1), which is clear authority for holding that the conviction is not illegal. This conflicts with no provision of law, and no consideration of justice or expediency. The contrary view would materially hamper the work of Benches of Magistrates in all but the very simplest cases. I do not think any argument can be based on a supposed analogy with the case of a jury, or a body of arbitrators. The law and practice in England appears to be similar to what I hold to be legal here. *Vide* section 29 of the Summary Jurisdiction Act.

I would dismiss the petition.

(1) (1898) I.L.R., 21 Mad., 246.

VENKATA-RAMA AIYAR v. SAMINATHA AIYAR.

SESHAGIRI AYYAR, J.

SESHAGIRI AYYAR, J.—In this case, the accused were charged with assault under section 352 of the Indian Penal Code and convicted. The trial was before a bench of Honorary Magistrates for the town of Kumbakonam. At the commencement of the trial, six members of the bench, including the president, sat to hear the case. On adjourned hearings sometimes four and sometimes two only took part. The trial which was concluded on the 19th June 1913 was attended by only two. They delivered the judgment in the case It is conceded that these two Magistrates took part in the trial throughout. The question is whether the proceedings are vitiated by the fact that those who took part in the trial at the beginning and at the intermediate stages were not present to give their final decision in the case. Section 15 of the Code of Criminal Procedure, clause (1), empowers the local Government to direct "two or more Magistrates to sit together as a bench." If a bench had been constituted in this manner, it may well be argued that if any member of the bench ceases to take part in the subsequent proceedings, the trial is not regular. In the second clause of that section, the legislature has provided that the powers of a bench shall, be "of the highest class conferred on any one of its members." If a bench took cognisance of a case triable by a First-class Magistrate on the ground that one of its members was a Magistrate of the first class, can it be tried by the remaining members in his absence? The intention of the legislature apparently is that all the members before whom the case was begun should continue to take part in the proceedings until judgment. Therefore, if the matter were *res integra*, I would have felt considerable hesitation in holding that the proceedings in this case are regular. But it was decided in this Court in *Karuppana Nadan* v. *Chairman, Madura Municipality*(1), that the absence of some of the Magistrates from the further stages of the trial and at the time of judgment will not vitiate the proceedings. I am unwilling to disturb a practice which has guided Lower Courts for such a long period. Ordinarily, Honorary Magistrates will not be able to sit continuously and it may result in the undue prolongation of trials, if they are required to attend throughout. The object of appointing Honorary

(1) (1898) I.L.R., 21 Mad., 246.

VENKATARAMA AIYAR v. SAMINATHA AIYAR. — SESHAGIRI AYYAR, J.

Magistrates to hear cases is to ensure speedy disposal; that will be defeated by insisting upon the attendance of all the members of the bench from beginning to end. While thus alive to the difficulties which may result from not following *Karuppana Nadan* v. *Chairman, Madura Municipality*(1), I would suggest that the Government under section 16 of the Code should frame rules to obviate the difficulty. The legislature must also make a change in the language of the section. The analogy of arbitrators is not in point. As pointed out by Mr. J. C. Adam for the Public Prosecutor, the arbitrators derive their power under a contract and each of the referring parties is entitled to say that he has the right to the experience and guidance of every referee deciding his case. *Thammiraju* v. *Bapiraju*(2), proceeds on that principle. Nor is the provision relating to the termination of the proceedings when one of the empanelled jurors is unable or unwilling to take part in the trial *in pari materia* with this case. The minimum number of jurors has been fixed by the notification of the Government in the different districts of the Presidency. The absence of one of the jurors will vitiate the trial as the required number does not take part in it. On the other hand, the rules promulgated in England for trials by Justices of the Peace (Halsbury, Volume XIX, section 1259) seem to indicate that the trial will become invalid only if persons who did not take part in the taking of the evidence assisted in arriving at the final decision: *Hardwar Sing or Lall* v. *Khega Ojha*(3), and *Damri Thakur* v. *Bhowani Sahoo*(4), proceed upon this principle. I agree with my learned colleague in dismissing this petition.

(1) (1898) I.L.R., 21 Mad., 246. (2) (1889) I.L.R., 12 Mad., 113.
(3) (1893) I.L.R., 20 Calc., 870. (4) (1896) I.L.R., 23 Calc., 164.

APPELLATE CIVIL.

Before Sir John Wallis, Kt., the Officiating Chief Justice, Mr. Justice Ayling and Mr. Justice Seshagiri Ayyar.

1913 October 24 and 29 and 1914 September 24

THE VELLORE TALUK BOARD, BY ITS PRESIDENT (PLAINTIFF), PETITIONER,

v.

GOPALASAMI NAIDU (DEFENDANT), RESPONDENT.*

Contract, breach of—Damages, ascertainment of—Earnest-money, deposit of, forfeiture of—Credit for forfeited amount

Where a person deposits a certain amount as earnest-money for the due performance by him of his part of the contract under which he agrees to pay the other party a certain sum but breaks the contract thereafter, the other party who becomes entitled to retain the deposit as forfeited under the terms of the contract must, in a suit by him for damages for the breach of contract, give credit for the amount retained as forfeited and can only recover the difference between the actual loss sustained and the amount of the forfeited deposit

Ockenden v. *Henly* (1858) 1 E B & E, 485, s c, 27 L.J, Q B, 361, followed.

APPEAL under article 15 of the Letters Patent against the order of SADASIVA AYYAR, J., in Civil Revision Petition No 596 of 1909, preferred against the decree of K. KRISHNAMA ACHARIYAR, the District Munsif of Vellore, in Small Cause Suit No. 133 of 1909.

This is a suit for Rs. 104, being the damages said to have been caused to the plaintiff, the Taluk Board of Vellore, by reason of defendant's breach of his contract of lease relating to the Karadigudi fair market for the year 1908–09.

The defendant took a lease of the market for the year 1908–09 but failed to pay his monthly rents according to the terms of his contract and thereupon the plaintiff resold the lease with effect from 1st October 1908 for Rs 90 The amount of the lease of the plaintiff was Rs 217, and the plaintiff sues to recover Rs. 104 after giving credit to Rs 23 collected directly by the plaintiff himself as market fees The defendant raised the following among other pleas, viz.: (1) that some more money was handed over to the plaintiff as market dues, and (2) the plaintiff ought also to give credit for Rs. 36 deposited by the defendant with the plaintiff as earnest-money for the due performance by him of his part of the contract. The District Munsif

* Letters Patent Appeal No. 37 of 1914.

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loss on a re-sale, the deposit although forfeited, is to be taken into account as diminishing the deficiency. These are based on a judgment of Lord CAMPBELL of the year 1858 in *Ockenden* v. *Henly*(1). I think that case may be distinguished by the fact that the agreement of sale, which was the subject of the decision, mentioned all the consequences arising upon a default by the purchaser of goods as parts of a single condition, namely actual forfeiture of the deposit, an option of re-sale to be exercised by the vendor, and an obligation on the defaulter to make good any deficiency upon re-sale together with the expenses which on non-payment might be recovered as liquidated damages, whereas in the present case the muchilika provides "not only shall I (the defaulter) be deprived of the lease for the remaining months, but there shall be a re-sale at my risk and any loss resulting there from shall be made good from the moveable or immoveable properties belonging to me : and *I shall also forfeit* the aforesaid deposit of Rs. 36-2-8 paid by me." These are separate stipulations and there are others, which I have omitted as being unimportant. In case the distinction I have drawn is fanciful, I would still allow the present claim relying on the decisions quoted above especially that in *Singer Manufacturing Company* v. *Raja Prosad*(2) as being a case where the person who sued was the depositary.

To allow this appeal will be only to bind the parties by the terms of the contract which they made for themselves.

I think that this is what should be done when it has been found that none of the sections of the Contract Act, which might take the case out of the general rules, can be applied.

The District Munsif's decree in my opinion should be amended by giving the plaintiff a decree for Rs. 80-0-8 with proportionate costs throughout and further interest at 6 per cent. till realisation.

SADASIVA AYYAR, J.

SADASIVA AYYAR, J.—The facts have been set out by my learned brother in the judgment just now pronounced by him and I need not repeat them. I would, however, define the suit not as a suit to enforce both the stipulations in the contract referred to in my learned brother's judgment but to enforce only the first of those stipulations; the plaintiff Board having before bringing the suit treated the deposit of Rs. 36-2-8 which it had as already forfeited. I agree with my learned brother that the Full Bench

(1) (1858) 27 L.J., Q.B. 361. (2) (1909) I.L.R., 36 Calc., 960.

decision in *Natesa Aiyar* v. *Appavu Padayachi*(1) is binding upon us. Under that decision, a provision for the forfeiture of a resonable amount of deposit money under a contract could not be treated as a penal clause to be relieved against in a suit brought by the person who has forfeited that money for the recovery of such deposit or a portion of such deposit on the ground that the actual damage or loss incurred by person with whom the money was deposited was either *nil* or less than the amount deposited. But the question in the present case is whether, if the person for whose benefit the forfeiture clause was entered in the contract did not content himself with retaining the deposit as a forfeiture but sued for the *actual* loss incurred by him through the default of the other party on the ground that the deposit amount (which according to all the *English* cases was security for the due performance of the contract by the defaulter) was insufficient to cover such a loss or on the ground that the contract provided for both the forfeiture of the deposit and also for the right to recover the loss, whether in such a case, the plaintiff was not legally bound to give credit to the deposit money and whether he could recover more than the difference between the damages incurred and the deposit money

I am inclined to hold that the plaintiff in such a case cannot recover more than the difference between the loss incurred by him and the deposit money. In Mayne on Damages, pages 248 and 249 it is stated as follows:—"It results from this that if the seller seeks to recover damages beyond the amount of the deposit, he must give credit for the deposit which he has retained." Then *Ockenden* v. *Henly*(2), is quoted as authority. In that case, the condition in favour of the innocent party was as follows.—"The deposit . . . shall be *actually forfeited to the vendor*, who shall be at liberty to re-sell . . .", "*and any deficiency upon* . ." "*resale together with the expenses* . . . *shall* . . . *be made good by the defaulter;* and on non-payment . . . shall be recoverable as . . . liquidated damages" Thus in that case (as in this case) there was a provision in favour of the plaintiff both for forfeiture of the deposit and for a right to recover the loss on resale and yet the

(1) (1915) I.L.R., 38 Mad., 178, s.c., 24 M.L.J., 488 (F.B.).
(2) (1858) 1 E B. & E., 485, s.c., 27 L.J., Q.B., 361.

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SPENCER, J.

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The District Munsif's decree in my opinion should be amended by giving the plaintiff a decree for Rs. 86-0-8 with proportionate costs throughout and further interest at 6 per cent. till realisation.

SADASIVA AYYAR, J.

SADASIVA AYYAR, J.—The facts have been set out by my learned brother in the judgment just now pronounced by him and I need not repeat them. I would, however, define the suit not as a suit to enforce both the stipulations in the contract referred to in my learned brother's judgment but to enforce only the first of those stipulations; the plaintiff Board having before bringing the suit treated the deposit of Rs. 36-2-8 which it had as already forfeited. I agree with my learned brother that the Full Bench

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SADASIVA AYYAR, J.

learned Judges Lord CAMPBELL, C.J., COLERIDGE, J., ERLE, J., AND CROMPTON, J., held that the plaintiff could not retain the deposit and also recover the full damages caused to him but could only recover the difference. The judgment is a short but instructive one and I shall quote the greater portion of it: "There having been an actual forfeiture of the deposit by the express words of the seventh condition, the deposit, if paid, could not in any event have been recovered back by the purchaser, and the seller would have been entitled to any additional benefit . . . to the forfeited deposit, *and making a further demand of damages sustained on the resale,* it becomes necessary to consider what was the nature of the deposit. Now, it is well settled that, by our law, following the rule of the civil law, a pecuniary deposit upon a purchase is to be considered as a payment in part of the purchase money, and not as a mere pledge (Sugden's Vendors and Purchasers, Chapter I, sec. (iii), art. 18, page 40, thirteenth edition). Therefore in this case, had the deposit been paid, the balance only of the purchase money would have remained payable. *What then, according to the seventh condition is the deficiency arising upon the resale which the seller is entitled to recover?* We think the difference between the balance of the purchase money on the first sale and the amount of the purchase money obtained on the second sale: or, *in other words, the deposit, although forfeited so far as to prevent the purchaser from ever recovering it back, as without a forfeiture he might have done (Palmer v. Temple)(1) still is to be brought by the seller into account if he seeks to recover as for a deficiency on the resale.*"

I am unable to distinguish the present case from the decision in *Ockenden* v. *Henly*(2) so far as the legal principles applicable to the rights of the parties are concerned and I would therefore dismiss the Revision Petition with costs. Under sections 93 and 111 of the Civil Procedure Code the petition will stand dismissed with costs, three months being granted to the Vellore Taluk Board to pay the costs.

From this an appeal under article 15 of the Letters Patent was preferred by the plaintiff.

(1) (1839) 9 A. & E., 508.

(2) (1858) 1 E. B. & E., 485 at pp. 492 and 493; s.c., 27 L.J., Q.B., 361.

THE PRESIDENT, VELLORE TALUK BOARD v. GOPALASAMI NAIDU.

WALLIS, OFFG. C.J., AYLING AND SESHAGIRI AYYAR, JJ.

Letters Patent Appeal No. 37 *of* 1914.

The Honourable Mr. *L. A. Govindaraghava Ayyar* for the appellant.

C. R. Subrahmanya Ayyar for the respondent.

JUDGMENT.—We think the case is covered by the authority of *Ockenden* v. *Henly*(1), which was distinguished in *Essex* v. *Daniell*(2), and referred to with approval by FRY, L.J., in *Howe* v. *Smith*(3), and was apparently followed by JOYCE, J., in the most recent case of *Shuttleworth* v. *Clews*(4).

We accordingly agree with SADASIVA AYYAR, J., and dismiss the appeal with costs.

PRIVY COUNCIL.*

ANNIE BESANT (DEFENDANT),

v.

NARAYANIAH (PLAINTIFF).

1914. May 4, 5 and 25.

[On appeal from the High Court of Judicature at Madras.]

Guardian—Hindu father entrusting sons for custody and education in England to another person who defrays expense of their maintenance and education—Revocation of such authority and demand for sons to be restored to his custody—Suit to enforce demand in District Court—Questions to be determined in such a suit—Jurisdiction of the District Court—Guardians and Wards Act (VIII of 1890), sec 9—'Ordinarily resident,' meaning of—Suit, not the appropriate procedure—Transfer of suit from the District Court to the High Court under clause (13) of the Letters Patent, 1865—Powers of the High Court in dealing with the suits so transferred—Mandatory order of the kind asked for, not to be made—What a Court of competent jurisdiction in India could do under the circumstances—Order declaring a guardian, when to be made—Guardians and Wards Act (VIII of 1890), sec. 19—Order declaring a guardian during respondent's life, propriety of.

Among Hindus, as in England, the father is the natural guardian of his children during their minority, but this guardianship is in the nature of a sacred trust, and he cannot therefore during his lifetime substitute another person to be guardian in his place He may, in the exercise of his discretion as guardian, entrust the custody and education of his children to another, but the authority he thus confers is essentially a revocable authority, and if the welfare of his children require it, he can, notwithstanding any contract to the

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(1) (1858) 1 E B & E, 485, s.c, 27 L J, Q B, 361.
(2) (1875) L.R., 10 C P, 538.
(3) (1884) L.R., 27 Ch. D., 89
(4) (1910) 1, Ch 176.

* *Present*: The LORD CHANCELLOR (Lord HALDANE), Lord MOULTON, Lord PARKER, SIR JOHN EDGE AND MR AMEER ALI

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then widower, was, at his own request, allowed to live rent-free at Adyar in a small house belonging to the Theosophical Society with his family and other relatives. In September 1909 whilst the appellant was in America, the respondent removed Kristnamurti and Nityananda, his two sons, now interveners in this appeal, from the school where they were being taught, and handed them over for instruction to a Mr. Leadbeater, a member of the Theosophical Society, whom he selected as their tutor. On her return to Adyar in November or December 1909 the appellant became acquainted with the two boys, and finding that the respondent could not afford to give them the upbringing and education for which she considered they were fitted, she early in 1910 offered to take entire charge of the boys, and to defray the expenses of their maintenance and education in England and at Oxford University.

On the 6th March 1910 the respondent accepted the appellant's offer by a letter in which referring to the boys now interveners then respectively of the ages of 14 and 11 years he said:

"Unsolicited by me you have resolved to bear the cost of their maintenance and education while they are under the age of 25 years, and have further made a provision for it in your will. Being fully convinced that until they grow up and become fit to enter upon life they cannot be in better supervision than yours, it is my wish that you alone should be the guardian of their persons during their minority. And accordingly I hereby constitute you their guardian and authorise you to act as such henceforth.

"As my desire is that you and you alone should be their guardian, I do not give you power to transfer the guardianship I give you to any other, but to myself in case you find any necessity to do so. If you happen to pass away from your present body before I do, the gurdianship which is hereby vested in you should naturally revert to me, if I happen to live till then, or to such persons whom I may appoint for that purpose. If, by the time you and I pass away from this world, these boys should still be minors (under 25 years of age) their guardianship must then vest in the persons appointed by me, for that purpose, in my will."

Thereafter the appellant took over custody of the two boys, taking them with her in 1910 through Northern India, and in 1911 to Burma and Benares, and thence in April of that year to England, with the full approval of the respondent. The European Principal of the Central Hindu College, Benares, a

Master of Arts of Cambridge University, went with them on this occasion, taking six months' leave to act as tutor to the boys. During this visit to England their names were entered at Oxford where they were to take up their residence in 1914, and it was arranged that they were to be in England continuously from the spring of 1913 in order to complete their preparation for the University.

On their return to India in September 1912 the appellant and the two boys went to Adyar where the latter were, with the knowledge of the respondent, again in charge of Mr. Leadbeater. In December 1911, however, the respondent objected to the boys having that tutor, and to satisfy him, the appellant arranged to take them again to Europe, in February 1912 and eventually brought them to England where they had since remained.

On 11th July 1912 the respondent wrote to the appellant cancelling the letter of 6th March 1910 by which he had constituted her the guardian of his two sons and demanding that the two boys should be handed over to him by 31st August "failing which I shall be constrained to take legal steps to *obtain my sons from you.*"

As the appellant refused to hand over the boys to the respondent, the latter on 24th October 1912 instituted the suit out of which the present appeal arose in the Court of the District Court at Chingleput against the appellant in which he prayed (*inter alia*) for a declaration that the respondent was entitled to the custody of his boys, and for an order directing the appellant to hand them over to the respondent.

The suit was subsequently removed from the District Court of Chingleput to the High Court at Madras by an order made under clause 13 of the Letters Patent of 1865 and was tried by the High Court in the exercise of its extraordinary original Civil jurisdiction.

The suit was tried by BAKEWELL, J., who held that under the circumstances the Court had jurisdiction to pass orders as to the custody of the children; that it was necessary for their interests that they should be declared wards of Court and he made a declaration to that effect; and it was decreed that the respondent was the guardian of the boys; and that the appellant should on or before 26th May 1913 hand over the custody of them to the respondent as their guardian. From that decision the present appellant appealed and the appeal was heard by Sir CHARLES

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ARNOLD WHITE, C.J., and OLDFIELD, J., before whom the question of jurisdiction was first argued, and after hearing arguments the Appellate Court held that BAKEWELL, J., had jurisdiction to make the decree appealed from.

The CHIEF JUSTICE after stating that the effect of the order appointing the respondent guardian, was, under section 3 of the Majority Act (IX of 1875) to extend the minority of the boys until they were 21, held that the Guardian and Wards Act (VIII of 1890) did not take away any common law or equitable jurisdiction which was vested in a District Court at the time the Act came into force; that notwithstanding clause 20 of the Letters Patent of 1865, the jurisdiction of the High Court in the suit was the same as if the suit had been originally instituted in the High Court; and that it was not restricted to such jurisdiction as could have been exercised by the District Court if the suit had not been transferred to the High Court under clause 13 of the Letters Patent of 1865. The Chief Justice further held that the words "within the Presidency of Madras" in clause 17 of the Letters Patent of 1865 were used for purposes of territorial limitation, and that they did not qualify or restrict the powers of the High Court with regard to the guardianship of minors, but that the jurisdiction which the High Court at Madras had in connexion with the estates and persons of minors was the jurisdiction which was exerciseable by the LORD CHANCELLOR in England acting for the Sovereign as *parens patriæ* when the Supreme Court in Madras was instituted; and that if the domicile and residence of the father within the jurisdiction of the Court of Chancery in England would have been sufficient to give jurisdiction to the Courts in England as would be the case in the present suit, the same facts, *mutatis mutandis*, would be sufficient to give jurisdiction in the suit.

OLDFIELD, J., after stating that it had been suggested that the plaint could be treated as a petition, and the proceedings as being proceedings under the Guardians and Wards Act, 1890, held that if there were no legal objection to that course, and the necessary finding that the boys were ordinarily resident within the Chingleput jurisdiction could be reached, there was still a possibility that the appellant would suffer prejudice, which debarred the Court from such use of its discretion; that the Guardians and Wards Act did not bar remedies or close jurisdiction open at the date of the Act, and that though they might

have fallen into disuse in the District Courts of the Madras Presidency, that could not affect the respondent's right to use them when the Act had not been abrogated in any legal way, and that therefore that objection to the jurisdiction failed; that if clause (13) of the Letters Patent, 1865, was in question it was clear that BAKEWELL, J.'s powers were, under section 20, only those of the District Court of Chingleput. OLDFIELD, J., then considered the provisions of the Civil Procedure Code (Act V of 1908) and held that under those provisions, BAKEWELL, J., had jurisdiction to make the decree appealed from notwithstanding that the boys were not resident within the jurisdiction of the Chingleput Court.

The appeal was afterwards heard on the merits, and on 29th October 1913, the Appellate Court delivered separate judgments upholding the order of BAKEWELL, J.

The Chief Justice said that, in his opinion, the law as to the right of a father to the control and custody of his minor children was that the Court of Chancery could not decide upon the custody of infants simply with reference to what was most for their benefit, and could not interfere with the rights of a father unless he conducted himself in such a manner as to render it essential to the safety and welfare of the children, in some serious and important respect, either physically, intellectually or morally, that they should be removed from his custody. And after stating that there could be no question that the agreement of the 6th March 1910 had been acted on, said he was prepared to accept and apply the statement, of the law which was to be found in Lord Halsbury's "Laws of England," volume XVII, page 107, namely: "After a surrender by him (the father) of the custody has actually taken place, he can recover the custody unless his doing so would be injurious to the interests of the child."

The CHIEF JUSTICE stated in conclusion that the question whether as things then stood the relative advantages of the boys were on the side of their remaining where they were, and continuing the course of training which had been laid out for them by the appellant, or on the side of their being restored to the care and custody of their father was one of great delicacy and difficulty; but that on the case as a whole, he had, after long and anxious consideration, come to the conclusion that the Court ought not to disturb the order of BAKEWELL, J.,

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appointing the respondent the guardian of the boys, nor interfere with the direction given for the handing over of the boys for the purpose of making the order effective.

OLDFIELD, J., concurred with the conclusions stated by the Chief Justice(1).

On this appeal, *Younger, K.C., Sir H. Erle Richards, K.C.*, and *Roger W. Turnbull* for the appellant contended that the High Court at Madras had no jurisdiction to make the decree of 22nd April 1913. In the first place there was no jurisdiction in the District Court: in the second place there was no jurisdiction in the High Court, after transfer of the case, which was not possessed by the District Court: and in the third place if the High Court had any jurisdiction outside that given by statute the order made was not right, first as not being in accordance with the principles laid down by Lord ELDEN who said that the Court of Chancery would not declare a father the guardian of his sons; secondly because the infants had no property, nor was there any question as to property; and thirdly because one of the boys was not now a minor. As to the District Court its jurisdiction was governed by the Guardians and Wards Act (VIII of 1890) which repealed and extended the effect of the Majority Act (IX of 1875). Act VIII of 1890 had repealed all the previous legislation with regard to the appointment of guardians. It contemplates (section 9) that the minors must be resident within the jurisdiction of the Court which deals with them; and there are portions of it which seem not to contemplate the appointment of the father as guardian. In this case when the suit was commenced neither the father (respondent) nor the minors were within the jurisdiction of the Court. A special procedure was provided by Act VIII of 1890. The proceedings under it were initiated by petition and not by suit, and it was submitted that the institution of the present suit was a wrong procedure. Reference was made to sections 1, 2, 3, 4, sub-sections (4) and (5), sections 6, 7, sub-sections (1), (2), (3), sections 8—10, 24, 25, 26, 30, 39, 43 and 52. Act VIII of 1890 has been decided to be a code for the decision of all questions relating to guardians and wards, and superseding all other legislation in these matters; [illegible]

(1) The judgments of the High Court will be found in Annie Besant v. Narayaniah (1914) 15 M.L.T., 1.

Sham Lal v. *Bindo*(1); though other Courts have held that there appeared to be nothing in Act VIII of 1890 to take away the jurisdiction to proceed by suit, as might have been done when Act IX of 1861 (relating to minors) was in force; though that Act was different and dealt only with procedure: see *Ghasita* v. *Wazira*(2), *Sharifa* v. *Munekhan*(3) and *Krishna* v. *Reade*(4).

As to the jurisdiction of the High Court when the case was transferred to it under clause 13 of the Letters Patent of the High Court, 1865, that Court had, it was submitted, under clause 20, in the trial of the case, only such jurisdiction as the District Court was possessed of. Reference was made to the constitution of the Supreme Court at Madras under the Letters Patent of 26th December 1800 (passed under 39 & 40 Geo. III, cap. 79); and the Letters Patent of the High Court, 1862 (passed under the Charter Act, 24 & 25 Vict., cap. 104), clause 16, which extended the jurisdiction of the Charter of 1800 to infants, and was amended by the Letters Patent, 1865, clause 17.

With regard to any jurisdiction the High Court might have outside that given by statute the order made should have followed the principles laid down by Lord ELDON in *Lyons* v. *Blenkin* (5) and *The Queen* v. *Gyngall*(6); *In re Agar Ellis*(7). The Custody of Infants Act 1873. The Guardians and Infants Act, 1886; the Custody of Children's Act 1891; and Ex parte *Mountfort*(8) per Lord ELDON, L.C. were referred to. Apart from statutory power the test was, was there contractual obligation? but there was none in this case. The writ of *habeas corpus* was not applicable: it has been done away with in India, and section 491 of the Criminal Procedure Code (Act V of 1898) enacted the present procedure. There was no power under section 9 of the Civil Procedure Code, 1908, because of Act VIII of 1890. Reference was made, as to the action of the Courts in England in matters of appointment of guardians, and the custody of children, to *Barnardo* v. *Ford*(9) and *Hope* v. *Hope*(10), where the Court refused to make an order which would not be complied with; and *In re Willoughby*(11). The statement of these principles of delegated power shows that it cannot be

(1) (1904) I.L.R., 26 All., 594.
(2) (1896) 32 Punjab Rec., 41.
(3) (1901) I.L.R., 25 Bom., 574.
(4) (1886) I.L.R., 9 Mad. 31.
(5) (1821) Jacob, 245.
(6) (1893) L.R., 2 Q.B., 232.
(7) (1883) L.R., 24 Ch. D., 317.
(8) (1809) 15 Ves. J., 447.
(9) (1892) L.R., A.C., 326.
(10) (1854) 4 De Gex. M. & G., 328 at pp. 332 and 334.
(11) (1885) L.R., 30 Ch. D., 324.

exercised by the High Court of Madras. If it can, it can be exercised by the District Court. The power is one delegated only to the LORD CHANCELLOR, and exercised now by the Court of Chancery.

The waiver or delegation by a father of his rights was revocable until acted upon; but when acted upon it was only revocable if it was for the infant's benefit that it should be revoked. In this case the agreement of 6th March 1910 had been acted upon for more than two years; and it was submitted that it was not for the benefit of the respondent's sons that they should be sent back to their father. It was indeed contrary to their welfare, and also against their own wishes that their English education should be put an end to, and that they should be sent back to India. Evidence was produced at the trial that the wishes of the boys were to remain in charge of the appellant, and under her control, and the Appellate Court should have taken it into consideration, but that Court excluded such evidence as being inadmissible.

In any case the decree ought not to have contained a mandatory injunction on the appellant to hand over the boys to the respondent, but should have been limited to an injunction restraining the appellant from interfering with their return to India, or with the respondent's efforts to recover the custody of them. In these proceedings there was no power to make any order affecting the status of the minors. With regard to the elder boy he attained his majority on 11th May 1913, since which date the order of the High Court had no effect with regard to his person; and it was submitted that no order should be made with regard to the younger boy which would involve his separation from his brother, to whom he was greatly attached. Even if the effect of the decree was, with reference to the Majority Act (IX of 1875), section 3, as amended by section 52 of Act VIII of 1890, to extend the period of minority of the elder boy from 18 to 21, such an extension ought not to have been made as he was on the point of attaining his majority, except for special reasons which did not exist in the present case.

The *Lord Advocate* (with him *Robert Munro, K.C., W. R. Sheldon* and *W. Ingram*) for the Interveners, stated in reply to the LORD CHANCELLOR that the boys strongly objected to return to India, and ardently wished to stay and continue their education in England. He had personally satisfied himself on that point.

Kenworthy Brown for the respondent contended that the High Court in India had jurisdiction to make the order appealed from. The suit in the District Court was competent under section 9 of the Civil Procedure Code (Act V of 1908); and it was competently transferred to the High Court under clause 13 of the Letters Patent, 1865. The High Court had jurisdiction independently of that which they exercised in the suit, and it was open to the High Court to exercise that independent jurisdiction. Under the Guardians and Wards Act (VIII of 1890) there was no machinery for working out what it was desired to obtain by the present suit; it was not practicable to adopt the procedure under section 25 of that Act The proceedings under Act VIII of 1890 could only be taken in a Court within the jurisdiction of which the minors were resident at the time. They were not at any time resident in the jurisdiction of the District Court at Chingleput, or of any Court in India, so that Act VIII of 1890 was not applicable. But a declaration could be made in the present suit that the respondent was the proper guardian of the minors notwithstanding that they were out of the jurisdiction. The suit was primarily for the purpose of considering the effect of the letters of March 6th, 1910, and that of 11th July 1912 which purported to cancel the authority given to the appellant by the former letter for the custody of the boys: it was a competent suit for that purpose. [Lord MOULTON Could it be a competent suit in the absence of the minors when its object was to effect an alteration in their status? Mr. AMEER ALI: With reference to section 42 of the Specific Relief Act (I of 1877) a mere declaration was not sufficient to maintain the suit.] One of the main issues was whether the respondent could revoke the authority he had given to the appellant for the custody and guardianship of his children. He was by Hindu Law their proper guardian, and, it was submitted, he was absolutely within his right in revoking the agreement contained in the letter of 6th March 1910, and in asking for a declaration that he was the guardian of his sons. Act VIII of 1890 did not exclude other modes of procedure, the particular relief asked for in the present suit could not have been obtained under it. Reference was made to *Sham Lal* v. *Bindo*(1). [The LORD CHANCELLOR: We do not think it necessary to decide whether the Act of 1890 is

(1) (1904) I.L.R., 26 All., 594.

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an exhaustive Code.] It was desirable and necessary in the interests of the boys who were both minors, that the order made should be upheld and carried out. [The LORD CHANCELLOR said that his present opinion was that the proceedings were misconceived, and had been brought in a wrong form. Owing to the minors not having been represented sufficient attention was not paid to their interests and welfare with regard to the circumstances of the case, and the events which had happened since the respondent acquiesced in the appellant having charge of them.] In that view and if the proceedings as initiated cannot succeed counsel said he did not purpose to argue the case further

The LORD CHANCELLOR said their Lordships were of opinion that the judgment of the Courts below could not stand and would give their reasons in full on a later day.

The judgment of their Lordships was delivered by

LORD HALDANE, L.C., LORD MOULTON, LORD PARKER, SIR JOHN EDGE AND MR AMEER ALI.

Lord PARKER.—This is an appeal from an order made by the High Court of Madras in its Appellate jurisdiction on the 29th October 1913, confirming, with a variation as to costs, a decree of Mr. Justice BAKEWELL in a suit in which G. Narayaniah (the present respondent) was plaintiff, and Annie Besant (the present appellant) was defendant. The decree declared that J. Krishnamurti and J. Nityananda, the sons of the plaintiff, were wards of Court and that the plaintiff was guardian of their persons, and ordered the defendant to hand over the custody of the wards to the plaintiff as such guardian.

The facts which gave rise to the action were as follows:—The plaintiff is a Hindu residing at Madras. He is a Brahmin, but is not well off, having an income of some 160*l.* per annum only. He was for many years a member of a society called the Theosophical Society, of which the defendant was president and was well acquainted with her. He had two sons, J. Krishnamurti and J. Nityananda, born respectively on the 11th May 1895 and 30th May 1898. Early in 1910 the defendant offered to take charge of these sons and defray the expense of their maintenance and education in England and at the University of Oxford. The plaintiff thought it desirable to take advantage of the opportunity thus afforded of giving his sons a western education, notwithstanding it would entail a loss of caste. He accordingly accepted the defendant's offer, and by a letter to the defendant, dated the 6th March 1910, affected to appoint the

defendant to be guardian of their persons and authorised her to act as such from that time forward.

In their Lordships' opinion the principle on which the legal effect of such a letter falls to be determined do not admit of dispute.

There is no difference in this respect between English and Hindu Law. As in this country so among the Hindus, the father is the natural guardian of his children during their minorities, but this guardianship is in the nature of a sacred trust, and he cannot therefore during his lifetime substitute another person to be guardian in his place. He may, it is true, in the exercise of his discretion as guardian, entrust the custody and education of his children to another, but the authority he thus confers is essentially a revocable authority, and if the welfare of his children require it, he can, notwithstanding any contract to the contrary, take such custody and education once more into his own hands. If, however, the authority has been acted upon in such a way as, in the opinion of the Court exercising the jurisdiction of the Crown over infants, to create associations or give rise to expectations on the part of the infants which it would be undesirable in their interests to disturb or disappoint, such Court will interfere to prevent its revocation : *Lyons* v. *Blenkin*(1).

Shortly after the respondent accepted her offer the appellant took charge of the boys and they have since been in her custody and she has defrayed the expense of their maintenance and education. In February 1912 they left India in her company, and after staying with her for some time in Sicily and Italy finally accompanied her to England, where she left them under the charge of Mrs. Jacob Bright, having made arrangements for their having a course of tuition such as would enable them to enter the University of Oxford.

Though the respondent's confidence in the appellant appears to have been shaken sometime previously for reasons to which it is unnecessary to refer, he assented to, or at any rate acquiesced in, the departure of his sons in her company for Europe. Nevertheless on the 11th July, 1912 he wrote the appellant a letter cancelling his previous letter of the 6th March, 1910, demanding that his sons should be restored to his custody and threatening proceedings if such demand were not complied with. The appellant who had returned to India refused to comply with

(1) (1821) Jac., 245.

such demand, and the respondent thereupon commenced a suit in the District Court of Chingleput, in the Madras Presidency, asking to have it declared, that he was entitled to the guardianship and custody of his sons, and that the appellant was not entitled to, or in any case was unfit to be in charge and guardianship of such sons, and for an order on the appellant to hand over such sons to the respondent or such other person as to the Court might seem meet.

In their Lordships' opinion this suit was entirely misconceived It was not, and indeed could not be disputed that the plaintiff remained the guardian of his children notwithstanding that he had affected to substitute the defendant as guardian in his place. The real question was whether he was still entitled to exercise the functions of guardian and resume the custody of his sons and alter the scheme which had been formulated for their education. Again, it was not and could not be disputed that the letter of the 6th March 1910 was in the nature of a revocable authority. The real question was whether in the events which had happened the plaintiff was at liberty to revoke it. Both questions fell to be determined having regard to the interests and welfare of the infants bearing in mind, of course, their parentage and religion, and could only be decided by a Court exercising the jurisdiction of the Crown over infants, and in their presence. The District Court in which the suit was instituted had no jurisdiction over the infants except such jurisdiction as was conferred by the Guardians and Wards Act, 1890. By the ninth section of that Act the jurisdiction of the Court is confined to infants ordinarily resident in the district. It is in their Lordships' opinion impossible to hold that infants who had months previously left India with a view to being educated in England and going to the University of Oxford were ordinarily resident in the district of Chingleput. Further a suit *inter partes* is not the form of procedure prescribed by the Act for proceedings in a District Court touching the guardianship of infants. It is true that the suit was subsequently transferred to the High Court under clause 13 of the Letters Patent, 1865, but the powers of the High Court in dealing with suits so transferred would seem to be confined to powers which but for the transfer might have been exercised by the District Court.

Again, the relief asked for was a mandatory order directing the defendant to take possession of the persons of the infants in

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at pleasure, and that the directions in question were properly given by virtue of such general jurisdiction. It is to be observed, however, that whatever may have been the jurisdiction of the High Court to declare the infants to be wards of Court, an order declaring a guardian could only be made if their interests required it, and, as appears above, they were not before the Court, nor were their interests adequately considered. And further, no order declaring a guardian could by reason of the 19th section of the Guardians and Wards Act, 1890, be made during the respondent's life unless in the opinion of the Court he was unfit to be their guardian, which was clearly not the case.

Since the appeal has been presented the infants have obtained the leave of the Board to intervene therein and be heard by Counsel. Counsel on their behalf have appeared before their Lordships' Board and stated that the infants do not desire to return to India or abandon their chance of obtaining an university education in this country. The order of the High Court directing the defendant to take them back to India cannot be lawfully carried out without their consent or without an order from the Court exercising the jurisdiction of the Crown over infants in this country. It is and always was open to the respondent to apply to His Majesty's High Court of Justice in England for that purpose. If he does so the interests of the infants will be considered, and care will be taken to ascertain their own wishes on all material points. Their Lordships do not consider it desirable to express any opinion of their own on questions with which only the High Court in England can deal satisfactorily. It is enough to say that the order made by the Trial Judge in India as varied by the High Court in its Appellate jurisdiction cannot stand, and their Lordships will humbly advise His Majesty that the same ought to be discharged, and the suit dismissed with costs both here and in the Courts below, but without prejudice to any application the respondent may think fit to make to the High Court in England touching the guardianship, custody and maintenance of his children.

Appeal allowed.

Solicitors for the appellant: *Lee and Pembertons.*

Solicitor for first respondent: *Douglas Grant.*

Solicitors for the intervener respondents: *Caller, [illegible] and Petheck.*

APPELLATE CIVIL—FULL BENCH.

Before Sir Charles Arnold White, Kt., Chief Justice, Mr. Justice Sankaran Nair and Mr. Justice Oldfield.

MADURAI PILLAI (DEFENDANT), APPELLANT,

v.

T. MUTHU CHETTY (PLAINTIFF), RESPONDENT.*

1913. November 5 and 1914 January 5.

Presidency Small Cause Courts Act (XV of 1882), ss. 9 and 38—New trial, application for—Right of a party to apply—Presidency Small Cause Court Rules, O XLI, r. 2, ultra vires—High Court, power of, to make rules—Matters of practice or procedure—Right of a party to apply, not a matter of practice or procedure

The rules of the Presidency Small Cause Court are made by the High Court under the powers conferred by section 9 of the Presidency Small Cause Courts Act, of 1882, as amended by the Act of 1895

That section only empowers the High Court to make rules with reference to matters of practice or procedure and not matters of substantive right

On a true construction of section 38 of the Act, the power given to the Court is really a right given to a party to apply for a new trial: such right like the right of appeal, is not a matter of practice or procedure.

Order XLI, rule 2 of the Presidency Small Cause Court Rules which requires at the time of presenting an application for new trial, either the deposit in Court of the decree amount or the giving of security for the due performance of the decree is inconsistent with the statutory right given by section 38 of the Presidency Small Cause Courts Act and is *ultra vires*

Attorney-General v. *Sillen*(1864) 11 E R, 1200, s c, 10 H.L C, 704, referred to

Colonial Sugar Refining Company v. *Irving* (1905) L.R., A.C., 369, referred to.

PETITION under section 115, Civil Procedure Code (Act V of 1908), praying the High Court to revise the order of the Full Bench of the Court of Small Causes in Full Bench. Application No. 96 of 1912 in Small Cause Suit No. 12034 of 1912.

The necessary facts appear from the Order of Reference to the Full Bench.

V. Raghunatha Sastriyar and *C. Krishnamachariyar* for *K. Bhashyam Ayyangar* for the petitioner.

P. M. Sivagnana Mudaliyar for the respondent.

This petition came on for hearing before SANKARAN NAIR and AYLING, JJ., who made the following

ORDER OF REFERENCE TO THE FULL BENCH.

SANKARAN NAIR, J.—A decree was passed against the petitioner by a single Judge of the Madras Court of Small Causes, SANKARAN NAIR, J.

* Civil Revision Petition No. 952 of 1912.

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at pleasure, and that the directions in question were given by virtue of such general jurisdiction. It is to be o however, *that whatever may have been the jurisdictio* High Court to declare the infants to be wards of C order declaring a guardian could only be made if their required it, and, as appears above, they were not before t nor were their interests adequately considered. And no order declaring a guardian could by reason of the 19t of the Guardians and Wards Act, 1890, be made du respondent's life unless in the opinion of the Court he to be their guardian, which was clearly not the case.

Since the appeal has been presented the infants have the leave of the Board to intervene therein and be h Counsel. Counsel on their behalf have appeared bef Lordships' Board and stated that the infants do not return to India or abandon their chance of obtaining an u education in this country. The order of the *High Cou* ing the defendant to take them back to India cannot be carried out without their consent or without an order Court exercising the jurisdiction of the Crown over in this country. It is and always was open to the respon apply to His Majesty's High Court of Justice in *Engl* that purpose. If he does so the interests of the infant considered, and care will be taken to ascertain their own on all material points. Their Lordships do not con desirable to express any opinion of their own on questi which only the High Court in England can deal satisf. It is enough to say that the order made by the *Trial J* India as varied by the *High Court in its Appellate juris* cannot stand, and their Lordships will humbly advise H jesty that the same ought to be discharged, and the su missed with costs both here and in the Courts below, but prejudice to any application the respondent may think make to the *High Court in England touching* the guardi custody and maintenance of his children.

Appeal allowed.

Solicitors for the appellant: *Lee and Pembertons.*

Solicitor for first respondent: *Douglas Grant.*

Solicitors for the intervener respondents: *Callr, W..ls and Petheck.*

to the High Court to cut down the jurisdiction of the Small Cause Court. The rule is said to have been framed by the High Court, "by virtue of the powers conferred by the Presidency Small Cause Courts Act, 1882, and the Acts amending the said Act and of all other powers hereunto enabling." If it is this Act itself that gives power to the High Court to frame rules, then, apparently, the High Court has no power to cut down the jurisdiction. The section in the Small Cause Courts Act under which these rules are framed, is apparently section 9 of the Act. That section places the Small Cause Court under the jurisdiction of the High Court, for the exercise of the powers which are conferred upon it by the Letters Patent, by the Civil Procedure Code, the Legal Practitioners Act and 24 and 25 Vict., c. 104, section 105. Now if that is the only section under which the High Court can frame these rules, then, as I have said before, I am disposed to think that the High Court had no jurisdiction to frame this rule.

But apart from the Small Cause Courts Act, the High Court has certain powers over the Civil Courts in the Presidency, under the enactments and Letters Patent above referred to, and the rules are also said to have been framed under all other powers enabling the High Court to make the rules. Therefore the question arises whether, apart from section 9 of the Small Cause Courts Act, the High Court had not the power under the other provisions of law to make the rule in question. This question has not been argued before us. Such power, if vested in the High Court under the above provisions of law, cannot be taken away by implication. If the Indian Legislative Council is entitled to cut down the power of the High Court, then it must be borne by express enactment and not by implication. I have also considered the question, whether the Small Cause Court, having acted under these rules or rules similar to these, framed under the same powers, from 1882 up to this date, may not have impliedly accepted the rules as their own. But I am not able to accept this suggestion The mind of the Small Cause Court was never directed to the question, and they never considered whether they had the right to accept or discard these rules. The question is one of great importance and affects the procedure of the Court and might affect the validity of numerous decisions. I therefore refer to a Full Bench the question,

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whether Order XLI, rule 2 of the Presidency Small Cause Court Rules is *ultra vires.*

AYLING, J.

AYLING, J.—I agree to the reference proposed by my learned brother.

This petition coming on for hearing before the Full Bench, the Court expressed the following Opinion:—

V. Raghunatha Sastriyar and *C. Krishnamachariyar* for *K. Bhashyam Ayyangar* for the petitioner.

P. M. Sivagnana Mudaliyar for the respondent.

WHITE, C.J.

WHITE, C.J.— The question which has been referred to us in this case is,— "Whether Order XLI, rule 2 of the Presidency Small Cause Court rules is *ultra vires.*" The rule provides that no application (for a new trial) shall be entertained unless the applicant at the time of presenting the application either deposits in Court the amount due from him under the decree or order, or gives security to the satisfaction of the Court or the Registrar for the performance of the decree or order in respect of which the application is made. The power to grant a new trial in a suit in the Presidency Small Cause Court is regulated by section 38 which provides "where a suit is contested, the Small Cause Court may on the application of either party made within eight days from the date of the decree or order in the suit, order a new trial to be held, or alter, set aside or reverse the decree or order upon such terms as it thinks reasonable." The rules of the Presidency Small Cause Court are made under the powers conferred by section 9 of the Presidency Small Cause Courts Act of 1882. Under the Act as it originally stood, there was a power in the Small Cause Court itself, with the previous sanction of the High Court, to make rules. In 1895 that section was repealed and the power to make rules was given to the High Court. The terms of the section which empowers the High Court to make rules in reference to the Small Cause Court are very wide. The general rule is, no doubt, that stated in the case referred in the order of reference, *Reg.* v. *Bird Needles* ex parte(1), that is, "where a power to make regulations is given by a statute, no regulations made under the statute can abridge a right conferred by the statute itself." That is the general rule. But if by statutory enactment a power is given to a rule-making authority

(1) (18[illegible]) [illegible] Q.B., [illegible]

to make rules, the rules, as it seems to me if they were within the power given, would be good even if they purported to abridge the rights given by the statute.

I think the only question we have to decide is, is this rule within the powers conferred upon the High Court by the section which was introduced into the Act in 1895? Now whatever may be the true construction of this section, one thing seems clear and that is, it only empowers the High Court to make rules with reference to matters of practice or procedure. It cannot, as it seems to me, be suggested that the terms of the section are wide enough to give this Court power to make rules with regard to matters of substantive right, or matters which are not practice or procedure. Then the question is,—can it be said that the right to apply for a new trial is a matter of practice or procedure? Section 38 which regulates this question of new trials is, perhaps, somewhat curiously worded. It does not say in so many words that a party has the right to apply for a new trial. It says that "the Small Cause Court may, on the application of the party, order a new trial." But I think on the true construction of the section it gives a right to a party to apply for a new trial.

As regards the right of appeal, the right of appeal being a creature of that statute, I think it is well settled that a right of appeal is not a matter of practice or procedure. I may refer to certain observations made by Lord WESTBURY in a case to which our attention has been called, *Attorney-General* v. *Sillem*(1). The LORD CHANCELLOR thus describes the right of appeal: he says "the right of appeal is the right of entering a superior Court and invoking its aid and interposition to redress the error of the Court below. It seems absurd to denominate this paramount right part of the practice of the inferior tribunal." Our attention has also been called to a decision of the House of Lords, *Colonial Sugar Refining Company* v. *Irving*(2), in which there is an observation by Lord MACNAGHTEN:—"To deprive a suitor in a pending action of an appeal to a superior tribunal which belonged to him as of right is a very different thing from regulating procedure." Now can we draw any distinction between a right of appeal conferred by statute and the right to

(1) (1864) 11 E R., 1200 at p. 1209, s c., 10 H.L C., 704.
(2) (1905) L.R., A.C., 369.

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WHITE, C.J.

apply for new trial? I think we cannot. Our attention has not been called to any case in which any such suggested distinction has been drawn, nor to any case in which it has been held that the right to apply for a new trial is a matter of practice or procedure. Of course, there is no objection to the Small Cause Court, if they think fit, making it one of the terms which they are entitled to impose when they make an order for a new trial, that the condition imposed by Order XLI, rule 2, should be satisfied before they grant the application. But to say that the Small Cause Court has the power to do that is a very different thing from saying that the rule in question is a rule of practice or procedure and within the powers conferred by section 9. The preamble to the rules states that they are made "by virtue of the powers conferred by the Presidency Small Cause Courts Act of 1882 . . . and of all other powers hereunto enabling, the High Court . . . " Our attention has not been called to any power in the High Court in this connection outside the powers conferred by section 9 of the Presidency Small Cause Courts Act.

One word with regard to *Morgan* v. *Bowles*(1), which was cited in argument in support of the contention that the rule is bad. I do not think that either this case or *West Devon Great Consols Mine*(2), affords us any assistance with reference to the question as to whether the rule in question here is *ultra vires* or not. *Morgan* v. *Bowles*(1) had reference to a provision of an Act which imposed an obligation on a party appealing to give security for costs. Then certain rules were passed which did not reproduce this provision and it was held that the obligation to give security for costs under the Act continued. That case was decided upon the question of construction on the ground that the words of the rule did not abrogate the provision of the Act with reference to security for costs.

In *West Devon Great Consols Mine*(2), Lord BOWEN said with regard to this matter: "The rule 'generalia specialibus non derogant' applies" and he decided the question purely as one of construction. And Lord Justice COTTON in his judgment says "Assuming, without deciding, that the Rule Committee had power to take away this condition with regard to the security

(1) (1894) 1 Q.B. 236.

(2) (1883) 23 Ch. D. 21.

for costs or with regard to the deposit, they had not purported to do so."

MADURAI PILLAI v. MUTHU CHETTY.

WHITE, C.J., SANKARAN NAIR, J., OLDFIELD, J.

It seems to me, for the reasons I have stated the answer to the question referred to us is that the rule is *ultra vires*.

SANKARAN NAIR, J.—I agree that the rule is *ultra vires*.

OLDFIELD, J.—I concur.

K.R.

APPELLATE CIVIL—FULL BENCH.

Before Sir John Wallis, Kt., Chief Justice, Mr. Justice Ayling and Mr Justice Seshagiri Ayyar.

PONNAMMAL (PLAINTIFF), APPELLANT,

1914. February 9, and September 21 and 24.

v

RAMAMIRDA AIYAR AND TWO OTHERS (DEFENDANTS) RESPONDENTS.*

Civil Procedure Code (Act V of 1908), O II, rr. 2 and 4—Previous suit for possession of lands only—Claim for past mesne profits, not included—Subsequent suit for the same, not barred—Cause of action for mesne profits different from that for possession of land

Claim for possession and claim for mesne profits are separate causes of action and have been always so treated under the Codes of Civil Procedure.

Where a plaintiff sued for possession of lands only when he might have joined in the same action claims for *mesne* profits and damages, it is open to him to bring a subsequent suit against the same defendants for the profits which became payable before the institution of the former suit and which might have been included in such suit.

Monohur Lall v. *Gouri Sunkur* (1883) I.L.R., 9 Calc, 283; *Tirupati* v *Narasimha* (1888) I.L.R., 11 Mad., 210, *Lalessor Babui* v. *Janki Bibi* (1892) I.L.R., 19 Calc., 615 and *Gutta Saramma* v. *Maganti Raminedu* (1908) I L R, 31 Mad., 105, followed.

SECOND APPEAL against the decree of A. S BALASUBRAHMANYA AYYAR, the Subordinate Judge of Kumbakonam, in Appeal No. 840, preferred against the decree of K. GOPALAN NAIR, the District Munsif of Mannargudi, in Original Suit No. 117 of 1909.

The material facts appear from the Order of Reference to the Full Bench.

This Second Appeal came on for hearing before SANKARAN NAIR and AYLING, JJ. who made the following.

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* Second Appeal No 1804 of 1911.

ORDER OF REFERENCE TO THE FULL BENCH.

PONNAMMAL v. RAMAMIRDA AIYAR.

SANKARAN NAIR AND AYLING, JJ.

Plaintiff is the daughter-in-law of one Sundarappier. In a partition between him and his sons 30 *mahs* of land were allotted to him which under the partition deed on his death were to devolve in equal shares on the plaintiff's husband and his brothers, defendants Nos. 1 and 3. He died in 1888. On account of the minority of the plaintiff's husband, the defendants Nos. 1 and 3 continued in possession of the entire property including the plaintiff's husband's share, paying him his share of the profits till 1890. After her husband's death, the plaintiff sued for partition of her husband's share and got a decree. She now sues for mesne profits. The question for decision is, whether her claim for mesne profits prior to the institution of the suit for partition is barred.

The following cases are relied upon in favour of the plaintiff's contention :—

Monohur Lall v. *Gouri Sunkur*(1), *Tirupati* v. *Narasimha*(2), *Lalessor Babui* v. *Janki Bibi*(3) and *Gutta Saramma* v. *Maganti Raminedu*(4).

On behalf of the defendant, the following cases are relied upon :—

Venkoba v. *Subbanna*(5), *Mewa Kuar* v. *Banarsi Prasad*(6) and *Shanmugam Pillai* v. *Syed Gulam Ghose*(7).

All those cases are referred to and discussed in *Subraya Chetti* v. *Rathnavelu Chetti*(8), in which however the question argued before us was not decided.

On this question which we propose to refer to a Full Bench for decision, there is a real difference of opinion. We accordingly refer to the Full Bench the question :—

If a plaintiff sues for possession only when he might have joined in the same action claims for profits and damages, is it open to him to sue subsequently for the profits which became payable before the institution of the suit and which might have been included in such suit?

The Honourable Mr. *L. A. Govindaraghava Ayyar* for the appellant.

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(1) (1883) I.L.R., 9 Calc., 253.
(2) (1888) I.L.R., 11 Mad., 210.
(3) (1892) I.L.R., 19 Calc., 615.
(4) (1908) I.L.R., 31 Mad., 464.
(5) (1888) I.L.R., 11 Mad., 151.
(6) (1895) I.L.R., 17 All., 533.
(7) (1904) I.L.R., 27 Mad., 116.
(8) (1909) I.L.R., 32 Mad., 320.

KRISHNA BHOOPATHI DEO v. RAJA OF VIZIANAGARAM.

SPENCER, J.

transferred for execution; and the decision in *Hurrish Chunder Choudhry* v. *Kalisunderi Debi*(1) is cited as an instance of the High Court disposing of a similar question arising in the execution of an order of Her Majesty in Council. But in my opinion the position of an original Court, which itself passed a decree against which appeals have been carried up to the Privy Council, when it receives the order of His Majesty in Council transmitted to it by the High Court, is not to be compared with the position of a Court to which the decree of another Court has been transferred for execution. They are totally different positions.

Order XXI, rule 16, permits a transferee of a decree to apply for execution of the decree to the Court which passed it. Section 38 permits a decree to be executed either by the Court which passed it or by the Court to which it is sent for execution. Section 37 defines the expression "Court which passed a decree" as including the Court of first instance where there has been an appeal. Similar words are used in Order XLV, rule 15, where it is provided that the Court from which an appeal to His Majesty has been preferred shall transmit the order of His Majesty in Council to the Court *which passed the first decree* appealed from. The act of the High Court in receiving and filing an order of the Privy Council is a purely ministerial function (*vide* observation in *Premlall Mullick* v. *Sumbhoonath Roy*(2). It is so provided that the High Court should act as an intermediary for carrying out the orders of His Majesty in Council, because the Privy Council does not deal direct with subordinate Courts.

In the present instance the petition of the transferee decree-holder to transmit the order of the Privy Council with a prayer for a direction to bring him on record in that capacity came before a Bench of this Court, and the learned Judges who disposed of his application (the Chief Justice being one of the Bench) expressly refused to make any directions. Without treating him as having no *locus standi* to make the application they transmitted the order, without prejudice to his right to take and the original decree-holder's right to give an assignment of the decree in question.

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I therefore find nothing irregular or contrary to law in the action of the District Court in permitting the transferee to execute the decree, nor has the original decree-holder raised any objection to his doing so.

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Every document must be construed with reference to its particular terms, and differently worded documents afford but little assistance for correctly construing the document concerned in this case. We have referred to the power-of-attorney concerned in *Palaniappa Chettiar* v. *Arunachella Chettiar*(1) and we find that the scope of the agent's powers was far more limited than that of the powers conferred under Exhibit A. The learned Judges who decided that case observed that there was 'no clause of a comprehensive character which would show that the principal intended to confer plenary powers on his attorney, to deal with all properties and rights belonging to him.' While it is true, as laid down in that case, that established law requires a power-of-attorney to be construed strictly, it is also correct to hold that when an agent has a general power-of-attorney to act in some business or series of transactions he may be assumed to have all usual powers.

I feel no doubt that the words in Exhibit A "to conduct and manage all other the estate property, moneys, affairs and concerns of the zamindari . . . in all respects as fully and absolutely as the principal himself is empowered to do and (subject as aforesaid) to do, perform and carry out all such acts and deeds and things whatsoever as may be considered requisite for the above purposes as amply and effectually as the principal could do

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KRISHNA BHOOPATHI DEO v. RAJA OF VIZIANAGARAM.

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ANNAMALAI v. MURUGAPPA.

against the decree of K. APPAJI RAO, the *District Munsif of* Pattukkota, in Original Suit No. 312 of 1905.

S. Saundaraja Ayyangar for *T. Natesa Ayyar* for the appellants.

T. R. Venkatarama Sastriyar for the fifth respondent.

SADASIVA AYYAR AND SPENCER, JJ.

The JUDGMENT of the Court was delivered by SADASIVA AYYAR, J.

The plaintiffs are the appellants in this Second Appeal. The suit was brought for the cancellation of a rent-sale held at the instance of a receiver who represented the melvaramdars of certain lands. The receiver as such melvaramdar became the *landlord* of the plaintiffs and of the first defendant who are brothers. The *rent-sale* was held *on the footing* that the first defendant was the tenant owning the kudivaram right and after notice to him under section 39 of the Rent Recovery Act VIII of 1865 (now superseded). The plaintiffs' contention is that the first defendant did not own the kudivaram right on the date of notice under section 39, that in a partition effected between the plaintiffs and the first defendant about 1890, the plaint land and trees fell to the plaintiffs' share, that the proceedings connected with that rent-sale cannot bind the plaintiffs as they were not made parties to the said sale *proceedings and they were not given notice* under section 39 (Rent Recovery Act) and the notice given to the first defendant will not bind them, and that " there was no muchilika, attachment or sale proclamation with regard to plaint lands and trees." In the suit, they joined about 80 persons as defendants, the defendants Nos. 3 to 80 being the melvaramdars of the village in which the plaint lands are situated. One of the defences raised by these *melvaramdars* was *that as a receiver* had been *appointed* (Original Suit No. 8 of 1901 on the file of the Subordinate Judge's Court of Tanjore) to be in possession of the entire melvaram rights of all the melvaramdars till the disposal of that suit and as it was that receiver who gave the notice under section 39 of the Rent Recovery Act and brought the plaint properties to the sale in auction in which the second defendant purchased them, the *said receiver was a necessary party-defendant to the suit* and the suit was bad for non-joinder of that necessary party. The District Munsif overruled this contention on the ground that the receiver had no personal interest in the subject matter of the present suit and the melvaramdars (defendants Nos. 3 to 80) and the purchaser, second defendant, were the persons directly

interested. On appeal, the District Court of Tanjore held that the receiver was a necessary party. Its reasons are "that a receiver's acts are not necessarily or probably for the benefit of each of the parties to the proceedings, that he is not the representative of any or all of them, but of the Court and of the estate, the ownership of which is uncertain; that the object of his appointment is to provide a provisional representative of the estate, who can do legal acts without the question of title in dispute arising; and this object would be frustrated, if a plaintiff would go behind him and implead the contesting melvaramdars themselves." The District Court therefore remanded the suit to the District Munsif's Court for retrial after giving the plaintiffs an opportunity to make the receiver a supplemental defendant. When the receiver was accordingly made a supplemental defendant, more than one year had elapsed from the date of the rent-sale and the District Munsif dismissed the whole suit as barred by limitation as the necessary party, the defendant receiver was impleaded only after the period of one year prescribed by article 12 (*b*) of the Limitation Act. This second decision of the District Munsif's Court dismissing the suit as barred by limitation was confirmed by the District Judge on appeal. In Second Appeal before us, various contentions have been raised, but we think it is necessary to set out only the sixth and eighth grounds of the appeal memorandum which are as follows:—

"6. The receiver being an unnecessary party, the lower Appellate Court has erred in directing the plaintiff to add him as a party and then to dismiss the whole suit on the ground of limitation.

"8. The lower Appellate Court has erred in remanding the case. It should have disposed of the case on the merits."

We are of opinion that none of the melvaramdars nor the receiver is a necessary party to this suit to set aside a rent-sale and that it is only the second defendant the purchaser at the rent-sale who is a necessary party defendant. A landlord who under the Rent Recovery Act, VIII of 1865, takes steps by the issue of notice under section 39 and otherwise to bring the tenant's property to sale is not a party to the sale. Nor is such a sale held in execution of any decree to which he is a party. He has only to send a duplicate of the notice under section 39 to the Collector with an endorsement stating the date of service of the notice

ANNAMALAI v. MURUGAPPA.

SADASIVA AYYAR AND SPENCER, JJ.

and the mode of service effected and the Collector proceeds to sell the property under sections 40, 18, 33 and 35 of the Rent Recovery Act (section 40 making the other sections which directly relate to the mode of sale of moveable properties also apply to the mode of sale of immoveable properties). There is no provision in the Act indicating that the landlord who brings about an illegal or irregular sale is a necessary party to a suit brought in the Civil Court to have the sale set aside. Under Order I, rule 3, Civil Procedure Code, the proper persons to be joined as defendants in a suit are those "against whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally or in the alternative." When the sale of the kudivaram right in a land takes place under the auspices of the Collector under the Rent Recovery Act and the tenant (the owner of the kudivaram right) brings a suit to set aside that sale, the relief (the granting of which establishes or re-establishes the title of the plaintiff when so granted) will affect only the purchaser at the rent-sale and no other person; and hence the right to such relief exists only against the rent auction-purchaser. In the case of a sale under the Civil Procedure Code in execution of a decree, the setting aside of the sale will affect the decree-holder also, as under Order XXI, rule 93, if the sale is set aside, he cannot take or retain the purchase money towards his decree amount, and he will be further delayed in obtaining the fruits of his decree. Hence to proceedings under Order XXI, rule 90, he has been held to be a necessary party. Sales under the Rent Recovery Act, however, stand on a different footing. In *Bal Mokoond Lall* v. *Jirjudhun Roy*(1), the question was considered whether in a suit to set aside even a revenue sale, the Collector was a necessary party under the Bengal Act XI of 1859. We shall quote the following paragraphs of Mr. Justice MITTER's judgment (which on this point was concurred in fully by NORRIS, J.): "Then a question was raised to the effect that the plaintiff was bound to make the Secretary of State a party to this suit, and in support of the appellant's contention upon this point our attention was drawn to the provisions of section 33, Act XI of 1859. That section says: 'In the event of a sale

(1) (1883) I.L.R., 9 Calc., 61.

being annulled by a final decree of a Court of Justice, and the former proprietor being restored to possession, the purchase money shall be refunded to the purchaser by Government, together with interest at the highest rate of the current public securities.' Comparing this section with the analogous section in Regulation VIII of 1819, viz., section 14, which is to the effect that 'the purchaser shall be made a party in such suits, and upon decree passing for reversal of the sale, the Court shall be careful to indemnify him against all loss, at the charge of the Zamindar or person at whose suit the sale may have been made,' it appears to me that this section 35 by itself does not afford any ground for the contention that the Secretary of State was a necessary party to the suit It merely provides that in the event of a sale being annulled by a final decree of a Court of Justice, and the former proprietor being restored to possession, the purchase money shall be refunded to the purchaser by Government, together with interest at the highest rate of the current public securities. But although it appears to me to be clear that section 35 does not afford any support to the contention raised before us, yet it is by no means clear that the Government was not interested in the question raised in the suit, because, if the sale be set aside, the Collector will have to proceed *de novo* in the matter for the realization of the arrears of revenue. The Government, therefore, have such interest in the suit as would, on their application, entitle them to be made a party to it." Thus it was held that the Secretary of State is *not* a necessary party to the suit even if the Government would have to refund the purchase money if the sale was set aside. But as the Government was *interested* in the result of the suit by reason of the provision that the Government should refund the purchase money in the event of the sale being set aside, the Government might on *their application* be made a party to the suit. This view of the position of a person who brings about and conducts a revenue sale under the Bengal Act applies, it seems to us, *a fortiori* to the case of the person who brings about and conducts a rent-sale under the Act VIII of 1865. In *Balkishen Das* v. *Simpson*(1), their Lordships of the Privy Council had to deal with an objection raised by the respondent

(1) (1898) I.L.R., 25 Calc., 833.

ANNAMALAI v. MURUGAPPA. — SADASIVA AYYAR AND SPENCER, JJ.

that the Secretary of State for India had not been joined as a party to the appeal before them in a case which related to the setting aside of a revenue sale. Their Lordships say that "in their opinion the position of the Indian Secretary, in cases like the present, is correctly explained by Mr. Justice MITTER in *Bal Mokoond Lall* v. *Jirjudhun Roy*(1)." It is clear to us that but for the provision in section 315, Civil Procedure Code (Order XXI, rule 93) even the decree-holder will not be a necessary party to an application under *Order XXI, rule 90, or Order XXI, rule 91*, to set aside a Court auction sale and because the general rule of *caveat emptor* was relaxed in favour of a Court auction-purchaser in Order XXI, rule 91, and Order XXI, rule 93, the decree-holder is a necessary party in applications to set aside Court auction-sales. The order of remand, therefore by the District Court cannot be supported but it need not be set aside at this stage. Neither the melvaramdars nor the receiver being necessary parties to the present suit, the addition of the receiver merely for the purpose of safeguarding their interests (if any), will not make the provisions of section 22 of the Limitation Act applicable—see *Gururayya* v. *Dattatraya*(2). And the suit brought within the limitation period (assuming as against the plaintiffs, the suit has to be brought within one year after the sale) against the only necessary party-defendant (namely, the purchaser, second defendant) is not barred by limitation. We therefore set aside the decisions of the lower Courts dismissing the suit as barred and remand the suit to the Court of First Instance to decide the case on the issues Nos. 2 to 6 and any other questions which might arise other than those dealt with by us, that is, other than the question of limitation and the question of the receiver being a necessary party. None of the party defendants need, however, be struck off the record. The District Munsif will, in disposing of the case *de novo*, give findings on the merits of the case also (unless the suit is dismissed for default or is withdrawn or is compromised) in order to prevent further remands in this suit which is nearly nine years old already. All parties shall be at liberty to adduce evidence. Costs hitherto will abide the result of the fresh decision of the District Munsif.

K.R.

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(1) (1882) I.L.R., 9 Calc., 271. (2) (1904) I.L.R., 28 Bom., 11.

APPELLATE CIVIL.

Before Mr. Justice Miller and Mr. Justice Spencer.

PONNUSAMY PADAYACHI AND ANOTHER (DEFENDANTS Nos. 2 AND 3), APPELLANTS,

1914. January 9, 16 and 27.

v.

KARUPPUDAYAN AND ANOTHER (PLAINTIFF AND FIRST DEFENDANT), RESPONDENTS.*

Madras Estates Land Act (I of 1908), sec. 8, excep.; sec. 153, proviso; ss. 157 and 163—Shrotriemdar—Right to kudivaram, presumption as to—Acquisition of kudivaram right—Surrender or abandonment, effect of—Suit in ejectment—Jurisdiction of Civil or Revenue Courts—Tenant for a term—Tenant in possession after expiry of term—No subsequent recognition by landholder as tenant, effect of—Trespasser

The plaintiff, who was the shrotriemdar of a certain village brought a suit in the Civil Court to eject the defendant who was a tenant of some lands forming old waste under a lease for a period of three years which had expired before the Madras Estates Land Act came into force. *It was found that the defendant* had no occupancy right in the holding, and that he was not recognised as a tenant by the landholder after the expiry of the period of the lease. The defendant contended that the Civil Court had no jurisdiction to entertain the suit.

Held, that the Civil Court had jurisdiction to entertain the suit

Per MILLER, J —Surrender or abandonment by the tenant is one of the modes in which the landholder can acquire the kudivaram right so as to attract the provisions of the exception to section 8 of the Estates Land Act.

When it is found that a tenant has no occupancy right in his holding and that the land is not private land, the presumption is that the occupancy right is in the landholder either by the original grant or by prior or subsequent acquisition.

Per SPENCER, J —The provisions of section 153 of the Estates Land Act are not exhaustive of all possible cases of eviction; cases of eviction of tenants under leases for terms not exceeding five years are taken out of the Act by the proviso to section 153 and consequently out of the jurisdiction of the Revenue Courts.

A tenant in possession after the expiry of his term, who has not been recognised by the landholder as a tenant subsequent thereto, is a trespasser within the meaning of section 163 of the Act, and consequently a suit in ejectment can be instituted against him in a Civil Court

SECOND APPEAL against the decree of F. H. HAMNETT, the District Judge of South Arcot, in Appeal No. 64 of 1912, preferred

* Second Appeal No. 366 of 1913.

PONNUSAMY PADAYACHI v. KARUPPUDAYAN.

against the decree of S. RAGHAVA AYYANGAR, the District Munsif of Vridhachalam, in Original Suit No. 1840 of 1910.

The facts of the case appear from the judgment of SPENCER, J.

The Honourable Mr. *L. A. Govindaraghava Ayyar* for the appellants.

C. V. Anantakrishna Ayyar for the first respondent.

MILLER, J.

MILLER, J.—Mr. C. V. Anantakrishna Ayyar, vakil for the first respondent, does not support the view of the case taken by the District Judge, but argues that the land in question is not part of an estate within the meaning of the Madras Estates Land Act, and contends also conceding that the position of the second defendant is that of a ryot of old waste, that by virtue of the proviso to section 153 of the Madras Estates Land Act the jurisdiction of the Civil Courts is nevertheless not ousted. Mr. L. A. Govindaraghava Ayyar, vakil for the appellants, accepting as the position of his clients that of a non-occupancy ryot, being a ryot of old waste, argues on the strength of *Atchaparaju v. Krishnayachendralu*(1) that section 157 nullifies the effect of the proviso to section 153 which otherwise would, he concedes, be applicable to the facts of the case and so would save the jurisdiction of the Civil Ceourt. The District Judge has not decided the question whether the land is or is not part of an estate and the District Munsif has decided that it is part of an estate. I am of opinion that on the fact found and not now contested, that the second defendant has no occupancy right, the presumption arises that the occupancy right was either granted to or acquired by the inamdar. That presumption was the basis of the finding of the Subordinate Judge of Tanjore in *Rajaram Rao v. Sundaram Aiyar*(2), and was, as I understand, the judgment of SANKARAN NAIR, J., in that case accepted in this Court as sufficient to attract to the case the exception to section 8 of the Madras Estates Land Act.

It is argued here on the strength of certain cases in Bombay that if we presume, as we must in this case presume, the original grant to have been the grant of the revenue only, the fact that the occupant has no occupancy right is not sufficient to show that the inamdar has acquired that right. These cases do not

(1) (1913) 24 M.L.J., 402 (2) (1910) M.W.N., 274

support that contention. In *Ramchandra* v. *Venkatrao*(1), it is said that the *saranjamdar* may deal with unoccupied lands and cultivate it by himself or through tenants not as grantee of the soil but for purposes of revenue, and that observation is explained in *Ganpatrav Trimbak Patwardhan* v. *Ganesh Baji Bhat*(2), as equivalent to a decision that the *saranjamdar* may acquire occupancy rights which would be unaffected by the resumption of the grant. Far from supporting the appellants this latter case supports the view taken by the Subordinate Judge in *Rajaram Rao* v. *Sundaram Aiyar*(3). The other case is *Rajya* v. *Balkrishna Gangadhar*(4), where it is pointed out at page 420 that lands unoccupied at the time of the grant would be *sheri*, that is, as I understand it private land [vide *Ganpatrav Trimbak Patwardhan* v. *Ganesh Baji Bhat*(2)], and if that is so, the case does not help the appellants. It seems to me that these cases support the view that when it is found that a tenant has no occupancy right in his holding, and the land is not private land, the presumption is that the occupancy right is in the landholder either by the original grant or by prior or subsequent acquisition. It is argued that under the exception to section 8 of the Madras Estates Land Act, the landholder must be shown to have acquired the occupancy right in some particular way, but I cannot accede to that argument I agree with the view taken upon that point by SPENCER, J., in *Suryanarayana* v. *Patanna*(5). It is, I think, an unsafe method of construing the statute to restrict the meaning of the word 'acquire' in the exception to section 8, merely on the ground that in section 6 (2) and for the purposes of that section, the Legislature does not permit the landholder before the lapse of ten years indefeasibly to acquire the occupancy right in land abandoned or surrendered. The exception to section 8 is referred to in section 6 (2) and the effect of that may be that in construing section 6 (2) we shall have to exclude surrender and abandonment from the methods of acquisition by which a landholder may at once acquire indefeasibly an occupancy right, but that does not appear to me to afford a reason for restricting

(1) (1882) I.L.R., 6 Bom., 598 at p. 608.
(2) (1886) I.L.R., 10 Bom., 112 at p. 117.
(3) (1910) M.W.N., 566.
(4) (1905) I.L.R., 29 Bom., 415.
(5) (1915) I.L.R., 38 Mad., 603.

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MILLER, J.

the meaning of the word 'acquire' when the context does not compel us to do so. In the present case, we have to take it that the inam is one to which section 3 (2) (*d*) applies and consequently that there is a kudivaram right in the land. That kudivaram right must be in some one, and it is not shown to be in any third party: it is, *ex concessis*, not in the second defendant, it must, therefore, so far as I can see, be in the landholder: that is, for our purpose in the plaintiff and if we cannot, in the circumstances, hold that it was granted to him along with the melvaram or that he had it before the grant (in either of those cases the second defendant is out of Court), it follows to my mind that he has acquired it since the grant. The land is therefore not part of an estate and it is not contended that on the merits the second defendant has any claim to remain in possession. On this ground, and without deciding the other questions, I would dismiss the Second Appeal with costs.

SPENCER, J.

SPENCER, J.—The first appellant is a tenant of old waste in a shrotriem village within one of the meanings of clause 7 of section 3 of the Madras Estates Land Act, that is, he occupies ryoti land in respect of which before the passing of the Act the landholder had obtained a final decree of a competent Civil Court establishing that the ryot had no occupancy right. I take the words "final decree" to mean what the Full Bench in *Gorakala Kanakayya* v. *Janardana Padhi*(1) decided they meant, viz., a decree which has ceased to be liable to be modified on appeal, and I refer to the judgments filed as G series K and L.

In fact first appellant's pleader does not now contend that his client possesses any occupancy right.

Exhibit C_1 is the counterpart of a lease for three years executed by second defendant to the landholder on May 15th, 1905. It expired on May 15th, 1908, but on its expiry the tenant held over. The Madras Estates Land Act came into force on July 1st, 1908. No right of occupancy accrued to him as being in possession at the date of the introduction of the Act by virtue of section 6, because that section especially excepts old waste.

The question is whether the first appellant is liable to be evicted, and if so, whether the first respondent can obtain his remedy in a Civil Court. I take it that the first respondent

(1) (1910) M.W.N., 641.

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SPENCER, J.

(plaintiff) who purchased this land under Exhibit A, a sale-deed of August 2nd, 1908, from second respondent, had no power of evicting tenants which the second respondent did not himself possess previously. Certain powers are given to land-holders under section 153 of the Act of evicting non-occupancy ryots and No. 19, part A of Schedule to the Madras Estates Land Act, shows that suits to enforce those powers must be brought in a Revenue Court. The present case does not fall under any of the grounds detailed in the body of that section. The District Munsif held, I think rightly, that the proviso to section 153 has the effect of taking the case of non-occupancy ryots holding under an expired lease granted before the Act out of the jurisdiction of the Collector's Court. This proviso runs thus:—

"Nothing in this section shall affect the liability of any "person who is a non-occupancy ryot according to the provi-"sions of this Act to be ejected on the ground of expiry of the "term of a lease granted before the commencement of this Act."

It is plain that the provisions of section 153 are not exhaustive of all possible cases of eviction. Clause (e), for instance, provides for tenants under leases for more than 5 years holding over. There is no provision for tenants under shorter leases holding over. It is absurd to suppose that the legislature intended to favour persons on short tenure more than those on long tenure and to protect the former class from eviction under any circumstances. For such persons there exist the general provisions of law, among which one is that on the determination of a lease the lessee is bound to put the lessor into possession of the property. Section 19 of the Act shows that its provisions were not intended to be exhaustive of all the relations of landlord and tenant

When the Bill was being passed into law there was a discussion whether the Revenue Courts were not usurping too many of the powers of the ordinary Civil Courts of ejecting trespassers, among whom were included persons occupying ryoti land otherwise than by inheritance or legal transfer and without being admitted as ryots. (See pages 500—507, *Fort St. George Gazette* of March 17, 1908.) The introducer of the Amendment Bill explained the necessity for meeting the case of tenants under a lease for a term not exceeding five years holding over after its expiry. Such cases were therefore by the proviso

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MILLER, J.

the meaning of the word 'acquire' when the context does not compel us to do so. In the present case, we have to take it that the inam is one to which section 3 (2) (*d*) applies and consequently that there is a kudivaram right in the land. That kudivaram right must be in some one, and it is not shown to be in any third party: it is, *ex concessis*, not in the second defendant, it must, therefore, so far as I can see, be in the landholder: that is, for our purpose in the plaintiff and if we cannot, in the circumstances, hold that it was granted to him along with the melvaram or that he had it before the grant (in either of those cases the second defendant is out of Court), it follows to my mind that he has acquired it since the grant. The land is therefore not part of an estate and it is not contended that on the merits the second defendant has any claim to remain in possession. On this ground, and without deciding the other questions, I would dismiss the Second Appeal with costs.

SPENCER, J.

SPENCER, J.—The first appellant is a tenant of old waste in a shrotriem village within one of the meanings of clause 7 of section 3 of the Madras Estates Land Act, that is, he occupies ryoti land in respect of which before the passing of the Act the landholder had obtained a final decree of a competent Civil Court establishing that the ryot had no occupancy right. I take the words "final decree" to mean what the Full Bench in *Gorakala Kanakayya* v. *Janardana Padhi*(1) decided they meant, viz., a decree which has ceased to be liable to be modified on appeal, and I refer to the judgments filed as G series K and L.

In fact first appellant's pleader does not now contend that his client possesses any occupancy right.

Exhibit C_2 is the counterpart of a lease for three years executed by second defendant to the landholder on May 15th, 1905. It expired on May 15th, 1908, but on its expiry the tenant held over. The Madras Estates Land Act came into force on July 1st, 1908. No right of occupancy accrued to him as being in possession at the date of the introduction of the Act by virtue of section 6, because that section especially excepts old waste.

The question is whether the first appellant is liable to be evicted, and if so, whether the first respondent can obtain his remedy in a Civil Court. I take it that the first respondent

(1) (1910) M.W.N., 641.

PONNUSAMY PADAYACHI v. KARUPPUDAYAN.

SPENCER, J.

(plaintiff) who purchased this land under Exhibit A, a sale-deed of August 2nd, 1908, from second respondent, had no power of evicting tenants which the second respondent did not himself possess previously. Certain powers are given to landholders under section 153 of the Act of evicting non-occupancy ryots and No. 19, part A of Schedule to the Madras Estates Land Act, shows that suits to enforce those powers must be brought in a Revenue Court. The present case does not fall under any of the grounds detailed in the body of that section. The District Munsif held, I think rightly, that the proviso to section 153 has the effect of taking the case of non-occupancy ryots holding under an expired lease granted before the Act out of the jurisdiction of the Collector's Court. This proviso runs thus:—

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It is plain that the provisions of section 153 are not exhaustive of all possible cases of eviction. Clause (*e*), for instance, provides for tenants under leases for more than 5 years holding over. There is no provision for tenants under shorter leases holding over. It is absurd to suppose that the legislature intended to favour persons on short tenure more than those on long tenure and to protect the former class from eviction under any circumstances. For such persons there exist the general provisions of law, among which one is that on the determination of a lease the lessee is bound to put the lessor into possession of the property. Section 19 of the Act shows that its provisions were not intended to be exhaustive of all the relations of landlord and tenant.

When the Bill was being passed into law there was a discussion whether the Revenue Courts were not usurping too many of the powers of the ordinary Civil Courts of ejecting trespassers, among whom were included persons occupying ryoti land otherwise than by inheritance or legal transfer and without being admitted as ryots. (See pages 500—507, *Fort St. George Gazette* of March 17, 1908.) The introducer of the Amendment Bill explained the necessity for meeting the case of tenants under a lease for a term not exceeding five years holding over after its expiry. Such cases were therefore by the proviso

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the meaning of the word 'acquire' when the context does not compel us to do so. In the present case, we have to take it that the inam is one to which section 3 (2) (*d*) applies and consequently that there is a kudivaram right in the land. That kudivaram right must be in some one, and it is not shown to be in any third party: it is, *ex concessis*, not in the second defendant, it must, therefore, so far as I can see, be in the landholder: that is, for our purpose in the plaintiff and if we cannot, in the circumstances, hold that it was granted to him along with the melvaram or that he had it before the grant (in either of those cases the second defendant is out of Court), it follows to my mind that he has acquired it since the grant. The land is therefore not part of an estate and it is not contended that on the merits the second defendant has any claim to remain in possession. On this ground, and without deciding the other questions, I would dismiss the Second Appeal with costs.

SPENCER J

SPENCER, J.—The first appellant is a tenant of old waste in a shrotriem village within one of the meanings of clause 7 of section 3 of the Madras Estates Land Act, that is, he occupies ryoti land in respect of which before the passing of the Act the landholder had obtained a final decree of a competent Civil Court establishing that the ryot had no occupancy right. I take the words "final decree" to mean what the Full Bench in *Gorakala Kanakayya* v. *Janardana Padhi*(1) decided they meant, viz., a decree which has ceased to be liable to be modified on appeal, and I refer to the judgments filed as G series K and L.

In fact first appellant's pleader does not now contend that his client possesses any occupancy right.

Exhibit C_1 is the counterpart of a lease for three years executed by second defendant to the landholder on May 15th, 1905. It expired on May 15th, 1908, but on its expiry the tenant held over. The Madras Estates Land Act came into force on July 1st, 1908. No right of occupancy accrued to him as being in possession at the date of the introduction of the Act by virtue of section 6, because that section especially excepts old waste.

The question is whether the first appellant is liable to be evicted, and if so, whether the first respondent can obtain his remedy in a Civil Court. I take it that the first respondent

(1) (1910) M.W.N., 641.

PONNUSAMY PADAYACHI v. KARUPPUDAYAN.

SPENCER, J.

(plaintiff) who purchased this land under Exhibit A, a sale-deed of August 2nd, 1908, from second respondent, had no power of evicting tenants which the secon[d] respondent did not himself possess previously. Certain po[wers] . . . a to land-holders under section 153 of the Act o[n] . . . n-occupancy ryots and No. 19, part A of Schedu[le] . . . adras Estates Land Act, shows that suits to enfor[ce] . . . powers must be brought in a Revenue Court. The pr[esent] case does not fall under any of the grounds detailed in t[he] body of that section. The District Munsif h[eld] . . . think rightly, that the proviso to section 153 . . . e from second respondent. . . . f non-occupancy ryo[ts] . . . he meaning of admitting a person to the poss[ession] . . . fore the Act land appears from the explanation to section 6 of the . . . iso mean the acceptance by the landholder of any portion of the *rent fixed for such land*. A *similar significance is attached* by section 116 of the Transfer of Property Act to the Act accepting rent from a lessee. If sections 163, 45 and the explanation to section 6 of Madras Act I of 1908 be read together, it is obvious that a *quondam* tenant is not entitled to better treatment than a trespasser on the strength of payments made under leases that expired before the Act came into operation. For the position of tenants holding over after the expiry of their term reference may be made to *Vadapalli Narasimham* v. *Dronamraju Seetharamamurthy*(1). Any claim founded on such relationship of landlord and tenant in this case is open to the objection that there has been a break in its continuity. No proof has been offered that either the first or second respondent accepted any payments of rent from the first appellant after his lease expired. The District Munsif finds that he was not accepted as a tenant by the landlord. He observes, "It "is not pretended that first defendant accepted second defendant "as his tenant or in any way acquiesced in second defendant "holding the land." Therefore it appears that under section 163 also the present suit for eviction can be maintained in a Civil Court.

The District Judge held that under Exhibit A the second respondent only transferred the *kudivaram* right in the suit land. It is doubtful if this is the right construction to be placed on the

(1) (1908) I.L.R., 31 Mad., 163.

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document. But in the view now taken of section 163 and of the proviso to section 153 it is unnecessary to determine this point.

The first respondent's pleader has attempted to support the finding of the lower Courts on the ground that this is not an "estate" within the meaning of the Act but he has not succeeded in establishing this contention to my satisfaction. The question does not require discussion as the Second Appeal fails on other grounds. It should, in my opinion, be dismissed with costs.

K.R.

APPELLATE CIVIL.

Before Mr. Justice Sadasiva Ayyar and Mr. Justice Tyabji.

1914. January 5, 6 and 28.

SUNDARAMBAL AMMAL AND ANOTHER (APPELLANTS IN SECOND APPEAL No. 1333 OF 1912 ON THE FILE OF THIS HIGH COURT), PETITIONERS,

v.

YOGAVANAGURUKKAL (RESPONDENT IN SECOND APPEAL No. 1333 OF 1912 ON THE FILE OF THIS HIGH COURT), RESPONDENT.*

SUNDARAMBAL AMMAL v. YOGAVANAGURUKKAL.

A person, who is permanently disqualified to do the duties of an office cannot inherit the office whilst at the same time delegating the duties to others, whether the permanent disqualification is the result of conversion to any other religion or insanity or sex.

A trusteeship for secular purposes can be held by a female.

The fact that a person is obliged to part with his property for what he considers an unduly low price owing to his pressing necessities, is not a ground for holding that the contract is vitiated by undue influence.

PETITION praying the High Court to pass a decree in terms of the Razinamah Petition in Second Appeal No. 1333 of 1912 preferred to the High Court against the decree of E. L. THORNTON, the District Judge of Trichinopoly, in Appeal No. 53 of 1911, preferred against the judgment of C. V. VISVANATHA SASTRIYAR, the District Munsif of Trichinopoly, in Original Suit No. 39 of 1910.

The facts of the case appear sufficiently from the judgment of SADASIVA AYYAR, J.

M. B. Duraiswami Ayyangar and *C. Pattabhirama Ayyangar* for the petitioners.

S. T. Srinivasagopalachariar for the respondents.

SADASIVA AYYAR, J.

SADASIVA AYYAR, J.—This is a petition put in by the plaintiffs, appellants in the *Sundarambal Ammal* v. *Yogavanagurukkal*(1) praying for the passing of a decree in accordance with the terms of a compromise signed by the two plaintiffs and by the first defendant. The first defendant, though he has signed the compromise petition, opposed the application on the grounds :—

(a) that he was induced to sign the compromise through undue influence exerted on him by the second plaintiff's husband ;

(b) that the agreement was not the result of a *boná fide* compromise of doubtful claims but was really a sale of a portion of the first defendant's rights for a very low consideration and that the sale was also invalid for want of proper consideration ; and

(c) that the compromise is further illegal as it is really an alienation of a religious office to persons legally incompetent to hold the office (see 17th paragraph of the first defendant's affidavit dated 2nd October 1913.)

Having considered the affidavits on both sides, I don't think that there is any force in the objections (a) and (b). No doubt,

(1) Second Appeal No. 1333 of 1912.

PONNUSAMY PADAYACHI v. KARUPPU DAYAN. — SPENCER, J.

document. But in the view now taken of section 163 and of the proviso to section 153 it is unnecessary to determine this point.

The first respondent's pleader has attempted to support the finding of the lower Courts on the ground that this is not an "estate" within the meaning of the Act but he has not succeeded in establishing this contention to my satisfaction. The question does not require discussion as the Second Appeal fails on other grounds. It should, in my opinion, be dismissed with costs.

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v.

YOGAVANAGURUKKAL (RESPONDENT IN SECOND APPEAL No. 1333 OF 1912 ON THE FILE OF THIS HIGH COURT), RESPONDENT.*

Civil Procedure Code (Act V of 1908), O. XXIII, r. 3—Lawful compromise—Hindu Law—Office of Archaka, alienation of—Custom, validity of—Disqualification of females to perform duties of—Right of females to inherit—Performance of duties by proxy—Public policy—Undue influence - Low price, effect of—Contract Act (IX of 1872), sec. 16, cl. 2.

Where the parties to a suit instituted in respect of a half share in the *Archaka* miras in a Saivite temple, entered into a compromise during the pendency of a Second *Appeal* in the case, by which one of the parties alienated for a pecuniary benefit a portion of his right to the office in favour of the other party (who was a female), and the latter applied by a petition to the High Court to pass a decree in accordance with the compromise,

Held, that the compromise was not lawful and that no decree could be passed in accordance therewith under Order XXIII, rule 3, of the *Civil Procedure* Code.

Per SADASIVA AYYAR, J.—An alienation of a religious office by which the alienor gets a pecuniary benefit cannot be upheld, even if a custom is set up sanctioning such an alienation.

It is the settled custom that females by reason of their sex are permanently disqualified from performing the duties of an *Archaka* in a Saivite temple.

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* Civil Miscellaneous Petition No. 924 of 1913.

SUNDARAMBAL AMMAL v. YOGAVANAGURUKKAL. — SADASIVA AIYAR, J.

factor to be concerned in deciding on the right to the office unless there has been such a precise and uniform course of descent by heredity (almost irrespective of any consideration as to the person's fitness for holding the office) as to raise an irresistible inference as to the intention of the original creator of the office." Of course, in the case of religious offices, mere heredity *alone* cannot form a complete qualification entitling the heir to become the owner of such an office A religious office in a Hindu temple, though it is a hereditary office, cannot surely be acquired through mere heredity. Let us suppose that the son of the last office holder has become a convert to another religion. Even though Act XXI of 1850 removed the disqualifications to inherit properties (which disqualification formerly existed) on the score of conversion to any other religion, it did not and could not remove the disqualification to inherit an office owing to the nature of the office being connected with the Hindu religion. A temporary disqualification such as minority or curable insanity, death pollution and birth pollutions and so on, are, no doubt, no obstacles to obtain the right to a religious office by heredity. But permanent personal disqualifications do, in my opinion, prevent the acquisition of the right to hold a religious office notwithstanding that the condition of being the next heir to the previous holder of the office is fulfilled.

As regards the Archaka office in a Saivite temple which has been established according to both Vedic and Tantric rites, it is the settled custom that females by reason of their sex are permanently disqualified from performing the duties of the office of Archaka. This proposition is not only not disputed by the appellants, but the affidavits filed on their own side establish it. It is no doubt an interesting question whether this disqualification by custom is really in accordance with the ancient shastras. I am inclined to the view that Brahman ladies who have become twice-born by the proper sacraments (the marriage sacrament being in later days considered as the only sacrament proper to all ladies even Brahmans by birth) are entitled to pronounce vedic mantrams, and to hold religious offices but a discussion of such a question is purely one of academical interest now and I must resist the temptation to enter upon such a discussion, as the question is now settled against the rights of the fair sex on the strength of mediæval legal authorities. These

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legal authorities have twisted even a vedic text (which related to the disqualification of a lady in the vedic days by reason of the feebleness of her nervous organization to share in the Soma drink) as a disqualification to her inheriting any property, though the unnatural rigour of that monstrous rule was qualified in favour of the wife, the mother and the grandmother by the argument that these ladies are entitled to inherit by reason of special texts.

Taking it then that a woman is disqualified by her sex from doing the duties of a religious office, can it be said that she can still be the owner of that office by inheritance, overcoming the disqualification to perform the duties of the office by the expedient of having them performed through a male proxy? I am clearly of opinion that on principle, *a personally disqualified heir*, i.e., permanently disqualified to do the duties of an office, cannot inherit the office while at the same time delegating the duties to others. Whether the permanent disqualification is the result of conversion to any other religion, or insanity or sex, I am unable to see why any distinction should be made in the results of such disqualification. I don't see any reason how the disqualification to perform the duties can be logically separated from the disability to inherit the rights, consequent on such disqualification. Coming to the authorities, I shall consider them under three headings: (*a*) those which relate to the alienability of a religious office, (*b*) those which relate to the disqualification by sex to hold a religious office, and (*c*) those which relate to a compromise of litigations involving rights which are not ordinary rights but rights connected with public or quasi-public duties (I shall quote only a few authorities under each head).

In *Kuppa* v. *Dorasami*(1), it was held following *Keyake-Ilata Kotel Kanni* v. *Y. V. Achuda Pisharodi*(2), and the decision in *Ramasami Pillai* v. *Raman Pusari*(3), that the sale of the office of temple pujari was invalid. In *Kuppa* v. *Dorasami*(1), no objection has been taken in the lower Courts to the validity of such a sale and yet this High Court upholding the objection raised in Second Appeal, dismissed the alienee's suit. The learned

(1) (1883) I.L.R., 6 Mad., 76. (2) (1863) 3 M.H.C.R., 380.
(3) Special Appeal No. 750 of 1876.

Judges doubt the correctness of the decision in *Mancharam* v. *Pranshankar*(1), to the effect that the sale if made to a person in the line of heirs and qualified to perform the duties of the office is not illegal. In *Rajaram* v. *Ganesh*(2), PARSONS and RANADE, JJ., approve of *Kuppa* v. *Dorasami*(3). That decision related to the sale of a *vritti* office. The learned Judges consider the Bombay decisions as to the alienation of a religious office and make the following remarks: "It appears from the authorities cited, and from others which will be noticed further on, that a distinction has been made by the Courts between *vrittis* such as those in dispute in this case, and defined in *Ganesh Ramckandra Date* v. *Shankar Ramchandra*(4), and the right of hereditary service in temples, private and public, and between alienation to strangers and to members of the family and, lastly, between compulsory and private alienation" Then the learned Judges say that custom and practice must be followed in such cases. In *Sennayan* v. *Sinnappan*(5), MUNRO and SANKARAN NAIR, JJ., upheld the contention of the respondent's counsel as to the inalienability of a non-hereditary religious office and that a renunciation in favour of even the next senior member of the family by the eldest member who held the office was invalid. Thus the Madras High Court, to use the argument of respondent's counsel in that case, "has not accepted the position taken by the Bombay and Calcutta High Courts," namely, that alienation to the next in succession is valid. That the office of archakar differs in many respects from a purely secular private office goes without saying. In *Seshadri Iyengar* v. *Ranga Pattar*(6), it is stated: "The position of an archakar . . . though he may have a hereditary tenure in the office, is, in our opinion, essentially that of a servant." He is subject to the discipline of the trustee of the temple. And it is impossible to admit that a servant can alienate his office with its appurtenant emoluments at his pleasure (even to another qualified person) especially without the consent of his master, for by such alienation he would encroach upon the rights of his master. I might add that as regards Mahomedan religious offices also, *Sarkum Abu Torab*

(1) (1882) I.L.R., 6 Bom., 298. (2) (1899) I.L.R., 23 Bom., 131.
(3) (1883) I.L.R., 6 Mad., 76. (4) (1886) I.L.R., 10 Bom., 395.
(5) (1910) 20 M.L.J., 654. (6) (1911) 21 M.L.J., 580 at p. 582.

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legal authorities have twisted even a vedic text (which related to the disqualification of a lady in the vedic days by reason of the feebleness of her nervous organization to share in the Soma drink) as a disqualification to her inheriting any property, though the unnatural rigour of that monstrous rule was qualified in favour of the wife, the mother and the grandmother by the argument that these ladies are entitled to inherit by reason of special texts.

Taking it then that a woman is disqualified by her sex from *doing the duties of a religious office, can it be said that she can* still be the owner of that office by inheritance, overcoming the disqualification to perform the duties of the office by the expedient of having them performed through a male proxy? I am clearly of opinion that on principle, *a personally disqualified heir*, i.e., permanently disqualified to do the duties of an office, cannot inherit the office while at the same time delegating the duties to others. Whether the permanent disqualification is the result of conversion to any other religion, or insanity or sex, I am unable to see why any distinction should be made in the results of such disqualification. I don't see any reason how the disqualification to perform the duties can be logically separated from the disability to inherit the rights, consequent on such disqualification. Coming to the authorities, I shall consider them under three headings: (*a*) those which relate to the alienability of a religious office, (*b*) those which relate to the disqualification by sex to hold a religious office, and (*c*) those which relate to a compromise of litigations involving rights which are not ordinary rights but rights connected with public or quasi-public duties (I shall quote only a few authorities under each head).

In *Kuppa* v. *Dorasami*(1), it was held following *Keyake-Ilata Kotel Kanni* v. *Y. V. Achuda Pisharodi*(2), and the decision in *Ramasami Pillai* v. *Raman Pusari*(3), that the sale of the office of temple pujari was invalid. In *Kuppa* v. *Dorasami*(1), no objection has been taken in the lower Courts to the validity of such a sale and yet this High Court upholding the objection raised in Second Appeal, dismissed the alienee's suit. The learned

(1) (1883) I.L.R., 6 Mad., 76. (2) (1863) 3 M.H.C.R., 380.
(3) Special Appeal No. 759 of 1876.

right was not recognised in that case on the ground that the custom of that particular Bairagi community did not disqualify a female from holding that office. Managers of several temples have been Sudras. [See *Radha Mohun Mundul* v. *Jadoomonee Dossee*(1)]. In fact, several Non-Brahmin Tambirans are managers of many temples in Southern India. Hence so far as the question of the management of temples or mosques is concerned, sex is no disqualification. But as regards the office of temple pujari or Acharya Purusha or other priestly office in a temple or a mosque, or among a community there are cases which show that disqualification to inherit by reason of sex can exist. In *Seshammal* v. *Soondararajiengar*(2), it was held following the opinion of the Sudder Court pandits, that a woman was disqualified by reason of her sex from inheriting the office of Acharya Purusha. The pandits clearly say that a lady's being the next heir under the ordinary Hindu Law, to the properties left by the last male, cannot by itself entitle her to inherit also the office of Acharya Purusha left by the said male owner (though lands were attached to that office as emoluments) as she was disqualified by reason of her sex from performing the duties of the office. The pandits seem to have, when pressed with further questions, attempted to make a distinction between the Acharya Purusha office and the office of Archaka or Purohitha and to have been inclined to hold that these other offices which, though religious offices, are not of as high a character as an Acharya Purusha's office may be inherited by females, though females could not perform the duties of these offices and that such female heirs might employ male substitutes to do the duties of these lower offices while themselves enjoying the emoluments; but that opinion was clearly obiter and no reasons were given or authority quoted by the pandits. In *Janokee Debea* v. *Gopaul Acharjea*(3), the Calcutta High Court say that a widow who was the heiress of her husband as regards private properties, cannot by reason of that simple fact claim to be entitled also to succeed to her husband's right to hold the office in a temple. The learned Judges say: "The presumption in her favour from her husband having been in possession, would not apply in this case

(1) (1875) 23 W.R., 369 (2) (1853) M.S.D.A., 261.
(3) (1877) I.L.R., 2 Calc., 365.

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not an opportunity of judging for itself whether the will is the will of the deceased person and to what extent the rights of the parties will be affected, if the agreement be allowed to be made a rule of Court." The Court itself has certain duties in connection with a case in which a judgment *in rem* has to be pronounced, or in a case which involves the right of the public or the right to a religious and charitable office, or the right of a minor or other incapacitated person. Where an agreement or compromise attempts to affect such rights after they are brought before the Court for adjudication, it seems to me, that it is not a lawful agreement or compromise. In *Muhammad Ibrahim Khan* v. *Ahmad Said Khan*(1), the learned Judges say: "A party can refer a matter of a private individual right of a civil nature to arbitration, but he has no power to refer a matter *which is not purely of a private civil character*, and it is on this ground that a Bench of this Court in *Mahadeo Prasad* v. *Bindeshri Prasad*(2), held that the appointment of a guardian to a minor not being a matter of a private right as between parties, was not a question which could be settled by reference to arbitration." Then the learned Judges say: "the right to the office of a trustee to a public charity cannot also be settled by private arbitration."

As I have shown above, the duties of the Archaka office are more important than the rights of the office holder; the rights of the deity to have the office performed are entitled to much more consideration than the so-called hereditary rights of any particular person to hold the office and it therefore seems to me that the dispute involving the right to such an office when it has once been brought before a Court for adjudication cannot be settled lawfully by a mere razinamah between the parties. To summarise, I hold that the razinamah in this case is not lawful (1) because it is really an alienation of a portion of a religious office (that is, the right to receive the emoluments of the office during certain days in the year, (2) because the alienation is made in favour of persons who are permanently disqualified to hold the office and (3) because there can be no lawful compromise made of a dispute in respect of a religious office, the proper performance of the duties of which concern not merely the parties

(1) (1910) I.L.R., 32 All., 503 at p. 513. (2) (1908) I.L.R., 30 All., 137.

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to the compromise but principally affect the religious trust itself and the Hindu public for whose benefit the religious trust exists.

As held in *Jenkins* v. *Robertson*(1), the decree by consent between a plaintiff (who is allowed to represent the public) and the defendants, would not bind the public at large and it is only the result of a contested litigation which would bind the public. A judgment by consent will not bind the public even if it was not a purchased consent and *a fortiori* if such consent was a purchased consent. In the present case, the rights obtained by the plaintiffs under the disputed compromise were clearly purchased rights. In *Rajah M. Bhaskara Sethupati and Irulappa Nadan* v. *Narayanasamy Gurukkal*(2), this Court refused to allow the Raja of Rāmnād who was a temple trustee to compromise a dispute with the Shanars which related to the alleged right of the Shanars to enter the temple, because such a compromise affected the usages of the temple and the rights of other sections of the Hindu public. [See also in *Gyanananda Ashram* v. *Kristo Chandra Mukherji*(3).]

In the result, this Petition No. 924 of 1913 in which the plaintiffs (appellants) pray for the passing of a decree in accordance with the terms of the razinama must be and is dismissed. There will be no order as to costs as the first defendant having agreed to the compromise, has succeeded in his objections not on the ground of any merits in himself but on the ground of public policy which requires the Court not to accept the compromise in the interests of the public and of the religious trust.

TYABJI, J.—I have had the benefit of reading the judgment prepared by my learned brother. I agree that the compromise cannot be upheld. As he has discussed the law in detail, it is unnecessary for me to do the same. But with regard to the main question, whether a Hindu female can hold the religious office which is the subject of litigation, I should like to indicate why I have come to the conclusion that the compromise cannot be upheld. TYABJI, J.

The founder of a religious charitable institution has wide powers of laying down the manner in which he requires the

(1) (1867) L.R., 1 H.L Sc., 117. (2) (1892) 12 M.L.J., 360.
(3) (1901) 8 C.W.N., 404.

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institution to be administered; that power includes the laying down of the method of filling the offices necessary for administering the institution. So that if he desires that the office-bearers shall be selected in any particular mode, his desire is as a rule, given effect to. But his desires will not be given effect to, if, for instance, they are opposed to public policy, or to the fulfilment of the general object of the institution.

Where, therefore, the question is whether a particular person should succeed to a religious office, the first matter to which attention must be directed is, in what method did the founder of the institution desire that the succession to the office should devolve? Where the founder has put his desires in writing in the form of a trust deed, or sanad, or some similar instrument, it only remains to interpret that instrument, and to see whether there is anything in law or in the nature and objects of the institution to prevent these desires being given effect to. But where, as frequently happens, there is no written instrument laying down the terms in accordance with which the institution is to be administered, the course of practice in the past may furnish indications of what the founder must have intended; and this may be supplemented by the general law and also by a consideration of the customs and usages prevailing in similar institutions in the same locality.

Where, therefore, the question arises whether a particular person is entitled to hold the office, and that person bases his claim on the hereditary devolution of the office, it must, in the first instance, be determined whether, as a matter of fact, the founder desired that the office should devolve hereditarily. If it is found that he did so desire, then the question will be whether there is any reason why that desire should not be given effect to. If, on the other hand, it is doubtful whether he did so desire, a number of considerations must arise.

In the particular case with which we are now dealing, the first question that is involved is, whether the office was intended to devolve hereditarily and in such a manner that, if the person indicated by the hereditary principle is a female and if her sex necessarily disqualifies her from performing the functions of the office, still she must be deemed to hold the office having the right to get the functions of the office performed by a deputy. There is no instrument showing what the intentions of the founder

were, and we have, therefore, to discover whether he could have intended to lay them down as is claimed on behalf of the plaintiff. In considering whether such could have been the intention of the founder, regard must be had, to the point whether the hereditary principle of selection is chosen merely as an easy mode of selecting the person who is to hold the office, or whether it is intended to provide that the property annexed to the office should belong to the first office-holder and his descendants. For this purpose an important consideration appears to be whether the emoluments of the office are commensurate with the duties to be performed by the person holding the office. Thus if it is found that the functions of the office are such that they may be performed by any member of a large body of persons, and that no special abilities or moral qualities are *necessary for enabling the person to perform the duties satisfactorily*, in such a case the expenses of getting the duties performed are frequently in the nature of fees paid to Brahmans or other members of the priestly class for conducting the ceremonies, and these fees are fixed within certain limits by custom. The fact that a higher fee may be demanded by one person for performing such ceremonies does not imply that he will perform them better than another: for *ex hypothesi* the functions are such as can be performed equally well by any one of the body of persons who are competent to perform them.

Where, then, the functions of the office are of such a nature that the expenses for performing them consist of more or less fixed fees, and where it is found that the emoluments provided for the performance of these functions are far in excess of the necessary usual fees, and where in such a case the office is made to devolve hereditarily—these facts may furnish indications that the intention of the founder was that the property should remain in the family of the first office-holder, but should be charged with the expenses of getting the duties of the office performed, with liberty to the members of the family to perform the duties themselves and thus to save the paying out of fees to a third person.

In such a case, therefore, I should be less inclined to hold that a person who would be entitled to the property by heredity should be deprived of that property because that person cannot himself or herself fulfil the functions; for I have started with the

institution to be administered; that power includes the laying down of the method of filling the offices necessary for administering the institution. So that if he desires that the office-bearers shall be selected in any particular mode, his desire is as a rule, given effect to. But his desires will not be given effect to, if, for instance, they are opposed to public policy, or to the fulfilment of the general object of the institution.

Where, therefore, the question is whether a particular person should succeed to a religious office, the first matter to which attention must be directed is, in what method did the founder of the institution desire that the succession to the office should devolve? Where the founder has put his desires in writing in the form of a trust deed, or sanad, or some similar instrument, it only remains to interpret that instrument, and to see whether there is anything in law or in the nature and objects of the institution to prevent these desires being given effect to. But where, as frequently happens, there is no written instrument laying down the terms in accordance with which the institution is to be administered, the course of practice in the past may furnish indications of what the founder must have intended; and this may be supplemented by the general law and also by a consideration of the customs and usages prevailing in similar institutions in the same locality.

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In the particular case with which we are now dealing, the first question that is involved is, whether the office was intended to devolve hereditarily and in such a manner that, if the person indicated by the hereditary principle is a female and if her sex necessarily disqualifies her from performing the functions of the office, still she must be deemed to hold the office having the right to get the functions of the office performed by a deputy. There is no instrument showing what the intentions of the founder

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Where, then, the functions of the office are of such a nature that the expenses for performing them consist of more or less fixed fees, and where it is found that the emoluments provided for the performance of these functions are far in excess of the necessary usual fees, and where in such a case the office is made to devolve hereditarily—these facts may furnish indications that the intention of the founder was that the property should remain in the family of the first office-holder, but should be charged with the expenses of getting the duties of the office performed, with liberty to the members of the family to perform the duties themselves and thus to save the paying out of fees to a third person.

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assumption that the functions are of such a nature that they can easily and satisfactorily be got to be performed by payment of comparatively small fixed fees. The institutions in such a case does not suffer by the heir of the last office-holder being the nominal office-holder, and the duties being performed by another person.

The case, however, is entirely different where the functions of the office are such that they require special qualifications, intellectual or moral, for performing them: as for instance, if the functions consist of giving expositions of religious or moral duties. In such a case, where a large income is set apart for the remuneration of the office-holder, it may well be inferred that the founder desired that the best available person should be selected to fill the office, and it is obvious that the higher the remuneration offered the greater the chances of obtaining a competent person to discharge the duties. In such a case to hold that one person should nominally be the office-holder and should take the full emoluments provided by the founder for the office, and should, out of a portion of such emoluments, remunerate the person who is actually to perform the function of the office, would be to get a person to perform the functions on payment of much smaller emoluments than were intended by the founder, and in this way to prevent as competent a person being available for the performance of the functions as had been provided for by the founder.

For these reasons, though I am not prepared to lay down broadly that in every case it is opposed to public policy to provide that a religious office should devolve hereditarily even on persons not themselves qualified to discharge the duties of the office, neither am I, by any means, of opinion that such a provision can always be given effect to. It seems to me that the question must be decided with reference to the particular facts of the case, including the nature of the functions to be performed by the holder of the office according to the directions of the founder, the remuneration provided for the performance of those functions, and similar other matters.

Now on the facts of this case, it would seem (and my learned brother informs me to the same effect) that the particular office concerned is in its nature such as requires special qualifications for being properly filled. Its functions are not such as can be

discharged by any individual; a fit and proper person must be selected for discharging them satisfactorily. The emoluments also are such that no surplus is left after providing a fair remuneration for the office-holder; to lessen those emoluments would be to prevent a proper person being selected for holding the office, and for its functions being discharged in the manner that they ought to be discharged.

Under these circumstances I agree that we cannot proceed on the basis that the office with which we are dealing can be permitted to be the subject of a compromise by which a female is to hold it in form, and to get its functions performed by a male proxy.

K.R.

APPELLATE CIVIL.

Before Mr. Justice Sadasiva Ayyar and Mr. Justice Spencer.

1912. September 23 and 27, December 6 and 1914. January, 26 and 28.

V. MUTHUKUMARA CHETTY (PLAINTIFF), APPELLANT IN ALL THE CASES,

v.

ANTHONY UDAYAR AND THIRTY OTHERS (DEFENDANTS), RESPONDENTS.*

Transfer of Property Act (IV of 1882), sec. 10—Hindu Law—Grant, deed of, for maintenance and other expenses—Grant by zamindar to his wife and minor son—Estate of grantees—Restraint on alienation—Lease for fifteen years by mother as guardian, if void, or voidable by minor—Repudiation by zamindar as natural guardian, mere act of, if sufficient—Suit to set aside—Decree in such suit necessary—Suit by guardian—Dismissal for default, effect of—Suit by lessee for rent—Objection by tenants as to validity of lease.

A zamindar made a grant of certain lands to his wife and his minor son for their maintenance, clothing and other expenses. The deed of grant contained a provision that the grantees were not to alienate the properties by sale, mortgage, etc. The mother of the minor son, granted a lease of the lands for fifteen years in favour of the plaintiff, and died a few months thereafter. The zamindar, the father and natural guardian of the minor, sued to set aside the lease, but the suit was dismissed in consequence of the zamindar's default in obeying an order of the Court to appear in person. The plaintiff, as the lessee of the lands, sued to recover *melvaram* due to him from the defendants

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* Second Appeals Nos. 892 to 912 and 914 to 922 of 1911.

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who were the ryots but did not join the minor grantee as a party to the suit. The defendants contended that the lease to the plaintiff was not valid and that the plaintiff was not entitled to recover rent from them.

Held (on a construction of the deed), that both the mother and the minor son obtained under the grant an estate in the property and were tenants-in-common during the life-time of the mother after which the son was to hold the whole property.

The provisions against alienation, contained in the deed of grant were absolute restraints on alienation and were void under section 10 of the Transfer of Property Act and under the Hindu Law.

The lease for fifteen years granted to the plaintiff by the mother acting as guardian of her minor son, even if it was beyond the powers of a guardian, was not void against the minor but only voidable by him.

The party who is entitled to avoid a transaction may do so by an unequivocal act repudiating the transaction or by getting a decree of Court setting it aside.

When a guardian (natural or appointed) of a minor has given a lease, another guardian cannot set it aside by a mere act of repudiation. he can do so only by obtaining a decree of Court in a suit which may be instituted on behalf of the minor during his minority; but his action in instituting a suit to set it aside (which was dismissed for his default) has no greater effect than his mere act of repudiation.

Held consequently, that the plaintiff was entitled to recover rent from the defendants under the lease.

SECOND APPEALS against the decrees of J. T. GILLESPIE, the Acting District Judge of Tanjore, in Appeals Nos. 216 and 335, 220 and 338, 222, 223 and 340, 224 and 341, 234 to 246, 248 to 250, 253 to 257, and 329 to 332 of 1910 preferred against the decrees of K. V. SRINIVASA AYYANGAR, the Deputy Collector of Tanjore Division, in Summary Suits Nos. 183, 188, 190 to 192; 221 to 233, 291, 293, 297, 306, 311, 315 and 316 of 1909 and 109 to 111 and 118 of 1908, respectively.

The facts of the case appear from the judgment.

T. R. Venkatarama Sastriyar and *V. Purushotham Ayyangar* for the appellant.

G. Krishnaswami Ayyar for the respondents.

SADASIVA AYYAR AND SPENCER, JJ.

These Second Appeals arise out of suits instituted by the plaintiff against a number of ryots for rent of certain lands leased to them. The Zamindar of Ghandarvakota made a grant of these lands as well as of certain other properties evidenced by Exhibit N in the case. The grant (which was in 1901) was in favour of two persons, his wife Madurambal and his minor son. Madurambal executed a lease, Exhibit I, in 1906 for a period of 15 years to the plaintiff in these suits. She died within a few

months after the execution of the lease. Disputes arose on her death between her husband, the Zamindar who purported to act on behalf of his minor son and the plaintiff. There were criminal proceedings which were followed by two suits, one of them by the Zamindar on behalf of his son to set aside the lease and the other by the lessee to restrain the Zamindar from interfering with his enjoyment under the lease. The former suit was dismissed in consequence of the Zamindar's default in obeying an order of the Court to appear personally. The latter suit was withdrawn by the plaintiff in consequence of the dismissal of the Zamindar's suit. The propriety of the dismissal is, we understand, now before this Court in a revision petition. The present suits for rent by the lessee under Exhibit I are resisted by the ryots, the minor grantee under Exhibit I not being a party.

Most of the contentions on which the resistance is based depend on the construction of the grant, Exhibit N. These contentions may be briefly stated as follows:—

(1) That the document created no right at all in the lands in favour of Madurambal or her son but only conferred rights of management on the former with the right to appropriate the incomes for defraying the expenses of her own maintenance and the maintenance and education of her son;

(2) that even if any estate in the properties, the subject-matter of the grant, was created in favour of Madurambal, none was created in favour of the son till the death of Madurambal;

(3) that according to the terms of the grant, the enjoyment of the property transferred was restricted to Madurambal and her son personally and therefore Madurambal had no right to make any transfer by way of lease in favour of the plaintiff;

(4) that the lease is void apart from the previous contention on the ground that the grant expressly provides that the grantees should have no power of alienation by sale, mortgage or otherwise;

(5) that Madurambal's right in the property ceased on her death and that she had no power to make a lease which would enure beyond her life-time and that she was not appointed the guardian of her son by the grant;

(6) that, even assuming she was her son's guardian, all leases executed by her for a period which would extend beyond

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the time of the son's minority must be regarded as void and at any rate would not last beyond the minority of the son;

(7) that, even if a lease intended to last beyond the period of minority could be regarded as not altogether void, the lease in question was injurious to the interests of the minor and could not be upheld; and

(8) that Exhibit I is not merely a lease but also a mortgage and as a mortgage is expressly forbidden by the terms of Exhibit N, Exhibit I must be held to be beyond the powers of Madurambal.

In the view we take in the case, it will not be necessary to deal with some of these contentions.

The first question for decision is whether Exhibit N merely conferred upon Madurambal the right to manage the properties included in it and did not create any estate in favour of either the wife or the son. On this point we are unable to entertain any doubt that the document cannot be regarded as merely creating a right of management in favour of Madurambal. The instrument is called a settlement deed executed in favour of Madurambal and the minor Rajagopalan. It states "I have given to the said Madurambal Rajayee this day for herself and the other person aforesaid (that is the minor son) and left in her enjoyment the buildings, gardens and other immoveable properties of the undermentioned villages worth Rs. 50,000"; and again it says "I have given to the said Madurambal Rajayee for the said two persons for the maintenance, clothing and other expenses of the said Madurambal Rajayee and . . . . Rajagopalan." There are no clauses in the instrument conflicting with the *primâ facie* interpretation to be put on the clauses mentioned above, namely, that there was a grant of the lands. The doubts as to her power under Act VIII of 1865 to enforce payment of rent against the tenants. There is not a word in the document which would show that she was to be a mere agent or was to occupy a position analogous to that of an agent. There is a further provision that after the lifetime of the said Madurambal, the said Rajagopalan shall enjoy all the said villages. There can be no doubt that Rajagopalan obtained under the instrument an estate which would last for his life. It is not

necessary for the decision of this case to express an opinion on the question whether Rajagopalan obtained an absolute estate under Exhibit N. That question may never arise for decision and if it should, it would probably arise not between him and any of the parties to the suit, but between him and some other descendant of the Zamindar. We, therefore, abstain from giving any opinion on the question. The view taken by the District Judge on the point discussed above is not quite clear. He finds definitely that the grantees did not obtain an absolute estate but only a limited estate but in one portion of his judgment he says "The arrangement contemplated by Exhibit N appears to have been very similar to that in *Raj Lukhee Dabea* v. *Gokool Chunder Chowdhry*(1), which was held not to create any absolute interest but only a trust for the management of the property for a particular purpose." But in the next sentence the opinion he expresses is that Exhibit N did not create any absolute interest in favour of Rajayee and her son We do not think that the District Judge really intended to hold, as was argued for the respondent, that no estate or right in the property was created at all by Exhibit N. In the case referred to by him, the Privy Council had to deal with a *Hibbahnamah* or gift executed by the owner in favour of two widows, and the question raised for decision before their Lordships was whether the widows had an absolute right in the property which would entitle them to alienate it at their pleasure or whether they had only a limited interest, and the alienation was therefore invalid, not being supported by necessity. The widows were entitled to succeed as heirs of the owner and there was no question, therefore, that they had a limited interest. Their right to deal with the property in the manner and to the extent to which the holder of a woman's estate could, was admitted. Their Lordships say that there was no absolute estate but only a trust for the management of the property possessed by the widow. They did not intend, however, to negative the existence of a life-interest in the widows. We are of opinion that the District Judge also in this case meant no more than to hold that an absolute estate was not created in Madurambal and her son.

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The next point is whether the son acquired no interest at all. The District Judge observes that Madurambal had no right

(1) (1869) 13 M.I.A., 209.

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to execute Exhibit I on behalf of her minor son, because the latter took no estate under Exhibit N until her death. We are unable to agree with this view. It is perfectly clear from the document that the grant was to both and that Madurambal was to hold possession on behalf of herself and her son. Her right was to cease with her life and afterwards the son was to enjoy the whole. Both the mother and the son were created tenants-in-common during the lifetime of the mother after which the son was to hold the whole. We are of opinion that the son also did obtain an estate in the property under the grant.

The next question is whether by the terms of the grant the enjoyment of the property was restricted to the grantees personally. We do not think that there are any provisions in the document which would justify such an interpretation. The provision that Madurambal herself should give pattas and take muchilikas and collect the kist was not intended to restrict the right of enjoyment but to make it clear that she was to have powers with respect to the management which might otherwise be doubtful with respect to the provisions of Act VIII of 1865. There is no doubt the provision that the grant was for the maintenance of the grantees, but that is not sufficient to show that the enjoyment of the property was restricted to the grantees personally. Maintenance might be derived out of the property by the grantees without enjoying the property personally. Our attention was drawn to the fact that items 11 and 12 of the properties in the grant are stated to be intended for the education of the minor son. One of these two items was punja land and the other was a plot of land with a building on it. There is no direction that the minor should live in the house, nor does it appear that the other item, the punja land, was an adjunct to the land containing the building so as to form one entire plot where the minor was to live. The document is perfectly consistent with the interpretation suggested for the appellants that the income arising from both those items should be used to defray the expenses of the minor's schooling.

Reliance was placed on *Munisami Naidu* v. *Ammani Ammal*(1), where SUBRAHMANYA AYYAR, J., held that a land granted to a widow for maintenance was not attachable in execution of a decree against the widow. That learned Judge followed another

(1) (1905) 15 M.L.J., 7.

decision in *Diwali* v. *Apaji Ganesh*(1), which held a similar view, but the question in those cases was whether the land in question would come within the purview of 'future maintenance' exempted from attachment by clause (*l*) of section 266 of the Civil Procedure Code (of 1882). There are various kinds of property which are transferable by the owner but which are exempt from attachment. The distinction was pointed out in *Ranee Annapurni Nachiar* v. *Swaminatha Chettiar*(2), where this Court held that property given for maintenance is transferable and distinguished *Diwali* v. *Apaji Ganesh*(1), and other cases which held that such property was not attachable The general principle undoubtedly is that though a grant may prescribe the mode in which the grantee is to enjoy the property, such a provision would not be binding on him. See section 1 of the Transfer of Property Act, section 125 of the Succession Act and *Chamaru Sahu* v. *Sona Koer*(3). A grant no doubt may be conditional on the grantee enjoying it in a particular manner; but where it cannot be construed to be conditional and there is a mere direction or request that the enjoyment should be in a certain manner, such a provision would not be binding. In *Rameswar Singh* v. *Jibender Singh*(4), it was held that *Babuana* grant for maintenance could be alienated. *Balaji J. Rahalkar* v. *Narayanbhat*(5), was not a case analogous to the present. There the lease was of a piece of land for building a house in which the grantee and his heir were to live. COUCH, C.J., and NEWTON, J., held that there was no grant of any interest in the land except of a personal use for a particular purpose. We must overrule this contention also and hold that the enjoyment is not restricted by Exhibit N personally to the grantees under it. The next question is whether the clause preventing alienation by the grantees is valid. Section 10 of the Transfer of Property Act enacts that where property is transferred subject to a condition or limitation absolutely restraining the transferee or any person claiming under him from parting with or disposing of his interest in the property, the condition or limitation is void. An exception is provided in the case of a lease where the condition is for the benefit of the lessor or those claiming under him. This section is applicable

(1) (1886) I.L.R., 10 Bom., 342. (2) (1911) I.L.R., 34 Mad., 7.
(3) (1911) 16 C.W.N., 99. (4) (1905) I.L.R., 32 Calc., 663.
(5) (1866) 3 Bom. H.C.R., A.C., 63 (A.C.J.).

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to Hindus unless any rule of Hindu law be affected by it. It has frequently been applied both to Hindus and to Muhammadans. See the cases collected in Gour's Transfer of Property Act, page 184. The prohibition of alienations is absolute in this case. The grantees were not to alienate by sale, mortgage, etc., and the reasons for the prohibition is stated to be that the properties are intended for the maintenance of the grantees. There is also a provision that the grantor himself should not make any kind of alienation. Having regard to the reason stated for the restraint on alienation, there can be no doubt that the clause must be construed as preventing alienation absolutely. There is no reason for holding that there is any rule of Hindu Law that alienations may be prevented in the case of grants for maintenance. The alienation, of course, would not be valid beyond the time that the grant itself enures. In *Kuldip Singh* v. *Khetrani Koer*(1), all that was held was that a provision in an agreement between a widow and her husband's relations that an alienation should not be made without the consent of the relations was not repugnant to the provisions of section 10, because alienation was not altogether forbidden but was only directed to be made subject to certain conditions.

Sri Bhagwat Singh v. *Ram Jatan*(2), in which the question was with respect to the right of pre-emption was similar. None of these cases supports the contention that there is any specific rule of Hindu law making restriction on alienation valid in grants which are made for maintenance. In speaking of Exhibit N as a grant for maintenance, we are not to be understood, as already stated, to express any opinion on the question whether the grant itself was absolute or would last only till the lifetime of Rajagopalan. The validity of even limited restraints on alienation is doubtful. See the matter discussed in *Chamaru Sahu* v. *Sona Koer* (3).

The next question is whether Madurambal had no right at all to make the lease on behalf of her son. We are clearly of opinion that Exhibit N constitutes Madurambal the minor's guardian. The document is executed to her both on her own behalf and on behalf of the minor who is described as being under her protection. She is to enjoy the estate for herself and for

(1) (1898) I.L.R., 25 Calc., 869. (2) (1910) 7 A.L.J., 40d.
(3) (1911) 16 C.W.N., 99.

the son. The Zamindar evidently intended to make her his son's guardian so far as this property was concerned. The son was to live with his mother. It may be that the Zamindar did not part with his guardianship altogether and that the mother's power as guardian was restricted to this property, but there can be no doubt that she did become his guardian under Exhibit N with respect to the properties comprised in it. The lease cannot, therefore, be objected to on the ground that Madurambal had no right to deal with the son's properties at all. Her powers must be taken to be those of a guardian. They are not restricted by any provisions in Exhibit N The restrictions against alienation referred to the estate created under the document and those restrictions were to apply equally to both the grantees, the mother and the son. They were not intended to and did not curtail any rights which the mother would possess as guardian to deal with the infant's estate.

The next question is, can the lease Exhibit I be treated as void because it was to last for a period of 15 years which would extend to about five years beyond the minority of the son. If it was altogether void, then the defendants would be entitled to resist the plaintiff's attempt to collect the rents from them. But a lease executed by a guardian beyond his powers must be held to be not void altogether against the minor but only as voidable by him. This is the view held in England. See Halsbury's Laws of England, volume 17, pages 99 and 132. Only one case is referred to *Roe* v. *Hodgson*(1), that decided in Ireland where the lease was held to be void. In America also such leases are held to be only voidable—see 21 Cyclopædia of American Law and Procedure, page 86, although there also one case is referred to in which it was held to be void. The same view has been taken in India—see Trevelyan on Minors, pages 197 and 201 and *Prosonna Nath Roy Chowdry* v. *Afzolonnessa Begum*(2). A sale by a guardian was also held to be only voidable in *Sham Chandra Dufadar* v. *Gadadhar Mandal*(3)., *Abdul Rahman* v. *Sukhdayal Singh*(4) is not a decision that a perpetual lease by a guardian is altogether void. Reference is made in it to a case where an unauthorised lease by a guardian was pronounced to be void, but the learned Judges refer also to

(1) (1760) 2 Wilson, 129.
(2) (1879) I.L.R., 4 Calc., 523.
(3) (1911) 13 C.L.J., 277.
(4) (1906) I.L.R., 28 All., 30.

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the other cases where such a lease was held to be only voidable and their own judgment is based on a ground which would be equally applicable to both views. In *Bachchan Singh* v. *Kamta Prasad*(1) which was also relied on by the respondents all that was held was that article 91 of the Limitation Act was not applicable to a suit by a minor to recover property improperly leased by the guardian. The case was taken to be governed by article 141. It is not clear why article 44 was not adverted to by the learned Judges.

Unni v. *Kunchi Amma*(2) was not the case of a transfer by a guardian. There are, no doubt, cases where a person affected by a conveyance may treat it as void but at the same time may ratify it. An alienation by a widow would seem to belong to this class of cases. The reversioner may accept the transaction as binding on him and ratify it, but if he does not do so he may sue for the recovery of the property within the time limited for suits for recovery of immoveable property and is not bound to institute his suit within a shorter period treating it as one to set aside a document. See *Bijoy Gopal Mukerji* v. *Krishna Mahishi Debi*(3). According to *Unni* v. *Kunchi Amma*(2) an alienation by the manager of a Hindu family not binding on his co-parcener would also belong to this class, but an alienation by a guardian affecting the interests of a minor is treated as only voidable. Section 30 of the Guardian and Wards Act shows that this is the view taken by the Legislature. Article 44 of the Limitation Act would also seem to support the same view although the inference to be drawn from that article is not to be regarded as strong. We must therefore hold that the lease made by Madurambal was only voidable as against the minor.

From this conclusion emerges the contention of the appellant that it is not open to the defendants who are ryots to contend that they are not liable to pay rent to the plaintiff, so long as the lease has not been avoided according to law. The soundness of this contention is not disputed, but it is urged that the lease has been avoided. The minor himself has never repudiated it; his guardian, the Zamindar, instituted the suit already referred to, to set aside the lease, but that suit failed without a decision on the merits. Now does this amount to an avoidance of the

(1) (1910) I.L.R., 32 All., 392. (2) (1891) I.L.R., 14 Mad., 26.
(3) (1907) I.L.R., 34 Calc., 329 (P.C.).

lease in law? We cannot uphold Mr. Rangachariar's contention that wherever a transaction is voidable it can be avoided only by getting a decree of Court setting it aside The party who is entitled to avoid may do so by an unequivocal act repudiating the transaction—see *Mata Din* v. *Ahmad Ali*(1) and *Bijoy Gopal Mukerji* v. *Krishna Mahishi Debi*(2). If Rajagopalan after attaining majority should wish to repudiate the lease, there can be no doubt he can do so without a suit. But can any one else do so? The right to avoid appears to be a personal privilege—see 22 American Cyclopædia, page 547. No doubt a suit may be instituted by the minor through a next friend to set aside a transfer by a guardian even during the time of minority, but the suit should be by the minor himself and the setting aside of the transaction would be the act of the Court. The Court is *parens patriæ* and has the right to set aside transactions affecting minors. Thus it has been held that although a minor cannot make an alienation, a Court of equity may do so on his behalf—see 22 American Cyclopædia 516 Even when a suit has been instituted a next friend cannot make an election but a guardian *ad litem* may with the consent of the Court, in which case the election is practically made by the Court—see 22 American Cyclopædia 662, at page 663 it is stated that a next friend cannot make a waiver. It has also been held that a minor is not bound by an election between two different remedies made by his guardian during his minority—see 21 American Cyclopædia 186. It would seem that a minor himself cannot ratify a contract during his minority (see Simpson on Infants, page 56, and also 22 American Cyclopædia 539 and 21 American Cyclopædia 106) because when the minor attains majority, he would not be bound either by his ratification or a conveyance made during minority. There is some authority no doubt for the proposition that a minor may avoid during minority a contract entered into by himself. But if he can do so it must be on the ground that the avoidance is not a contract and that the possession of sufficient discretion is enough to entitle the minor to perform an act of avoidance—see the observation of JERVIS, C.J., in *Douglas* v *Watson*(3). No authority has been cited in support

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(1) (1912) 9 A.L.J., 215. (2) (1907) I.L.R., 34 Calc., 329 (P.C.).
(3) (1856) 17 C.B., 685 at p. 691, s.c., 139 E.R., 1245 at p. 1248.

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of the view that when one guardian has given a lease—whether atural or appointed—another guardian could, by an act of his own, repudiate the lease or put an end to it; and a minor, according to the authorities already cited, would apparently not be bound by any act of avoidance made by his guardian. No doubt a suit may be instituted on behalf of a minor during his minority to set aside the lease in order to get the Court to set it aside. We must hold that the Zamindar as the natural guardian could not set aside the lease by mere repudiation at his own pleasure and could do so only by obtaining a decree of Court. His action in *instituting the suit cannot be regarded as standing on a better* footing than any other act of his expressing his intention that the minor should not be bound by the lease. The result is that the lease must be held to be still operative against Rajagopalan. It is not necessary to consider the question whether it is one which would be set aside at his instance by a Court or which he himself could repudiate on his attaining majority. As it is still operative against him, the defendants (ryots) could not resist the plaintiff's right to rent under it.

The District Judge observes in his judgment that the plaintiff did not obtain possession under the lease. We do not understand what exactly is meant by this or what the effect of his not obtaining possession is supposed to be. The ryots are in actual occupation of the land. The lease was only of the melvaram interest in the lands and the plaintiff's right under it is to receive rent from the ryots. The lease is sufficient title to entitle him to the rents. Even if the property leased were capable of tangible possession, the mere failure to obtain possession would be immaterial except to show that the lease was not intended to be a real transaction at all. In the result we hold that the plaintiff is entitled to recover the rent sued for. It is not necessary to express an opinion on the other questions raised and mentioned at the beginning of this judgment. The Deputy Collector was wrong in not giving a decree for faslis 1316 and 1317 on the ground that proper pattas were not tendered for those faslis. This Court has decided in several cases that in suits instituted after the coming into operation of the Estates Land Act the non-tender of proper pattas is not a valid objection to the suit. The decrees of the lower Courts must be reversed

and the plaintiff must have a decree as prayed for for all the three faslis with costs throughout.

MUTHUKUMARA CHETTY v. ANTHONY UDAYAR.

SADASIVA AYYAR AND SPENCER, JJ.

[Their Lordships called for a finding from the lower Court as to the amount of rent due to the plaintiff in all the cases; and on the return of the findings, the cases were posted for final disposal before SADASIVA AYYAR and SPENCER, JJ., who accepted the findings and decreed the plaintiff's entire claim with costs throughout.]

K.R.

APPELLATE CIVIL.

Before Mr. Justice Sankaran Nair and Mr. Justice Ayling.

1914. February 14 and 17.

HENRY MOBERLY (PLAINTIFF), PETITIONER,

v.

THE MUNICIPAL COUNCIL OF CUDDALORE (DEFENDANT), RESPONDENT.*

Madras District Municipalities Act (IV of 1884), ss. 53 and 60—'Holds office,' meaning of.

M, a District and Sessions Judge, whose usual place of business was within the Municipality of *C* resided for sixty days within the Municipality of *K*, during the annual recess and during that period did some administrative but no judicial work.

Held, (*a*) that *M* '*held his office*' during that period, within the Municipality of *K*, within the meaning of section 53 of the District Municipalities Act (IV of 1884), and (*b*) that a payment by him of profession tax for the half-year covering the sixty days to the Municipality of *K* was a lawful payment which would exempt him under section 60 of the Act from liability to pay the tax again for the same half-year to the Municipality of *C*.

Chairman, Ongole Municipality v. *Mounsey* (1894) I.L.R., 17 Mad., 453, distinguished.

PETITION under section 25 of the Provincial Small Cause Courts Act (IX of 1887) praying the High Court to revise the decree of the Subordinate Judge of Tanjore in Small Cause Suit No. 1381 of 1912.

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* *Civil Revision Petition No. 995 of 1912.*

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MUTHUKUMARA CHETTY v. ANTHONY UDAYAR.

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* Civil Revision Petition No. 995 of 1912.

MOBERLY v. THE MUNICIPAL COUNCIL OF CUDDALORE.

The facts are fully stated in the second paragraph of AYLING J.'s judgment and the point for decision is stated in the first paragraph of the same.

M. O. Parthasarathy Ayyangar and *V. Ramesam* for the petitioner.

T. R. Ramachandra Ayyar for the respondent.

AYLING, J.

AYLING, J.—It is not contended before us that the payment of profession tax to the Kodaikanal Municipality will entitle Mr. Moberly to the benefit of section 60 of the Madras District Municipalities Act, unless the same is legally due. The sole question for decision is therefore whether Mr. Moberly should be deemed to have held the appointment of District and Sessions Judge within the Kodaikanal Municipality during his stay in the limits thereof from April 30th to July 1st, 1911.

There is no dispute about the facts. Mr. Moberly was the District and Sessions Judge posted to the South Arcot district. He came to Kodaikanal to spend the annual recess, resided there for sixty days, drew his pay there and on various days during that period estimated at fourteen or fifteen in number "did some administrative and *quasi*-judicial work there." He did no strictly judicial work.

The point is not altogether free from doubt, but after consideration, I think the requirements of section 53 of the Madras District Municipalities Act must be held to be fulfilled. The words of the section are "holds any one or more of the offices or appointments," and do not in themselves necessarily involve any suggestion of discharging duties connected with the offices or appointments. It can hardly be suggested that during the period in question Mr. Moberly did not hold the office of District and Sessions Judge of South Arcot The office was certainly not in abeyance: nobody else was holding it, and Mr. Moberly was drawing the salary attached to it. The cases quoted deal with a somewhat different question arising out of the same section, and are of no direct help: but they are clear authority for holding that he did *not* hold the office in Cuddalore Municipality during the period of his absence therefrom. Where then, did he hold it except at Kodaikanal, the place where he was residing?

Mr. T. R. Ramachandra Ayyar for the respondent municipality argued that in the section, the phrase "hold the appointment" necessarily involved discharging the duties of the

appointment and for purposes of this particular case was obliged *to go further and contend that as strictly judicial functions form* the most important part of a Judge's duties, the actual discharge of these duties is essential to the holding of the office.

I do not think this reasoning can be accepted. There is nothing in the wording of the section to support it and the only authority quoted is a passage in the judgment of MUTHUSWAMI AYYAR, J., in *Chairman, Ongole Municipality* v. *Mounsey*(1), which runs thus:—"The material words, 'hold office or appointment within the municipality' mean carrying on business there as the holder of the particular office. The intention was to place public servants like the plaintiff in the same position in which others are, who exercise their profession within the municipal limits."

With all deference I may point out that section 53 of the Madras District Municipalities Act clearly distinguishes two classes of persons (*a*) salaried persons *holding* offices or appointments, (*b*) persons *exercising* particular avocations. There is a corresponding distinction in schedule A to the Madras District Municipalities Act though the word "exercising" being unnecessary does not appear. Both classes under certain circumstances have to pay the tax. but it does not seem obvious that their liability to pay it depends on the same factors. However this may be, the remark of the learned Judge as to the meaning of the words in the section was passed in considering a totally different case to the present one. The question before him for disposal was whether an officer who was absent from the municipality should be deemed to hold office within it, merely because his office building was situated within municipal limits, and one or more of his clerks remained working there. I do not think it need be taken as a deliberate pronouncement as to the law in connection with the point now occupying our attention. If it is to be so regarded the petitioner might fairly draw attention to a subsequent sentence, "The cause of his liability is his participation in the benefit and convenience conferred by the municipality upon those residing within the municipal limits."

Mr. Moberly undoubtedly participated equally in the benefit and convenience of the Kodaikanal Municipality, whether he did,

(1) (1894) I.L.R., 17 Mad., 453.

MOBERLY v. THE MUNICIPAL COUNCIL OF CUDDALORE.

AYLING, J.

or did not discharge any of his official duties at Kodaikanal. The acceptance of the doctrine that, for the purpose of this section, a man only holds office so long as he discharges the duties of the office might in practice lead to curious results: I am not sure that an officer might not claim that Sunday, public holidays and periods during which he was incapacitated from work owing to illness should be excluded from the period during which he held office. I further doubt whether the Courts would be justified in attempting to distinguish between the various duties, judicial and administrative, which have to be discharged by a District and Sessions Judge.

On the whole, I think that Mr. Moberly must be deemed to have held his office of District and Sessions Judge at Kodaikanal during his stay there on recess; and that he was liable to pay profession tax under section 53 of the Madras District Municipalities Act.

I would therefore give him a decree as sued for with costs in both Courts.

SANKARAN NAIR, J.

SANKARAN NAIR, J.—The question turns upon the construction to be put on section 53 of the Madras District Municipalities Act. Mr. Moberly cannot perform at Kodaikanal any of the duties of the District and Sessions Judge of South Arcot which has to be performed in Court, that is, in public or in the presence of parties. But there is nothing to show that he cannot perform certain other duties of his office which concern parties only very remotely, if at all, outside the district. I agree therefore with the proposed order.

N.R.

APPELLATE CIVIL.

Before Sir Charles Arnold White, Kt., Chief Justice, and Mr. Justice Oldfield.

NATESA GRAMANI (DEFENDANT), APPELLANT, 1914. February 10 and 17.

v.

TANGAVELU GRAMANI (PLAINTIFF), RESPONDENT.*

Indian Registration Act (III of 1877), sec. 17 (1) (b) and (d)—Lease of palmyra juice—Whether lease of immoveable property.

Where a document stated that the lessee had "taken for lease for two years, the palmyra trees" in a certain garden and . . that "he would not cut the leaves of any of the trees on which he climbed except those whose leaves had to be cut,"

Held, that it was not a lease of immoveable property and that the interest conveyed by it, was not, for the purposes of the Registration Act, an interest in immoveable property.

Sukry Kurdeppa v *Goondakull Nagireddi* (1871) 6 M H C.R, 71 and *Seeni Chettiar* v. *Santhanathan Chettiar* (1897) I L.R., 20 Mad, 58 (F.B), explained and distinguished.

APPEAL against the decree and judgment of C. V KUMARASWAMI SASTRIYAR, the City Civil Judge of Madras, in Original Suit No. 561 of 1910.

The facts necessary for the purpose of this report appear from the judgment of the learned CHIEF JUSTICE.

T. Ethiraja Mudaliyar and *K. Balamukunda Ayyar* for the appellant.

C. K. Mahadeva Ayyar for the respondent.

WHITE, C.J.—The only point taken in appeal was that Exhibit A was a document which under the law should be registered but had not been registered and that consequently it was inadmissible in evidence. No objection was taken to the admissibility of the document in the Court of First Instance. The document states that the lessee had "taken for lease for two years . . . for enjoyment for toddy, palmyra fruit, etc., the palmyra trees" in a certain garden, that he had paid the amount of the lease for two years (*i.e.*, Rs. 140) and that he would not cut the leaves of any of the trees on which he climbed WHITE, C.J.

* City Civil Court Appeal No. 30 of 1912.

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WHITE, C.J.

except those whose leaves had to be cut. The question is, is the instrument a lease of immoveable property within the meaning of section 17 (1) (*d*) of the Indian Registration Act, or an assignment of an interest of the value of Rs. 100 or upwards in immoveable property within the meaning of section 17 (1) (*b*) of the Act? For the purpose of this case I am prepared to assume that the instrument is a lease, or, if it is not, that it is an assignment of an interest of the value of Rs. 140. The Act defines "moveable property" as including "standing timber, growing crops and grass, fruit upon and juice in trees, and property of every other description, except immoveable property."

On behalf of the appellant Mr. Ethiraja Mudaliyar has relied upon two decisions as bearing directly upon the point we have to decide. They are *Sukry Kurdeppa* v. *Goondakull Nagireddi*(1) and *Seeni Chettiar* v. *Santhanathan Chettiar*(2). *Sukry Kurdeppa* v. *Goondakull Nagireddi*(1), which was not decided until 1871 turned on the meaning of section 13 of the Registration Act of 1864. That Act contained no definitions of moveable and immoveable property. The Act of 1866 introduced the definitions of moveable and immoveable property. The Act of 1871 introduced into the definition of moveable property the words "juice in trees." This amendment of the definition would seem to be in consequence of a decision of the Calcutta High Court in *Janoo Mundur* v. *Hucha Mundur*(3) where the Court held, though with some doubt, that section 50 of the Act of 1866 had no application to a lease of a right to take the juice of date trees. In view of the definition to which I have referred I do not think the present case is governed by the decision of this Court in *Sukry Kurdeppa* v. *Goondakull Nagireddi*(1).

In *Seeni Chettiar* v. *Santhanathan Chettiar*(2) the interest assigned was a right to cut and enjoy for four years the trees, etc., and the grass, korai, gum, karunela nut, etc., which grow in a certain tank for a certain period. Under the instrument the party was entitled to cut and carry away the whole of the vegetable produce growing in the tank in question. The effect of

(1) (1871) 6 M.H.C.R., 71. (2) (1897) I.L.R., 20 Mad., 58 (F.B.).
(3) (1869) 12 W.R., 366.

the definition to which I have referred was not considered in that case because no question of the right to take the "juice in trees" arose. In that case the Court was of opinion that the instrument created an interest in immoveable property. Mr. Justice SUBRAHMANYA AYYAR in his judgment on page 66 observed that "the fact that the comparatively long period of a little more than four years was granted to the defendant for cutting and removing the trees is, to my mind, strongly in favour" of the view expressed in *Marshall* v. *Green*(1) that "it was contemplated that the purchaser should derive a benefit from the further growth of the thing sold, from further vegetation and from the nutriment to be afforded by the land." SHEPHARD, J., pointed out that under the instrument then in question it was not among the trees and grass then growing and ready to be cut that the defendant was to acquire. He was further to be at liberty to take all the trees which might grow on the ground within the period named.

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The instrument in question in the present case only gives the right to take toddy and fruit for two years. No doubt any license under which a person is entitled to take toddy in a sense creates an interest in land since without land there would be no tree and without tree there would be no toddy. It may be that in this case there is an implied contract or covenant that the lessor should not cut down the trees in derogation of his own grant. But having regard to the definition to which I have referred it seems to me the right view is that the instrument in question is not a lease of immoveable property and that the interest conveyed by the document is not for the purposes of the Registration Act, an interest in immoveable property.

Accordingly I would dismiss the appeal with costs.

OLDFIELD, J.—The first of the two cases, on which the defendant has relied, *Sukry Kurdeppa* v. *Goondakull Nagireddi*,(2) can be dismissed shortly, because at its date "moveable property" was not defined for the purpose of registration as it now is.

OLDFIELD, J.

The second, *Seeni Chettiar* v. *Santhanathan Chettiar*(3) was decided after the amendment of the definition in 1871,

(1) (1875) L.R., 1 C.P.D., 35 at p. 39. (2) (1871) 6 M.H.C.R., 71.
(3) (1897) I.L.R., 20 Mad., 58, at p. 66 (F.B.).

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though without explicit reference to it; and it was held that an instrument authorising the enjoyment and removal of trees, grass, and other produce in a tank bed for a period of four years for a consideration of Rs. 3,400 required registration. Now, although a right to the juice of trees was not conveyed by that instrument, its terms indicating that no juice bearing trees were in question, yet it resembled Exhibit A in the present case to the extent that, the trees being referred to in the judgment as timber, it dealt with moveable property as it is at present defined. That however was not held to be decisive as to the necessity for registration. The ground, on which registration was required, was in the words of SUBRAHMANYA AYYAR, J., that "parties entering with such a contract may expressly or impliedly agree that the transferee shall enjoy for *a long or short period, some distinct benefit to arise out of the* land, on which the timber grows. In a case like that, the contract would undoubtedly be not one in respect of mere moveables, but would operate as a transfer of an interest in immoveable property." And in deciding whether the contract then in question fell under the latter description the learned Judge expressly attached importance to its duration, four years, and presumably also to the nature of the property, timber, grass and undergrowth which would be augmented by spontaneous growth. No doubt in the present case, in which planitiff's right was to draw palmyra juice, cut such leaves as his doing so involved and take the fruits of the trees, his right to do so for two reasons entailed that he should benefit to adopt an expression from *Marshal* v. *Green*(1) by "the nutriment afforded by the land." This benefit however is not in my opinion such an interest in land as section 17 (3) (*b*) of the Registration Act contemplates. For it involves only a stipulation that the trees are to remain available during the currency of the contract for the use specified in it, not any limitation on the transferor's enjoyment of the land as such. In *Seeni Chettiar* v. *Santhanathan Chettiar*(2) there was such a limitation. Although, as observed in the judgment already referred to, there was no such transfer of possession as would constitute a lease, the contract was still subject to the implied proviso that the transferor's

(1) (1875) L.R., 1 C.P.D., 35. (2) (1897) I.L.R., 20 Mad., 58 (F.B.).

"action should not injuriously affect the special rights conferred upon the transferee with respect to the trees, etc.," and the enjoyment of those rights would evidently have been irreconcilable with the retention of any substantial enjoyment by the transferor. Here it has not been explained and it does not appear how any ordinary use of the land could affect the nutriment it afforded to the trees, their juice or their fruit. It is therefore possible to give unrestricted effect to the reference to the juice of trees in the definition of moveable property in section 2 of the Act and to hold that Exhibit A transferred no interest in immoveable property.

Concurring with the learned CHIEF JUSTICE I would dismiss the appeal with costs.

S.V.

APPELLATE CIVIL.

Before Mr. Justice Seshagiri Ayyar.

1914. February 19 and 24.

SUBBAROYA REDDIAR (PLAINTIFF), PETITIONER,

v.

RAJAGOPALA REDDIAR AND TWO OTHERS (DEFENDANTS), RESPONDENTS.*

Limitation Act (IX of 1908), arts. 62 and 97—Sale of land by one having a voidable title and putting purchaser in possession thereunder—Dispossession by person entitled to avoid—Cause of action for return of purchase money, only on dispossession.

A who had a title to certain immoveable property, voidable at the option of *C*, sold it to *B* and put *B* in possession thereof. *C* then brought a suit against *A* and *B*, got a decree and obtained possession thereof in execution.

Held, that *B*'s cause of action for the return of the purchase money arose not on the date of the sale but on the date of his dispossession when alone there was a failure of consideration and that the article applicable was article 97 of the Limitation Act.

Cases on the subject reviewed.

PETITION under section 25 of the Provincial Small Cause Courts Act (IX of 1887), praying the High Court to revise the decree of A. N. ANANTARAMA AYYAR, the Subordinate Judge of Tinnevelly, in Small Cause Suit No. 1934 of 1912.

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* Civil Revision Petition No. 390 of 1913.

The necessary facts are given in the judgment.

C. S. Venkatachariyar for the petitioner.

S. T. Srinivasagopalachariyar for the respondents.

SESHAGIRI AYYAR, J.

JUDGMENT.—The facts of this case are not in dispute. One Subbaroya Reddiar was the original owner of the properties conveyed to the plaintiff. At Subbaroya's death, his widow Kanthammal took possession of the properties of her husband; Gnanammal, the mother of Subbaroya Reddiar, executed in 1892 a deed of release of her claims in favour of Kanthammal. On the 23rd August 1900 Kanthammal executed a release of her rights in favour of the father of defendants Nos. 1 and 2 and the third defendant: they are said to be the reversioners to the estate of Subbaroya Reddiar. In this release deed executed by Kanthammal reference is made to the release obtained by her from her mother-in-law. The father of defendants Nos. 1 and 2 and the third defendant by his guardian executed on the same day a sale deed to the plaintiffs. Plaintiffs were put in possession. Kanthammal died in 1904. In 1910 Gnanammal brought a suit to recover possession of the properties from the plaintiffs on the ground that her release of 1892 only related to her right to maintenance and that her right to succeed to her son's estate which accrued to her after the death of Kanthammal was not affected by the release. To that suit the plaintiffs and defendants were all parties. Gnanammal succeeded in her suit and she obtained possession of the property from the plaintiffs in 1911. The said suit was brought within a year of the dispossession. The plaintiffs' present suit is to recover the amount paid by them to the father of defendants Nos. 1 and 2 and the mother of the third defendant on the ground that the consideration for the sale failed when Gnanammal deprived the plaintiffs of possession of the properties. If article 62 or 97 of the Limitation Act applied, the suit would be in time. Mr. Srinivasagopalachariyar contended that no such suit would lie and if the suit were entertainable, the cause of action having arisen on the date of the sale, viz., the 23rd August 1900, the suit was barred by limitation. Upon the first question as to whether a suit lies I have come to the conclusion that it does. The contention for the counter-petitioner is that as there is no express covenant for title and as the plaintiffs took with full knowledge of the infirmities of title, the principle of *caveat emptor* applies

and there is no cause of action. In India, there is a statutory guarantee for good title unless the same is excluded by the contract of parties [*vide* section 55, clause (2) of the Transfer of Property Act]. The question of the knowledge of the purchaser does not affect the right to be indemnified under the Indian Statute Law. Even in England, if on the face of the conveyance a *primâ facie* title is secured, knowledge of facts which may lead to the discovery of flaws will not affect the claim to compensation. See *Page* v. *Midland Railway Company*(1). In the present case, the conveyance was *primâ facie* unimpeachable, and I do not think the construction to which the release of Gnanammal lent itself in the eye of law, can be said to amount to a knowledge of the defect of title. On the second question as to when the cause of action for damages arose, a very large number of cases were quoted before me. These cases can roughly speaking be classified under three heads: (a) where from the inception the vendor had no title to convey and the vendee has not been put in possession of the property; (b) where the sale is only voidable on the objection of third parties and possession is taken under the voidable sale; and (c) where though the title is known to be imperfect, the contract is in part carried out by giving possession of the properties. In the first class of cases, the starting point of limitation will be the date of the sale. That is Mr. Justice BAKEWELL's view in *Ramanatha Iyer* v. *Ozhapoor Pathiriseri Raman Nambudripad*(2); and I do not think Mr. Justice MILLER dissents from it. However, the present case is quite different. In the second class of cases the cause of action can arise only when it is found that there is no good title. The party is in possession and that is what at the outset under a contract of sale a purchaser is entitled to, and so long as his possession is not disturbed, he is not damnified. The cause of action will therefore arise when his right to continue in possession is disturbed. The decisions of the Judicial Committee of the Privy Council in *Hanuman Kamat* v. *Hanuman Mandur*(3) and in *Bassu Kuar* v. *Dhum Singh*(4) are authorities for this position. In the third class of cases also it is said that the cause of action will arise only on the disturbance

(1) (1894) 1 Ch., 11.
(2) (1913) 14 M.L.T., 524.
(3) (1892) I.L.R., 19 Calc., 123 (P.C.).
(4) (1889) I.L.R., 11 All., 47 (P.C.).

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SESHAGIRI AYYAR, J.

of possession. No question of concurrence of third parties either to avoid or perfect the title arises in this case. The most recent authority for this proposition is *Narsing Shivbakas* v. *Pachu Rambakas*(1). Mr. Justice MILLER in *Ramanatha Iyer* v. *Ozhapoor Pathiriseri Raman Nambudripad*(2) gives a qualified assent to the proposition laid down in that case. I do not find Mr. Justice BAKEWELL expressing his dissent from the view taken in it. I agree with the view taken by Mr. Justice MILLER that *it is impossible to see* "*how the sale can be* said to have been without consideration and consequently void *ab initio* where possession has been given under the contract of sale." The case before me, properly speaking, comes under *the second class. If the widow Gnanammal did not recover* possession, the plaintiff would never have been disturbed. The *sale was not void ab initio. It was only voidable if* Gnanammal chose to avoid it. Even if this view is not correct, I am prepared to hold that this case comes under the third class of cases where under an invalid contract possession had been given; until that possession is interfered with, the purchaser *is not bound to ask* for the return of his purchase money on the possible ground that at some future time his sale may be impeached. *I therefore* hold that the cause of action for this suit arose when under the decree obtained by Gnanammal, the possession of the plaintiff was disturbed. The decisions in *Ardesir* v. *Vajesing*(3), in *Shivram* v. *Bal*(4) and *Amrita Lal Bagchi* v. *Jogendra Lal Chowdhury*(5) all relate to cases where no possession passed to the vendee and consequently the consideration *failed at the date* of the sale. They have no bearing on the present case. On the other hand the judgments in *Rajagopalan* v. *Tirupananthal Thambiran*(6), *Sriramulu* v. *Chinna Venkatasami*(7) and *Venkatanarasimhulu* v. *Peramma*(8) are cases where possession passed to the vendee and there was subsequent *deprivation* of possession. The Subordinate Judge is therefore wrong in holding that the plaintiff was not entitled to bring the suit to recover the purchase money, that the cause of action arose on

(1) (1913) I.L.R., 37 Bom., 538.
(2) (1913) 14 M.L.T., 524.
(3) (1901) I.L.R., 25 Bom., 593.
(4) (1902) I.L.R., 26 Bom., 519.
(5) (1913) I.L.R., 40 Calc., 187.
(6) (1907) 17 M.L.J., 149.
(7) (1902) I.L.R., 25 Mad., 396.
(8) (1895) I.L.R., 18 Mad., 173.

the date of the sale and that the suit was barred by limitation. I reverse the decree of the Subordinate Judge and direct him to restore the case to his file and dispose of it according to law Costs to abide the result.

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N.R.

APPELLATE CIVIL.

Before Mr. Justice Sadasiva Ayyar and Mr. Justice Seshagiri Ayyar.

1912 September 23 and 27 and 1914. March 18.

UPADRASTA VENKATA SASTRULU (PLAINTIFF), APPELLANT IN ALL,

v.

DIVI SITARAMUDU AND EIGHTEEN OTHERS (DEFENDANTS), RESPONDENTS.*

Madras Estates Land Act (I of 1908), sec. 3, cl. (2) (d); sec. 8, excep.—Grant of village as inam—Village composed of cultivated lands and waste lands—Grant of melvaram—Tenant of waste lands, without occupancy right—Village, an estate—Surrender by tenant—No acquisition of kudivaram by Inamdar—Suit in ejectment—Jurisdiction of Civil Courts.

A village, granted as an inam in A.D. 1743, was comprised at the time of the grant partly of lands under cultivation and party lof waste lands. The waste lands were subsequently given by the inamdar for cultivation from time to time to different sets of tenants without occupancy right The inamdar brought the present suit in the Civil Court to eject the tenant whose period of tenancy had expired prior to the suit. The defendant contended that the Civil Court had no jurisdiction to entertain the suit

Held, that the village as a whole must be considered to be an 'estate' within the definition of section 3, clause (2) (*d*) of the Estates Land Act.

Surrender by a tenant is not one of the modes in which the kudivaram right can be acquired by an inamdar within the terms of the exception to section 8 of the Estates Land Act.

An inamdar cannot acquire the kudivaram right by surrender from a tenant who had himself no occupancy right in the holding.

Held, consequently, that the Civil Court had no jurisdiction to entertain the suit.

APPEALS against the orders of F. A. COLERIDGE, the Acting District Judge of Kistna, in Appeals Nos. 293 to 392 and 432 of 1910,

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* Appeals Against Orders Nos. 186 to 196 of 1911.

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respectively, preferred against the decree of A. VENKATARAMAYYA, the District Munsif of Gudivada, in Original Suits Nos. 453 to 460, 462, 463 and 461 of 1908, respectively.

The facts of the case appear from the judgment of SADASIVA AYYAR, J.

M. O. Parthasarathi Ayyangar for the Honourable Mr. *P. S. Sivaswami Ayyar, V. Ramesam* and *P. Nagabhushanam* for the appellant.

S. Srinivasa Ayyangar and *V. Ramadoss* for the respondents.

These appeals came on for hearing before SUNDARA AYYAR and SADASIVA AYYAR, JJ., who passed the following.

SUNDARA AYYAR AND SADASIVA AYYAR, JJ.

ORDER—Before disposing of these appeals we consider it desirable to have findings on the following points :—

(1) Whether the land in question in each of these suits was waste land or cultivated land at the time of the grant of the inam, and

(2) whether at the time of the letting to the defendant in each suit the kudivaram over the land in the suit had been acquired by the inamdars.

Both parties may adduce fresh evidence. The findings should be submitted within three months from the date of receipt of this order in the Court below and the parties will be at liberty to file memoranda of objections to the said findings within seven days after notice of return of the same shall have been posted up in this Court.

In compliance with the above order the District Judge of Kistna submitted the following findings : viz., on the *first issue,* that the lands were waste, as claimed by plaintiff, at the time of the grant and on the second issue, that the kudivaram over the land in the suit had not been acquired by the inamdars at the time of the letting to the defendant in each suit.

These appeals coming on for final hearing after the return of the findings of the Lower Appellate Court, the Courts delivered the following judgments :—

SADASIVA AYYAR, J.

SADASIVA AYYAR, J.—Plaintiff is the appellant. He is an inamdar of a village called Billapadu, the inam grant having been made so long ago as 1748. That village was then a Moujo village, that is, a village in which there were peasant proprietors owning cultivable lands even then. The suit relates to 60 acres out of the 300 acres in that village. For the purposes of this

case, it must be taken that these 60 acres were lying as immemorial waste at the time of the inam grant to plaintiff's ancestors. It is further found by the lower Appellate Court that these lands were afterwards given by the inamdar for cultivation from time to time to different sets of tenants without occupancy right. Paragraph 7 of the plaint says : "In fasli 1317 the plaintiff changed the tenant who was in possession prior to that time and leased the schedule-mentioned lands to the defendants for only a year." Treating the one year's tenancy as having expired on the 1st of April 1908, the suit was brought to eject the defendants in the District Munsif's Court of Gudivada.

The preliminary contention raised by the defendants was that, as the plaintiff's inam was an estate falling under section 3, clause (2) (*d*) of the Madras Estates Land Act, the Civil Court had no jurisdiction to entertain a suit for the ejectment of defendants from the plaint lands which are ryoti lands in the inam estate. The plaintiff's reply to this contention of the defendants seems to be that the inam itself is not an "estate" under the Estates Land Act, and even if the inam is an estate, these 60 acres either never formed part of the estate or had ceased to form part of the estate and hence the jurisdiction of the Civil Courts had not been taken away.

It has been held in numerous cases that, when a whole village is granted to a non-resident Brahman as inam, the presumption is that the grant is only the grant of the melvaram right. The grant of the melvaram right means that the grantee is to receive the melvaram revenue from the peasant proprietors who are already in the enjoyment of the cultivated lands in the village and that, as regards the waste lands in the village, he is entitled to create further melvaram revenue for himself by letting them to cultivating tenants. The District Munsif gave a decree for the plaintiffs in this case, but the District Judge on appeal held that the Civil Court's jurisdiction was ousted as the plaint lands were part of an "estate" and that the lands have continued to be ryoti lands in the estate, the plaintiff's ancestor (the grantee) not having been a holder of the kudivaram at the time of the grant of the melvaram to him. I think that the learned District Judge was right in his conclusions, and that his order directing the plaint to be presented to the Revenue Court is correct.

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SADASIVA AYYAR, J.

The appellant's learned advocate relied upon the observations found in *Lakshmi Narasimha Row* v. *Sitaramaswami*(1) and some similar observations in later cases. I don't think these cases go beyond this point, namely, that if it is proved that at the time of the grant of a whole village in inam all the lands in that village were lying waste or if it is proved that at the time of the grant of certain defined extent of lands in a village (such a grant being called a minor inam grant), that extent of land so granted as minor inam was lying waste, the grant might be deemed in either case to be not of the melwaram alone in such waste lands but of the kudivaram also. In such a case, of course, even the whole village so granted will not fall under the definition of "estate" in section 3, clause (2) (*d*), because that section relates to cases where the grant was of the melvaram *alone*. Were the entire lands themselves in the village, as they were lying waste, were granted in inam, it cannot, of course, be said to be a grant of the melvaram alone. But the present case is not such a case. Here the only thing admitted by the defendants is that about 20 per cent of the lands lay waste when the whole village was granted in inam. I do not think that in such a case, the mere fact that there were some immemorial waste lands situated in the village granted as inam, could remove the village itself from the definition of "estate" or that it can be held that the waste lands never formed part of the estate and were granted on a different footing from the grant of the remaining lands. Just as the private home-farm lands of an inamdar continue to be part of the estate, though no tenants have got any kudivaram right in them, so the immemorial waste in an estate does form part of the estate, provided that the grant of the village was intended to be only the grant of the melvaram right in the village lands. Where the Government or a Zamindar grants a whole village, some lands in which are lying waste but most of the lands in which are under cultivation, I think that the usual presumption prevails that the grant of the village in general terms means only the grant of the melvaram in the whole village lands including the waste lands. The inamdar, so far as the waste lands are concerned, cannot be considered to have the kudivaram right in them though he could create kudivaram

(1) (1912) 24 M.L.J., 283 at p. 290.

interest in a waste land by letting it to a cultivator and could have (before the Estates Land Act) *converted* it into a private land by cultivating it through his home-farm servants and thus got the kudivaram right vested in himself. Till he does either of these things, the lands would lie waste, *owned* by the inamdar, no doubt, in a certain sense (which is not at all an unreal sense) but he cannot be said to have the kudivaram right in it, kudivaram implying direct contact by cultivation with the soil. I do not feel myself much impressed with the argument based on logic that the kudivaram in a waste land must belong to somebody and, as regards immemorial waste, it must be with the landlord. This argument if pressed to its logical limit, would lead to the conclusion that when a ryoti-land is abandoned by the tenant, it becomes at once private or home-farm land as the kudivaram right till then existing in the tenant became joined in the landlord with the melvaram right and he became the owner of it to the same extent as he is of the private home-farm land in which land both such rights admittedly combine. The kudivaram might even be admitted to be vested in a sense in the landholder in ryoti lands abandoned by the former tenant if it is necessary to admit that proposition in order to support his right to grant the kudivaram right to any person he likes after the abandonment by the former tenant of the said lands but that does not vest absolutely in him according to the common law governing the rights of zamindars and tenants (and now according to the Madras Estates Land Act), in such a way that what was ryoti land became converted into the landholder's private land. Whether this state of things is logical or not, it has been accepted by the Legislature and I think Courts of Justice are under a duty to advance the views of the Legislature as clearly expressed in the Estates Land Act, namely, that the kudivaram interest in ryoti lands should, if possible, be prevented from so permanently vesting in the landlord as to convert them into his private or home-farm lands.

I think it must be admitted that the judgment of MILLER, J., in *Ponnusami Padayachi* v. *Karuppudayan*(1), goes to the length of holding that a land which is not the private or home-farm land of the inamdar ceases to be part of the estate if no

(1) (1914) 1 M.L.W., 218; s.c., 26 M.L.J., 255.

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tenant holds permanent occupancy right therein. With the greatest respect, it seems to me that if even private or home-farm land continues to be part of the estate (though the kudivaram right in it admittedly belongs to the inamdar), the mere fact that no tenant is able to prove that he has a permanent occupancy right in a ryoti land cannot make it cease to be part of the estate. SPENCER, J., in that same case expressed a different view at page 225 and he did not accept the contention that all lands in which no tenant proves a permanent occupancy right in an estate falling under section 3, clause 2 (*d*) cease to form part of the estate (see the penultimate paragraph of the judgment of SPENCER, J.). I think *Ponnusami Padayachi* v. *Karuppudayan*(1), is binding authority only for the proposition that a suit for the ejectment of a tenant of old waste who has no occupancy right and who holds under an unexpired lease granted before the Estates Land Act can be brought *in a Civil Court* provided the suit is not based on one of the grounds mentioned in section 153, clauses (*a*) to (*e*) of the Estates Land Act.

While the Legislature was not at all anxious to see that home-farm lands are not converted into ryoti lands but was rather anxious the other way (see the proviso to section 81 of the Estates Land Act), the Legislature has taken great care in section 185 to restrict the claim of the landlord to treat lands in an estate as private lands; it has raised a strong presumption in favour of lands being ryoti lands (section 23) and it has expressly enacted that the merger of the occupancy right in the landholder even by transfer or succession shall not convert ryoti land into private land (section 8, clause 3). If even a merger by transfer or succession cannot convert ryoti into private land, merger by abandonment or surrender (supposing such a merger can take place) cannot *a fortiori*, so convert it (see also section 6, clause 2). I have held in *Suryanarayana* v. *Potannah*(2) following *Badan Chandra Das* v. *Rajeswari Debya*(3), and *Muktakeshi Dasi* v. *Pulin Behary Singh*(4) that acquisition by the landholder of the kudivaram by surrender or abandonment of the land by the tenant cannot remove the tenant's lands from the definition of an "estate" even when the "estate" was one

(1) (1914) 1 M.L.W., 218; s.c. 26 M.L.J., 285.
(2) (1914) 26 M.L.J., 99.
(3) (1905) 2 C.L.J., 570.
(4) (1908) 8 C.L.J., 324.

falling under section 3, clause 2(*d*). As regards all other kinds of estates, the intention of the Legislature is quite clear and the exception to section 8 should therefore be strictly confined to the narrowest limits. The lower Appellate Court's conclusion, therefore, that so far as the plaint village, that is, the village, as a whole, is concerned, the land revenue alone was granted in inam to a person not owning the kudivaram thereof is correct. The village is an estate under section 3, clause 1 (*d*) of the Estates Land Act, and the 60 acres in dispute is part of the estate. Even immemorial waste lands in an estate are ryoti lands unless they are proved to come under the peculiar definition of "old waste" or unless they are proved to be private lands (section 23 of the Estates Land Act). In *Ramchandra* v. *Venkatrao*(1) and *Rajya* v. *Balkrishna Gangadhar*(2), it was held that an inamdar could not be held to have the same rights in the soil of immemorial waste lands as a kudivaramdar has in the soil of his holding, though the inamdar had the right to convert any portion of the immemorial waste into home-farm lands, that is, has the right to get kudivaram and occupancy rights by actual cultivation. I would, therefore, hold that the plaint lands were ryoti lands and not the private lands of the inamdar-landholder at the time of and immediately after the inam grant.

When the inamdar afterwards granted the lands for cultivation without giving the cultivators permanent occupancy rights (but only the rights to occupancy for one year or from year to year or a specified number of years) and when he changed the cultivators from time to time, it cannot be said that thereby the inamdar himself got any permanent occupancy or kudivaram right in the land as there is no evidence to prove that he let them expressly as his private or home-farm lands. The occupancy right (that is, the right to occupy and cultivate) was enjoyed by the cultivating tenants from time to time though they did not get a permanent occupancy right thereby. The contention that by the surrender of the land by the predecessor of the defendants to the inamdars, the inamdar got permanent occupancy or kudivaram rights under the exception to section 8 of the Estates Land Act is untenable both for the reasons

(1) (1882) I.L.R., 6 Bom., 598 at p. 603.
(2) (1905) I.L.R., 29 Bom., 415 at p. 420.

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mentioned in my judgment in *Suryanarayana* v. *Potannah*(1), and also for the reason stated by the learned District Judge on the facts of this case, namely, that even if the surrender by the tenant be equivalent to a transfer of the tenant's right to the landlord, the tenant who surrendered had himself no permanent occupancy or kudivaram right to transfer to the landlord. The judgment of my brother TYABJI, J., in the recent cases, *Buchi Saravagarudu Garu* v. *Venkata Raju*(2) and *Ardajeri Rama Reddi* v. *Karpi Sivaga*(3) have decided that so far as ryoti lands are concerned a suit for ejectment of a tenant by a landholder on any ground could be brought only in the Revenue Court. In the result, I would therefore dismiss these Civil Miscellaneous Appeals without costs.

SESHAGIRI AYYAR, J.

SESHAGIRI AYYAR, J.—The question for decision in these cases is whether the Civil Courts have jurisdiction to entertain the suits. My conclusions are based on the pleadings in the case and on the admission of the parties; any pronouncement made regarding the rights of the plaintiff and the defendants on this preliminary issue will not conclude parties at the further hearing of the case by the proper tribunal. The facts of the case in so far as they are material for the determination of this point are these. The village in question consists of 300 acres. It was granted to the ancestors of the plaintiffs in 1748. Of these, 60 acres were uncultivated and were lying waste. The remaining 240 acres must be taken for purposes of this case to have been under the occupation of tenants who had permanent rights. The present litigation relates to the 60 acres which were waste at the time of the grant. If the village is an *estate* then the Civil Courts have no jurisdiction to entertain this suit; otherwise this suit was rightly instituted. This is an inam village and as such it comes under section 3, clause 2 (*d*) of the Estates Land Act. There is no doubt that the entire land revenue of the village was granted to the plaintiff at the time of the grant. But there was a portion on which no land revenue was due because it was waste land. I do not think that should make any difference. It is true that the language of the definition seems to suggest that nothing but land revenue should

(1) (1914) 26 M.L.J., 99. (2) (1913) 21 I.C., 913.
(3) (1913) 21 I.C., 916.

have been granted if the village is to be regarded as an estate. The fact that upon a portion of the village no land revenue was due is not enough to conclude that the grant of the inam was not an estate. In coming to this conclusion I have not lost sight of the suggestion made by the learned counsel who appeared for the appellant that the grant of rights in the waste land must include the kudivaram rights as well. I think there is a great deal of force in that argument.

It was argued by Mr. Srinivasa Ayyangar that where a grant is of unoccupied waste land, all that the grantee acquires is a right to annex it to his home-farm land by doing certain acts indicative of his intention to do so, and that till then he acquires no higher rights in it than what he has in the lands occupied by permanent tenants. *Primâ facie* the grant of the soil comprises all there is in it. The potentiality of a tenant acquiring occupancy rights may be there, but that will not derogate from the grantee having full rights in the soil at the time of the grant. The history of legislation in this country, of which we are bound to take judicial notice, shows that the right in the soil vests in the paramount power. It may be open to argument when a particular legislation comes to be tested before a court of law whether such an assumption is well-founded. Till the Legislature makes a departure, Courts are bound to proceed on the assumption that the right in the soil is in the Government. This is based on the theory that the ancient sovereigns of this country had similar rights. In that view, I must hold that the grant of the village in 1748 included the right to such revenue or rent as the grantor had in the village, plus the full rights in those unoccupied portions of the village in which the tenants had no permanent rights of occupancy. My conclusion therefore is that in 1748 the grantee acquired both the kudivaram and melvaram rights in the 60 acres, and the rights of the melvaramdar alone in the remaining 240 acres. Even in this view, I must hold that the village that was granted in 1748 was an estate under the Estates Land Act. The use of the word *alone* in the section in qualifying *land revenue* is somewhat misleading. What the Legislature meant to lay down was that no kudivaram rights should have been granted in the lands which were under the occupancy of tenants; any other construction would lead to difficulties. Supposing the boundaries of a grant included, as it always does, a few

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estate is necessary. Some act has also to be done by way of putting an end to the tenancy. This conclusion derives support from the decision in *Cheekati Zamindar* v. *Ranasooru Dhora*(1), where Mr. Justice SUBRAHMANYA AYYAR says: "For in the case of lands which have been relinquished by the former occupants or which have been lying waste from time immemorial, they too, when taken up by a raiyat, are treated exactly on the same footing as land into the possession of which it is not shown that the raiyat was let in by a Zamindar, and the raiyat holds possession of them for an indefinite period."

In my opinion surrender *ipso facto* is not a mode of acquisition and has not the same effect in conferring rights as transfer or succession. Consequently the word *otherwise* will not include a surrender, because that will be obnoxious to the principle of construing words *ejusdem generis*.

My conclusion is that the plaintiff is not entitled to the benefit of the exception to section 8, and the village is an *estate*, and as such the Civil Courts have no jurisdiction to entertain the present suits. I would make no order as to costs.

(1) (1900) I.L.R., 23 Mad., 318 at p. 324.

K.R.

APPELLATE CIVIL—FULL BENCH.

Before Sir Charles Arnold White, Kt., Chief Justice, Mr. Justice Sankaran Nair and Mr. Justice Oldfield.

PERIYA AIYA AMBALAM AND ANOTHER (DEFENDANTS NOS. 2 AND 3), APPELLANTS, 1913. July 22, August 5, October 24 and December 10

v

SHUNMUGASUNDARAM AND FOUR OTHERS (FIRST PLAINTIFF AND LEGAL REPRESENTATIVES OF SECOND PLAINTIFF), RESPONDENTS.*

Usufructuary mortgage—Dispossession of mortgagee by a stranger, adverse to mortgagor from the time of his knowledge.

Where a trespasser dispossesses a mortgagee in possession and continues in possession asserting a title adverse to the mortgagor also, such dispossession will be adverse to the mortgagor from the time the mortgagor has knowledge of the assertion (though he may not then be entitled according to the terms of the mortgage to recover possession from the mortgagee).

The onus is on the trespasser to prove not only that he asserted a right adverse to the mortgagor but also that the latter knew it.

SECOND APPEAL against the decree of F. B. EVANS, the District Judge of Rāmnād at Madura, in Appeal No. 123 of 1911, preferred against the decree of A. SAMBAMURTI AYYAR, the Temporary Subordinate Judge of Rāmnād, in Original Suit No. 70 of 1910.

The facts of the case appear from the Order of Reference of SADASIVA AYYAR, J.

C. V. Anantakrishna Ayyar for the appellants.

S. Muthia Mudaliyar for the respondent.

ORDER OF REFERENCE TO A FULL BENCH.

SADASIVA AYYAR, J.—The defendants Nos. 2 and 3 (appellants) trespassed into the house mentioned in the plaint in 1898 and dispossessed the usufructuary mortgagee of the house, the equity of redemption vesting in the plaintiff and the mortgage term expiring only in 1917 This suit for declaration of the plaintiff's title to the house was brought in 1909 on the allegation that defendants Nos 2 and 3 denied the plaintiff's title to the equity of redemption, when the plaintiff remonstrated with them for constructing additional buildings upon the lands in 1908. SADASIVA AYYAR, J.

* Second Appeal No. 1973 of 1911.

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One of the questions for decision is, whether this declaratory suit is barred by limitation.

The plaintiff bases his cause of action in 1908 when the defendants Nos. 2 and 3 denied his title, and when he remonstrated with them, and he contends that he has six years from 1908 to bring his suit for declaration.

The defendants Nos. 2 and 3 contend that they have been in adverse possession of the house from 1898 to the plaintiff's knowledge, that they have been denying the plaintiff's title from 1898 and setting up title in themselves, and hence this declaratory suit, brought more than six years after 1898 and more than three years after the plaintiff attained majority, is barred.

That the period of limitation for a declaratory suit is one of six years under article 120 of the Limitation Act (the period being calculated from the date when the right to sue accrues) is now settled, unless the case comes under the classes of suits praying for the special declarations provided for in articles 92, 93, 118, 119, 125 and 129 (that is, suits for declarations in respect of forgeries of documents, adoptions, alienations by Hindu widows and maintenance, etc.).

Now declaratory suits might be of very various kinds and the question when the right to sue accrues in respect of a particular class of declaratory suits seems to be a question of great difficulty in many cases. Section 42 of the Specific Relief Act provides in general terms that any person entitled to *any legal character* or *to any right to property* may institute a suit against any person denying or interested to deny his title to such character or right and the Court may, *in its discretion*, make the necessary declaration that he is so entitled. Now, if a suit can be instituted not only against the person *denying* but even against the man *interested to deny*, when does the *right to sue accrue for a* suit brought against a person who is merely interested to deny? Is it as soon as the defendant becomes interested to deny or when the plaintiff apprehends that he may actually deny? And if the cause of action arises only when the denial occurs, should the denial be by a formal act or can an oral denial made to a person or a denial made in writing and not communicated to anybody give rise to a cause of action and will the plaintiff's suit be barred after six years from such denial? Can the defendant be allowed to say that he wrote a denial in his closet and put it in a

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box without communicating it to anybody and that six years from that date is the period for bringing the declaratory suit? Further, does each separate denial give rise to a separate cause of action? On these questions, the case law has not been very consistent. In *Chukkun Lal Roy* v. *Lolit Mohan Roy*(1), it was held that a suit for declaration of title to immoveable property is not barred so long as plaintiff's right to such property is a subsisting right and that the right to bring a declaratory suit is a continuing right so long as the right to the property itself is subsisting. But this dictum of the Calcutta High Court has been dissented from in *Rajah of Venkatagiri* v. *Isakapalli Subbiah*(2). Even in the latter case, there is no definite indication as to when the right to sue accrues in such cases. In that case, there was an attachment of property by a Magistrate under section 146 of the Criminal Procedure Code in consequence of the disputes raised by the defendant. The learned Judges say "right to sue certainly accrued on the date of the attachment, which is rightly given as the date of the cause of action." At least some days before the Magistrate attached the property, the defendant must have begun his denial of the plaintiff's title, and how could the date of the attachment and not the date of the original denial be rightly given as the date of the cause of action? In *Ottappurakkal Thazhate Soopi* v. *Cherichil Pallikkal Uppathumma*(3), it was held that "the right of junior members of a tarwad to sue for a declaration that an alienation by the karnavan is not binding on the tarwad, accrues the moment the document is completed and not when the plaintiff obtains knowledge of the alienation." Now the alienation was evidently made by a registered deed. ...at case, the learned Judges held that "the knowledge or ...nce of the plaintiffs of the fact of the alienation having ...made does not seem to be material on the question of the ...l of the cause of action for the declaratory suit." In ...*raya* v *Ramchandra*(4) it was held that though the ...dants had denied the plaintiffs' title in 1888 before ...urvey Officer in a proceeding to which the plaintiffs ...ho parties, the cause of action for plaintiffs' suit for

(1) (1893) I.L.R., 20 Calc., 906 at p. 925.
(2) (1903) I.L.R., 26 Mad., 410 at p. 416. (3) (1910) I.L.R., 33 Mad., 31.
(4) (1900) I.L.R., 24 Bom., 533

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declaration, filed in 1896, did not accrue in 1888, but in the year 1892 when the defendants opposed the petition put in by the plaintiffs to the Survey Officer to review his order of 1888 passed *ex parte*. At pages 537 and 538, the learned Judges make some observations which lead one to think that they were of opinion that time must be counted only from the date when the plaintiffs had notice of the entries in the Survey Officer's register of 1888 and that the conduct and denial of the plaintiffs' title must somehow affect the plaintiffs before the right to sue accrues. In *Akbar Khan* v. *Turaban*(1), the defendant, in derogation of the plaintiffs' title, had the defendant's own name entered in the revenue papers in respect of the property in suit in 1895. In 1903, the plaintiff attempted to have the entry corrected and the defendant resisted the plaintiff. The learned Judges held that there was only one cause of action which arose in 1895, and that the suit, brought within two years of 1903, was barred. They refer to a previous unreported decision of the Allahabad High Court which seems to have taken a different view and try to distinguish it. That unreported decision is set out at page 10 in the notes at the bottom of that page. With the greatest respect, I think that that case so reported in the footnote cannot be distinguished as was distinguished in the principal case. The learned Judges who decided the case reported in the footnote say "the Courts below reckoned as the starting point the order of the Settlement Officer referred to above. No doubt, the plaintiffs might, upon this order being made, have instituted a suit for a declaratory decree, but in our opinion they were not *bound* to do so. The defendant might have taken no steps *to enforce any right* under the order of the 5th May 1899, but when he did so, plaintiffs, in our opinion, got a *fresh cause of action* for asking for a declaratory decree." Thus, the learned Judges in the footnote case seem to have held that one cause of action accrued when the denial of title took place and a fresh cause of action when the defendant tried to enforce any order made in consequence of such denial of title. In *Mamabi* v. *Acharath Paralat*(2) where article 120 was applied to a suit for pre-emption by an ottidar under the customary law of Malabar, it was held that the right to sue to enforce the plaintiff's right to pre-emption accrued

(1) (1909) I.L.R., 31 All., 9. (2) (1912) 23 M.L.J., 607.

only when he had knowledge of the sale of the land by the mortgagor to a third person. I am inclined to think that, where the right to sue for the declaration of title to immoveable property accrues by reason of a mere denial of title behind the plaintiff's back by the defendant, whether the denial is made orally or by writing or by an act before a public officer, plaintiff's right to sue could not be held to accrue till he gets knowledge of such denial. Of course, it might be argued that the denial might have taken place several years ago and the plaintiff cannot be allowed to bring a declaratory suit several years afterwards simply because his knowledge of such denial dated only within six years before suit. But this danger is very easily avoided by the Court using its very wide discretion to refuse declaration in such circumstances, as the granting of declaratory relief is always in the discretion of the Courts (see section 42 of the Specific Relief Act).

Coming to the facts of the present case, taking the denial of the plaintiff's title by the defendants Nos. 2 and 3 as the date of the cause of action or as the date of *a* cause of action, the finding of the lower Courts is that the definite denial by the defendants took place in 1908 when the defendants made additions to the building and, when remonstrated with by the plaintiffs, denied the plaintiff's title. But the contesting defendants argued that, when they got into possession in 1898, they must be presumed to have got into such possession adversely to the plaintiffs. Possession is, no doubt, *primâ facie* notice to all the world of the right under which possession is taken. But is possession taken by a trespasser of a house adverse not only against the usufructuary mortgagee of the house but also against the mortgagor, though the mortgagor might not be entitled to claim possession at once? In other words, the question is whether a trespasser's dispossession of the usufructuary mortgagee of a house is adverse possession against the mortgagor barring also the latter's title to the equity of redemption. On this question, there seems to be a conflict of opinion between two recent decisions of two different Benches of this Court, both cases being reported in the 21st volume of the Madras Law Journal. In *Ramasami Chetti* v. *Ponna Padayachi*(1) ABDUR RAHIM and AYLING, JJ., held that "the

(1) (1913) I.L.R., 36 Mad., 97; s.c., 21 M.L.J., 397.

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existence of a mortgage at the time of the commencement of the adverse possession of the mortgaged property cannot prevent the person in possession from acquiring ownership of the mortgaged land both as against the mortgagor and mortgagee unless it be the case that the adverse possession was intended to be limited to the mortgagor's interest only." In that case the mortgage was a simple mortgage and the mortgagor continued in possession till the trespasser evicted him. In the case reported in page 468 it was held that the interest in the immoveable property which was affected by adverse possession was "that interest and that interest only, which the person who was entitled to immediate possession at the time the adverse possession began had at that time" and that possession adverse to the mortgagor was not adverse to a simple mortgagee. In this case, *Parthasarathi Naickan* v. *Lakshmana Naickan*(1), the learned Judges considered the earlier case *Ramasami Chetti* v. *Ponna Padayachi*(2), but declined to follow the said earlier case. [*Ramasami Chetti* v. *Ponna Padayachi*(2), has been reported in Indian Law Reports, Madras Series, volume 36, page 97.] If, in the present case, the principle of the ruling in *Ramasami Chetti* v. *Ponna Padayachi*(2) be followed, the denial of the plaintiff's title must be held to date from 1898 and the present suit for declaration is barred. If, however, the later case is followed, the possession of 1898 will be adverse only to the mortgagee and such possession will not necessarily constitute the denial of the mortgagor's (plaintiff's) title and the suit will not be barred. *Ramasami Chetti* v. *Ponna Padayachi*(2) and *Parthasarathi Naickan* v. *Lakshmana Naickan*(1) were cases in which it was contended that the simple mortgagee's rights were barred by the fact that the mortgagor (who had been in possession until he was dispossessed by the trespasser) had lost his rights by adverse possession. The present is the converse case; here, the *usufructuary* mortgagee has been dispossessed by the trespasser and the mortgagor who had given up possession to the mortgagee is sought to be barred. But I think the principles to be applied are the same. Is a mortgagor who has transferred possession to a usufructuary mortgagee for 20 years entitled to bring a suit for possession against the trespasser

(1) (1911) 21 M.L.J., 467. (2) (1913) I.L.R., 36 Mad., 97; s.c., 21 M.L.J., 397

who has ejected the mortgagee within those 20 years? If he is not, it seems to me to be hard on the mortgagor to treat the trespasser's possession as adverse against himself also. Having regard to the conflict of views between *Ramasami Chetti* v *Ponna Padayachi*(1) and *Parthasarathi Naickan* v. *Lakshamana Naickan*(2) we deem it advisable to refer the following question for the decision of a Full Bench:—

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Where a trespasser dispossesses a mortgagor in possession (the mortgage being simple) or a mortgagee in possession (where the mortgage is usufructuary), is such possession of the trespasser adverse against the simple mortgagee in the one case or against the mortgagor who is not entitled to possession in the other case?

My learned brother, notwithstanding *Rajah of Venkatagiri* v. *Isakapalli Subbiah*(3) feels some doubt on the question, whether the cause of action for a declaration of title does not arise afresh on each denial of title (so long as the title of the plaintiff subsists), as was held in *Chukkun Lal Roy* v. *Lohit Mohan Roy*(4), bearing in this respect some analogy to a suit for the restitution of conjugal rights which used to be governed by article 35, Limitation Act XV of 1877 (this article has been omitted from the Limitation Act of 1908). We, therefore, refer this other question also to the Full Bench, namely,—

Whether a fresh cause of action for a suit for declaration of title arises from each distinct denial of the plaintiff's title so long as the title itself is not lost, or whether there cannot arise any new causes of action based on new denials of title after the first denial?

TYABJI, J.—I agree.

TYABJI, J.

C. V. Anantakrishna Ayyar for the appellants

S. Muthia Mudaliyar for the respondent.

This Reference coming on for hearing before the Full Bench, the Court expressed the following:

OPINION.

SANKARAN NAIR, J.—The first question that is referred to us is "where a trespasser dispossesses a mortgagor in possession (the mortgage being simple) or a mortgagee in possession (where the

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(1) (1913) I.L.R., 36 Mad., 97; s.c., 21 M.L.J., 97. (2) (1911) 21 M.L.J., 467.
(3) (1903) I.L.R., 26 Mad., 410. (4) (1893) I.L.R., 20 Calc., 906.

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who has ejected the mortgagee within those 20 years? If he is not, it seems to me to be hard on the mortgagor to treat the trespasser's possession as adverse against himself also. Having regard to the conflict of views between *Ramasami Chetti* v *Ponna Padayachi*(1) and *Parthasarathi Naickan* v. *Lakshamana Naickan*(2) we deem it advisable to refer the following question for the decision of a Full Bench :—

Where a trespasser dispossesses a mortgagor in possession (the mortgage being simple) or a mortgagee in possession (where the mortgage is usufructuary), is such possession of the trespasser adverse against the simple mortgagee in the one case or against the mortgagor who is not entitled to possession in the other case?

My learned brother, notwithstanding *Rajah of Venkatagiri* v. *Isakapalli Subbiah*(3) feels some doubt on the question, whether the cause of action for a declaration of title does not arise afresh on each denial of title (so long as the title of the plaintiff subsists), as was held in *Chukkun Lal Roy* v. *Lolit Mohan Roy*(4), bearing in this respect some analogy to a suit for the restitution of conjugal rights which used to be governed by article 35, Limitation Act XV of 1877 (this article has been omitted from the Limitation Act of 1908). We, therefore, refer this other question also to the Full Bench, namely,—

Whether a fresh cause of action for a suit for declaration of title arises from each distinct denial of the plaintiff's title so long as the title itself is not lost, or whether there cannot arise any new causes of action based on new denials of title after the first denial?

TYABJI, J. — TYABJI, J.—I agree.

C. V. Anantakrishna Ayyar for the appellants.

S. Muthia Mudaliyar for the respondent.

This Reference coming on for hearing before the Full Bench, the Court expressed the following :

OPINION.

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mortgage is usufructuary), is such possession of the trespasser adverse against the simple mortgagee in the one case or against the mortgagor who is not entitled to possession in the other case?"

The facts which gave rise to this reference are these: the plaintiff mortgaged his house with possession for a term which would expire in 1917. The mortgagee was dispossessed by the defendants in 1898. In 1908 they made certain additions to the building, and when the plaintiff remonstrated with them they denied the plaintiff's title to the equity of redemption. The plaintiff brings this suit for a declaration of his title within six years from 1908. The defendants' plea is that limitation for the suit must be calculated from 1898, when they took possession of the property from the mortgagee.

On behalf of the plaintiff it may be argued that, as a mortgagor is not entitled to the possession of his property until he redeems his mortgage, the possession of a trespasser who dispossesses a mortgagee cannot be adverse to him; and, in any event, as the mortgage in the case before us is for a term which has not expired, he could not redeem and recover possession from the trespasser; and limitation cannot run against him when there is no remedy open to him to recover possession of his property. Mr. Anantakrishna Ayyar contends that a mortgagor may sue to recover possession to be delivered to the mortgagee and therefore limitation runs against the mortgagor when a trespasser takes possession of the property from the mortgagee claiming the property himself.

The question when limitation begins to run against the mortgagor when the usufructuary mortgagee is deprived of the possession of the property mortgaged has come often before this Court. The earliest decision is *Ammu* v. *Ramakrishna Sastri*(1). In that case, while the representatives of the mortgagees were in possession of the property, there was an enquiry by an officer of the Government, who held that the mortgaged property belonged to the Government, and it was thereupon granted to them by the Government under separate pattas. The mortgagor was a party to that enquiry. The District Judge following a Bombay decision [*Vithoba bin Ohabu* v. *Gangaram bin Biramji*(2)], held that there could be no trespass

(1) (1879) I.L.R. 2 Mad., 226. (2) (1875) 12 Bom. H.C.R., 180.

on the title of the mortgagor so long as he had only an equitable interest. This decision was reversed in appeal, the learned Judges holding that, though there might be cases in which the estate of the mortgagee alone was the subject of trespass and the title by prescription might therefore be acquired to the estate of the mortgagee leaving the estate of the mortgagor unaffected, yet there were other cases in which the rights and interests of both the mortgagor and the mortgagee might be invaded and possession held adversely to them both. And in such cases, where the mortgagor may have made over possession to the mortgagee, if the interest of the mortgagor is invaded, although he has not actual possession of the land, his remedy is to bring a suit for the recovery of the interest from which he has been ousted, and he cannot bring a suit for redemption *against the wrong-doer within the time* allotted for suits for redemption. It will be noticed that in this case a representative of the mortgagee himself was allowed to claim title by prescription. *A fortiori*, therefore, a stranger in adverse possession of the equity of redemption would be entitled to claim such a title.

In *Chathu* v. *Aku*(1), it was pointed out that the right to redeem was only a right of action and therefore, though a person received the rents and profits from the mortgagee, claiming to be the owner of the equity of redemption, the right of the true owner was not barred unless the claimant had actual possession of the property itself for twelve years.

In *Mussad* v. *The Collector of Malabar*(2), the Court held that the action of the Government in merely declaring the lands to be Government property and conferring a title upon the representative of the mortgagee could not affect the mortgagor's title unless the latter was shown to have been aware of these proceedings, and the decision in *Ammu* v. *Ramakrishna Sastri*(3) was distinguished on the ground that in that case there was a formal enquiry to which the mortgagor was a party. In *Ittappan* v. *Manavikrama*(4), Mr. Justice SUBRAMANIA AYYAR was apparently prepared to go further and to hold that, as the mortgagor having once put the mortgagee in possession had no right to the possession of the property himself until the mortgage

(1) (1884) I.L.R., 7 Mad., 26.
(2) (1887) I.L.R., 10 Mad., 189.
(3) (1879) I.L.R., 2 Mad., 226.
(4) (1898) I.L.R., 21 Mad., 153 at p. 165

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was paid off, limitation would not commence to run against him in favour of a trespasser till redemption; but he stated that in the case before him, even if the view adopted in *Ammu* v. *Ramakrishna Sastri*(1) be correct, the possession of the person taking the property from the mortgagee would not be adverse until the mortgagor had notice of it. That was also the opinion of SHEPHARD, J.

According to these Madras cases, therefore, where a stranger dispossesses a mortgagee in possession, whether adverse possession will run against the mortgagor or not depends upon the fact whether there was dispossession of the mortgagor also. Mere dispossession of the mortgagee will not amount to such adverse possession; there must be at least notice to the mortgagor that possession is held against him also.

The decisions of the other High Courts also are substantially to the same effect. The decision in *Vithoba bin Chabu* v. *Gangaram bin Biramji*(2), which holds that there can be no adverse possession of an equity of redemption, has been already referred to. It is dissented from by the learned Judges in *Ammu* v. *Ramakrishna Sastri*(1). In a later case, *Puttappa* v. *Timmaji*(3), SARGENT, C.J. and CANDY, J., following the English case of *Cholmondeley* v. *Clinton*(4), held that the possession of a trespasser may be adverse to the mortgagor. In *Chinto* v. *Janki*(5), the same question was fully discussed, and Mr. Justice FULTON stated the law in the following terms: "I think that, although the possession of a trespasser may undoubtedly be adverse to the mortgagor, the burden of proving when it became so rests on the former *Primâ facie*, by his act of possession he merely ousts the mortgagee who is entitled to hold the property." Referring to the plea of the trespasser in that case that he had many years before got his name entered in the Government records as owner and had since then purported to hold directly under the Government, he pointed out that there was no finding as to when the plaintiff's name was removed from the survey records and whether the plaintiff had any notice of it, and that it was for the defendant to show when he asserted that he was the owner of the property and not the mortgagee; and he referred to the lower

(1) (1879) I.L.R., 2 Mad., 226. (2) (1875) 12 Bom. H.C.R., 180.
(3) (1889) I.L.R., 14 Bom., 176. (4) (1821) 4 Bligh, 1.
(5) (1894) I.L.R., 18 Bom., 51 at p. 54.

Court the issue when the trespasser's possession became adverse to the plaintiff. TELANG, J., was strongly inclined to hold that the mortgagor had no right to recover possession of the property so long as the mortgage money was not paid off; but he agreed with Mr. Justice FULTON in remitting the issue of the lower Court for trial. The question was again discussed in a more recent case *Tarubai* v. *Venkatrao*(1), where BATTY, J., laid down the law correctly in the following words: "No doubt, as long as the mortgagee is in possession, he and all claiming under him represent the mortgagor's possession. If the mortgagee in possession is dispossessed on grounds affecting only his right, as for instance, his right as heir to represent the original mortgagee, or his right, as in *Purmananddas Jiwandas* v. *Jamnabai*(2), to possession in spite of a third party's lien on the property, then *the dispossession of the mortgagee obviously does not imperil or* call in question any right of the mortgagor and the mortgagor is not concerned or entitled to insist on being immediately restored to possession; and the possession taken is not adverse to him and cannot cause time to run against him. To give the mortgagor a right to insist on immediate possession, there must be an unequivocal ouster preventing the possession of the mortgagor from continuing altogether by leaving no room for doubt that the person taking possession does not profess to represent the mortgagor, but to hold in spite of him. In such a case, the mortgagor is as effectually and unmistakably displaced as if there had been no mortgage at all. When an ouster takes place in that manner the mortgagor knows that no one is in possession who can represent or continue his possession, or who is entitled preferentially to possession, and, therefore, he becomes entitled (and it is necessary and his duty, if he does not want his right to be barred) to claim possession immediately."

There was only one Allahabad case cited—*Ismdar Khan* v. *Ahmad Husain*(3), where also the same principle is laid down that *primâ facie* the possession of the trespasser is not full proprietary possession but was possession of a limited nature which would have the effect ordinarily of extinguishing the limited interest of the mortgagee and vesting that in the defendant;

(1) (1903) I.L.R., 27 Bom., 43 at p. 63 (2) (1886) I.L.R., 10 Bom., 49.
(3) (1905) I.L.R., 30 All., 119.

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but there may be cases where the adverse possession against the mortgagee would also be adverse possession against the mortgagor, as, for example, where the mortgagor is entitled to immediate possession or where the possession of the trespasser is coupled with a denial of the title of the mortgagor.

These cases establish that an equity of redemption may be lost by adverse possession; but for that purpose it is not sufficient for a trespasser, who has ousted a mortgagee, to prove that possession is held on an exclusive title, without also showing that it was acquired and retained with an assertion of an adverse title to the knowledge of the mortgagor. These decisions were apparently not cited before the learned Judges who made the reference. They are in accordance with the English law also. That an equity of redemption may be barred, has been finally decided in England. In the leading case of *Cholmondeley* v. *Clinton*(1), Lord Chancellor ELDON *said* : "I say, without entangling myself with the difficulties about seisin and intrusion, I am of opinion, that the adverse possession of an equity of redemption for twenty years is a bar to any other person claiming that equity of redemption; and it is an adverse possession which produces the same effect as those things you call abatement, intrusion and disseisin which belong to legal estates. It is an adverse possession which has the same effect, and, for the peace of families, and for the peace of the world, I think, ought to have the same effect; and therefore, without going through more of the cases, I submit it to your Lordships, as my humble opinion upon this grave and important question, that this bill cannot be maintained." The owner of the equity of redemption had full notice of the claim of the trespasser.

These decisions also seem to be consistent with principle. When the owner of the property in possession is dispossessed, the trespasser's possession is clearly adverse to him from its inception, as, to his knowledge, the property is held against his will, and he must assert his right within twelve years of his dispossession. But if his mortgagee, who has been placed in possession by him, is followed by another person there is no presumption in law that such possession was taken without any right. He may be an assignee of the mortgagee, or one who

(1) (1821) 4 Bligh, 1 at p. 105.

purchases the mortgage as a mortgage; or he may be an adverse claimant to the mortgage right; where more than one inference may be drawn, that inference should not be drawn which imputes a wrongful act to a person. The defendant has therefore to show that he took possession of his property as absolute property in contradistinction to mortgage property. Nor is this sufficient; as his possession may be consistent with the mortgagor's title, the mortgagor must obviously have notice that he is holding it as absolute property in denial of any right in him. Otherwise no laches can be imputed to him and the possession cannot be said to be adverse.

It is argued that, as the mortgagor is not entitled to sue the trespasser for possession, possession can never be adverse. A mortgagor, no doubt, must be entitled to protect himself against the loss of his property by adverse possession. In the judgment in *Ammu* v. *Ramakrishna Sastri*(1), it is stated that he may sue for the recovery of his interest. This apparently proceeds on the ground that by mortgage a person transfers only an interest and not the legal estate as in English law. In *Tarubai* v. *Venkatrao*(2), Mr. Justice BATTY says he could sue for possession This proceeds probably on the ground that the mortgagor is bound to secure possession to the mortgagee. Mr. Anantakrishna Ayyar contends that a mortgagor may by impleading the mortgagee obtain a decree for the surrender of the property to the latter. Suits by persons interested for delivery of properties to a trustee of an endowment, by junior members of tarwads for delivery of properties improperly alienated to karnavans, are analogous instances. The question what the proper remedy is, does not however arise on this reference.

The reply to the reference is that possession may be adverse but whether it is so or not in any case will depend upon the facts of each case. On the facts stated in the order of reference, possession of the trespasser was not adverse from 1898 to 1903, but it became adverse in 1908. The question whether the possession of a trespasser who dispossesses a mortgagor in possession is adverse against a simple mortgagee does not arise in the case and we express no opinion with regard to it.

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(1) (1879) I.L.R., 2 Mad., 226. (2) (1903) I.L.R., 27 Bom., 43.

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As the cause of action in this case arose only in 1908, the second question, whether a fresh cause of action arises from each distinct denial of the plaintiff's title, also does not arise in the case and we express no opinion with regard to it.

WHITE, C. J.

WHITE, C.J.—I agree.

OLDFIELD, J.

OLDFIELD, J.—I concur.

N.R.

APPELLATE CIVIL—FULL BENCH.

Before Sir Charles Arnold White, Kt., Chief Justice, Mr. Justice Sankaran Nair and Mr. Justice Oldfield.

1913. September 18, 19 and 26, and 1914. January 5 and 15.

MANAVIKRAMA ZAMORIN RAJA AVERGAL OF CALICUT (DIED) AND ANOTHER (DEFENDANT AND HIS LEGAL REPRESENTATIVE), APPELLANTS,

v.

R. P. ACHUTHA MENON (PLAINTIFF), RESPONDENT.*

Limitation Act (IX of 1908), sched. II, art. 131—Suit to recover sums due under periodically recurring right, governed by.

Article 131 of schedule II of the Limitation Act (IX of 1908) applies to a suit to recover sums due under a periodically recurring right whether there is a prayer for a declaration of plaintiff's right or not

Held, therefore, that a suit to recover arrears of "adima" allowance for a period of eight years was not barred as to any portion of it.

SECOND APPEAL against the decree of P. RAMAN, the Acting Subordinate Judge of South Malabar at Palghat, in Appeal No. 997 of 1910, preferred against the decree of A. P. P. SALDANHA, the District Munsif of Alatur, in Original Suit No. 333 of 1909.

The facts appear from the Order of Reference to the Full Bench.

T. R. Ramachandra Ayyar for the second appellant.

C. Madhavan Nair for *J. L. Rozario* for the respondent.

This case came on for hearing before AYLING and TYABJI, JJ., who made the following

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* Second Appeal No. 1972 of 1911 (F.B.).

ORDER OF REFERENCE TO A FULL BENCH.

ATLING, J.—This was a suit for recovery of arrears of "adima" allowance for a period of eight years with interest. The District Munsif decreed the claim for three years only, holding the rest of it to be barred by limitation, and gave interest at 10 per cent. from date of demand. The Subordinate Judge held that no part of the claim was time-barred and gave a decree for the allowance at the rate fixed by the District Munsif for the full period claimed, with interest at the same rate. Against this the defendant appeals.

The first point argued before us relates to the rate of allowance and the award of interest. In neither respect do we see reason to interfere. In our opinion the evidence on record, though meagre, in the absence of anything to contradict it, justifies the findings of the lower Courts as to the rate of allowance: and we are not disposed to interfere with the discretion of the lower Courts as to the award of interest or the rate thereof.

The only other point is that of limitation. The District Munsif held the suit to be governed by article 115 of schedule II of the Limitation Act, while the Subordinate Judge considers article 131 to be the one applicable. We may say at once that in our opinion article 115 (for compensation for breach of contract, etc.) certainly cannot be applied. The adima allowance is described in the plaint as due to the plaintiff's tarwad from time immemorial: and even if we accept appellant's contention that Exhibit A is the original grant (which does not appear to be the case) it is still a case of grant, and not of contract. If article 131 does not apply, the suit must be governed by article 120.

The real question is, however, whether article 131 applies: and on this point there appears to have been considerable difference of opinion in different Courts. The article runs thus:—

131. To establish a periodically recurring right.	Twelve years.	When the plaintiff is first refused the enjoyment of the right.

In the present case it is not denied that the right to the "adima" allowance is a periodically recurring one: but Mr. Ramachandra Ayyar argues that this suit is not one for the "establishment" of the right: but for the recovery of amounts due under the right. He contends that the article only applies to suits

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brought for a declaration of a periodically recurring right: and points out that the plaint in this case contains no prayer for a declaration, but asks *for a decree for payment of a specified* amount, being the arrears of the adima allowance.

Our attention is invited to articles 128 and 129: where a distinction is drawn between a suit for a declaration of right to maintenance, and a suit for arrears of maintenance. According to the appellant's contention the phrase used in article 131 "to establish" is equivalent to that in article 129 "for a declaration of the right." Respondent argues that the phrase "to establish" is intended to cover both classes of suits. We should be more inclined to adopt this view if the words used had been "*to enforce.*"

On a consideration of the various articles in the schedule we should be disposed to hold article 131 to be inapplicable: but our attention has been drawn to a series of rulings of this Court in support of the contrary view: *Ramnad Zamindar* v. *Dorasami*(1), *Alubi* v. *Kunhi Bi*(2), *Balakrishna* v. *The Secretary of State for India*(3) and *Ratnamasari* v. *Akilandammal*(4).

The first of these *Ramnad Zamindar* v. *Dorasami*(1) calls for little remark inasmuch as the decree which was the subject of appeal before the Court was merely one declaring the Ramnad Zamindari liable for a certain periodical payment, and not for any consequential relief.

In the next case, however, *Alubi* v. *Kunhi Bi*(2) the suit was not for a declaration of a recurring right, but for recovery of the actual amount payable thereunder, and the learned Judges said: "We think plaintiff is entitled to recover twelve years' rent of revenue up to date of suit under article 131 as a recurring right, and also under article 132 as money charged on land." This is a clear expression of opinion on the point now at issue; and all that can be said is, as there was a charge in that case, and article 132 applied, it was unnecessary for the decision of the case to consider whether article 131 also applied.

The next case is *Balakrishna* v. *The Secretary of State for India*(3). This was a suit not for recovery of money, but "to establish plaintiff's right to certain yearly remissions and to have

(1) (1884) I.L.R., 7 Mad., 341. (2) (1887) I.L.R., 10 Mad., 115.
(3) (1893) I.L.R., 16 Mad., 294. (4) (1903) I.L.R., 26 Mad., 291.

it declared that Government is not entitled to levy full assessment without granting those remissions." The learned Judges held that article 120, and not article 131, applied. They said: "Article 131 applies only to those suits in which a decree for consequential relief is asked for by virtue of the periodically recurring right, and in the present case no such relief has been asked, although the remission claimed has been refused from the year 1878. We must therefore hold that article 120 applies to this suit, which was brought to obtain a merely declaratory decree."

This, again, is a distinct expression of opinion: though it appears to involve the somewhat surprising result that a man asking merely for a decree declaring his periodically recurring right must sue within six years under article 120, whereas, if he asked for relief consequential on the said right, he could claim 12 years under article 131. The starting point for limitation would presumably be the same in each case.

The last case is *Ratnamasari* v. *Akilandammal*(1). The scope of article 131 was not in issue, but BHASHYAM AYYANGAR, J., in the course of his judgment appears to hold that article 131 is not confined to a declaratory suit, but may include one "for recovery of arrears due in respect of a periodically recurring right." This remark is simply made in illustration of the learned Judge's argument on another point.

Two of these cases *Ramnad Zamindar* v. *Dorasami*(2) and *Ratnamasari* v. *Akilandammal*(1), were considered by the Allahabad High Court in *Lachmi Narain* v. *Turab-un-nissa*(3) and expressly dissented from, though apparently under some misapprehension of the true effect of the earlier case. The learned Judges preferred to hold that the language of article 131 "to establish a periodically recurring right" could not be extended to cases in which the plaintiff seeks to recover specific sums of money due to him in respect of a periodically recurring right.

The Calcutta High Court appears to take the same view *vide*, *Kallar Roy* v. *Ganga Pershad Singh*(4), in which they held that a suit for recovery of arrears of malikhanas where plaintiff

(1) (1903) I.L.R., 26 Mad., 291.
(2) (1884) I.L.R., 7 Mad., 341.
(3) (1912) I.L.R., 34 All., 246.
(4) (1906) I.L.R., 33 Calc., 998.

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does not seek to enforce a charge is governed by article 115. It is to be noted however that article 131 is not specifically referred to in the judgment.

The Bombay High Court has held in *Sakharam Hari* v. *Laxmipriya Tirtha Swami*(1) that article 131 does apply to a suit for arrears due under a periodically recurring right if brought against the person originally liable to pay.

In this conflict of rulings, and, inclining, as we do, to a view contrary to that taken in previous decisions of this Court, we feel constrained to refer the following question for the decision of a Full Bench:—

"Does article 131 of Schedule II of the Limitation Act apply to suits brought to recover sums due under a periodically recurring right (*a*) where there is a prayer for a declaration that the plaintiff is entitled to such a right and (*b*) where there is no such prayer?"

TYABJI, J.

TYABJI, J.—I agree. Article 131 of the Limitation Act seems to me to have been meant to apply only where (in the words of the article) "the plaintiff has been refused the enjoyment of a periodically recurring right" and he wishes to establish that such a right exists. The language of the article does not seem to me to be appropriate to a suit for recovering sums that have become due under, or as a consequence of, such a right. Speaking with reference to the facts of this case it seems to me that the article applies to this suit in so far as it has reference to the establishment of the right to the adima allowance; but that the article does not refer to the claim for payment of the allowance already due under the right so established. The two questions are quite distinct and apart from the decisions cited by my learned brother I should be inclined to doubt whether both were intended to be included within words which as I have said seem to me to be appropriate to only one of them.

T. R. Krishnaswami Ayyar for *T. R. Ramachandra Ayyar* for the second appellant.

J. L. Rozario for the respondent.

The REFERENCE coming on for hearing, the Court expressed the following

(1) (1910) I.L.R., 34 Bom., 349.

OPINION.

WHITE, C.J.—If this matter had been *res integra* I should have been disposed to hold that article 131 should be construed as applying to a suit brought for the purpose of obtaining an adjudication as to the existence of an alleged periodically recurring right, and not to a suit in which it was sought to recover moneys alleged to be due by reason of the alleged right. The question of the existence of the right is no doubt distinct from the question of the right to recover moneys if it is established that the right exists. It is, however, difficult to see why the period of limitation should not in both cases be the same, as it is in the case of a suit for a declaration of a right to maintenance and in a suit for arrears of maintenance. If the contention of the appellant is well founded there is no article which deals specifically with the period of limitation in the case of a suit to recover moneys due under an alleged periodically recurring right. There is force in the contention that the use of the word "establish" and the fact that there is only one article in the case of a suit with reference to a periodically recurring right, and not two as in the case of suits based on an alleged right to maintenance (see articles 128 and 129) indicate that the legislature intended to deal with both classes of suits in article 131. I am not prepared to dissent from the view indicated in the Madras cases referred to in the order of reference, a view which has also been adopted by the Bombay High Court. See *Sakharam Hari* v. *Laxmipriya Tirtha Swami*(1). I would answer the question which has been referred to us in the affirmative

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WHITE, C.J.

SANKARAN NAIR, J.—The question is not free from doubt. But I am not prepared to differ from the decisions of this Court and I would therefore answer the question in the affirmative.

SANKARAN NAIR, J.

OLDFIELD, J.—I agree with the learned Chief Justice for the reasons stated by him.

OLDFIELD, J.

(1) (1910) I.L.R., 34 Bom., 349.

S.V.

APPELLATE CIVIL—FULL BENCH.

Before Sir John Wallis, Kt., the Officiating Chief Justice, Mr. Justice Seshagiri Ayyar and Mr. Justice Kumaraswami Sastriyar.

1914. September, 1 and 16 and October, 5 and 14.

ARUNACHALAM CHETTY AND ANOTHER (PLAINTIFFS), APPELLANTS,

v.

RANGASAWMY PILLAI (DEFENDANT), RESPONDENT.*

Declaration and injunction, suit for—Whether a suit for declaratory decree with consequential relief—Court fee payable, whether ad valorem*—Court Fees Act (VII of 1870), sec. 7, cl. 4 (c).*

A suit for a declaration that a mortgage-decree is not binding on the plaintiff and for an injunction restraining the defendant from executing the same is a suit for a declaratory decree with consequential relief within the meaning of section 7, clause 4 (c), of the Court Fees Act and an *ad valorem* fee is payable on the valuation fixed in the plaint.

SECOND APPEAL against the decree of E. L. THORNTON, the District Judge of Trichinopoly, in Appeal No. 297 of 1912, preferred against the decree of T. JIVAJI RAO, the District Munsif of Srirangam, in Original Suit No. 264 of 1910.

The facts are set out in the order of reference to the Full Bench.

V. Viswanatha Sastriyar for the appellants.

T. V. Muthukrishna Ayyar for the respondent.

This Second Appeal came on for hearing before SANKARAN NAIR and AYLING, JJ., who made the following

ORDER OF REFERENCE TO A FULL BENCH.

SANKARAN NAIR AND AYLING, JJ.

The question for decision in this Second Appeal is whether the plaintiffs are bound to pay *ad valorem* Court fee on their plaint.

The allegations in the plaint are that their father executed a hypothecation bond on which a suit was brought by the creditor against the father as first defendant in that suit and the present plaintiffs as defendants Nos. 2 and 3, that these plaintiffs were really minors at that time, though they were not

* Second Appeal No. 696 of 1913.

described as such in the plaint, and that a decree was passed both against the plaintiffs' father as well as against the plaintiffs. They now allege that the debt is not binding on the family and that the decree itself is a nullity. They, therefore, seek for a declaration to that effect and for an injunction to restrain the defendant from executing the decree. The lower Courts were of opinion that *ad valorem* Court fee should be paid. The contention in Second Appeal is that the suit is only for a declaratory decree and if the prayer for injunction is regarded as a consequential relief, then they are entitled to value it as they like and that the lower Courts were not right therefore in holding that the Court fee must be paid on the amount of the decree which is sought to be declared not binding on the plaintiffs.

The earliest case decided by the Madras High Court is *Naraina Putter* v. *Aya Putter*(1). In that case, the plaintiff had executed a document whereby he created a charge of Rs. 4,500 on certain immoveable property and the suit was brought to cancel the document. The question for decision was whether the suit should be valued for purposes of jurisdiction upon the sum secured by the document sought to be cancelled and whether institution fee should be paid on that sum. The first Court held in that case that the plaintiff merely sought for a declaration without any consequential relief and that therefore Rs. 10 was the proper institution fee. The High Court held that as the plaintiff in that suit had executed a document of legal validity, it created a charge of [the amount of Rs. 4,500 that the cancellation of that document was a relief of a very substantial description and very far from being a mere declaration. It was a suit in their opinion really to get rid of a charge and for the removal of a burden legally created. In *Tacoordeen Tewarry* v. *Nawab Syed Ali Hossein Khan*(2) their Lordships of the Privy Council held that a prayer for setting aside a deed is a prayer for substantial relief, taking apparently the same view as was subsequently taken by the Madras High Court. To the same effect is a decision in *Parathayi* v. *Sankumani*(3). In *Samiya Mavali* v. *Minammal*(4) their Lordships cited apparently with approval those two decisions. At any rate no dissent was expressed from them. The latest case in the Indian

(1) (1874) 7 M H C.R., 372 at p 374
(2) (1874) 21 W.R., 340.
(3) (1892) I.L.R., 15 Mad., 294
(4) (1900) I.L.R., 23 Mad., 490.

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Law Reports that has been cited to us is *Chinnammal* v. *Madarsa Rowther*(1). The plaint in that suit for the cancellation and delivery of a mortgage-deed for Rs. 4,000 executed by the plaintiff to the defendant was valued by the plaintiff at Rs. 50. The learned Judges, Messrs. BODDAM and BASHYAM AYYANGAR, JJ., held that the valuation given by the plaintiff must be accepted. This decision seems to us to be entirely opposed to those in *Naraina Putter* v. *Aya Putter*(2) and *Parathayi* v. *Sankumani*(3). In a later case, *Achammal* v. *Achammal*(4) a different view was taken. The suit was brought by 25 plaintiffs, 2 to 24 of whom were parties to a sale-deed regarding which a declaration of invalidity was sought. The learned Judges held that, so far as these plaintiffs who were parties to the deed were concerned, if a declaration were given, the result would be the same as if the deed were cancelled and therefore *ad valorem* stamp fee must be paid by them.

The decisions, therefore, appear to be in direct conflict with one another. The decisions in *Naraina Putter* v. *Aya Putter*(2), *Parathayi* v. *Sankumani*(3) and *Achammal* v. *Achammal* (4), hold that where there is a liability which is sought to be got rid of, then *ad valorem* fee must be paid. The decision in 27 Madras certainly and possibly *Samiya Mavali* v. *Minammal*(5) are in conflict with them. Where a party executes a document, or a decree is passed against him, *primâ facie* such deed or decree is binding on him. Until it is set aside it cannot be treated as void The decree, therefore, declaring that the deed or decree is not binding on the plaintiff has the effect of the cancellation of the deed or decree. It does not appear to us to be a mere declaratory decree. The case might be different where a declaration is sought by a person who is not a party to the bond or the decree. In a case like that, the suit may properly be regarded as one for declaration but in the other case, it is more properly a suit to get rid of an already existing obligation.

We think that in this state of authorities, as the question is one of procedure and great practical importance, it is desirable to have a final decision. We therefore refer to a Full Bench the question

(1) (1901) I.L.R., 27 Mad., 480. (2) (1874) 7 M.H.C.R., 372 at p. 374.
(3) (1892) I.L.R., 15 Mad., 294. (4) (1910) 20 M.L.J., 791.
(5) (1900) I.L.R., 23 Mad., 490.

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SANKARAN NAIR AND AYLING, JJ.

(1) Whether a suit for a declaration that an instrument of mortgage or sale executed by the plaintiff or a decree that has been passed against the plaintiff for a debt is not binding on him, is a declaratory suit only or

(2) Whether it is a suit with consequential relief falling under section 7, paragraph 4 (c) of the Court Fees Act under which the Court is bound to accept such valuation as may be fixed by the plaintiff or

(3) Whether it is a suit in which the plaint must be valued according to the mortgage or the decree amount.

This REFERENCE coming on for hearing before the Full Bench, the Court expressed the following

OPINION.

WALLIS, OFFG. C.J., SESHAGIRI AYYAR AND KUMARA-SWAMI SASTRIYAR, JJ.

A suit in which the plaintiff in terms prays for a declaratory decree and consequential relief *primâ facie* comes within clause 4, sub-clause (c) of section 7 of the Court Fees Act, but if at the same time it comes within any of the other classes of suits specified in the section, it must be treated as a suit of that description and dealt with accordingly. A suit such as the present for a declaratory decree that a decree passed against the plaintiff is not binding on him and for an injunction restraining the decree-holders from executing it against him cannot be brought within any other part of the section except clause 4, sub-clause (c). So too the other class of suits included in the reference, viz., suits to declare a mortgage or sale-deed not binding on the party executing it, cannot be brought within clause 8 or any other part of the section except clause 4, sub-clause (c). As the present suit for a declaration and an injunction comes within clause 4 (c), the plaintiff is required by the section to state the amount at which he values the relief sought by him in the plaint, which he has to verify, and the *ad valorem fee* payable in respect of the suit is to be computed accordingly. A Full Bench of this Court has recently held, in a judgment in *Ramiah* v. *Ramaswami*(1), to which one of the referring Judges was a party, that the valuation given by the plaintiff in cases coming under clause 4 is conclusive, and we do not think it was intended to raise that question again in the present reference, nor are we prepared to reopen it.

(1) (1913) 24 M.L.J., 233. (F.B.)

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We have now dealt with the present case of a prayer for a declaratory decree and consequential relief as well, but the terms of the reference include also the case where a declaratory decree of the nature indicated is asked for without any consequential relief. In *Tacoordeen Tewarry* v. *Nawab Syed Ali Hossein Khan*(1), such a suit was held not to be a suit for a mere declaration but for substantive relief. In *Naraina Putter* v. *Aya Putter*(2), a suit for the cancellation of a document obtained from the plaintiff by fraud was held not to be a suit for a mere declaration but also for consequential relief. In *Karam Khan* v. *Daryai Singh*(3), it was held in view of the provisions of section 39 of the Specific Relief Act, that such a suit was a mere declaratory suit and did not involve consequential relief. This was not followed in *Parathayi* v. *Sankumani*(4), and was expressly dissented from in *Samiya Mavali* v. *Minammal*(5), as also in *Kalabhai* v. *The Secretary of State for India*(6). In *Chinnammal* v. *Madarsa Rowther*(7), the case mentioned in the reference was a suit for the cancellation and delivery up of a bond, and was held, we think rightly, to be a suit for a declaratory decree with consequential relief under clause 4 (c). In *Chingacham Vitil Sankaran Nair* v. *Chingacham Vitil Gopala Menon*(8), the point was again expressly considered and it was held that the substance and not the language of the plaint must be looked to; and though the suit in question was held to be a merely declaratory suit not involving consequential relief, the Court at the same time expressed the opinion that where it was incumbent on the plaintiff to get the document set aside before he could question it, it must be treated as involving a prayer for consequential relief and the provisions of clause 4 (c) would be applicable. This was followed in *Achammal* v. *Achammal*(9), where it was held that though only a declaration was asked for, the suit was one for cancellation and that clause 4 (c) applied. The statement in the judgment that an *ad valorem* fee was payable does not mean that clause 4 (c) was not applicable, because the fee payable in suits falling under this

(1) (1874) 21 W.R., 340.
(2) (1874) 7 M.H.C.R., 372.
(3) (1883) I.L.R., 5 All., 331.
(4) (1892) I.L.R., 15 Mad., 294.
(5) (1900) I.L.R., 23 Mad., 490.
(6) (1905) I.L.R., 29 Bom., 19.
(7) (1904) I.L.R., 27 Mad., 480.
(8) (1907) I.L.R., 30 Mad., 18.
(9) (1910) 20 M.L.J., 791.

clause is *ad valorem*, though under the provisions of the section it is computed according to the amount at which the relief sought is valued in the plaint. The most recent decision in *Harihar Prasad Singh* v. *Shyam Lal Singh*(1), is to the same effect. Following these authorities, we are of opinion that a suit of the nature indicated in the reference which merely asks for a declaration is none the less a suit for a declaratory decree with consequential relief within the meaning of clause 4 (*c*).

ARUNACHALAM CHETTY *v.* RANGASAWMY PILLAI.

WALLIS, OFFG C J, SESHAGIRI AYYAR AND KUMARASWAMI SASTRIYAR, JJ.

This Second Appeal came on for final disposal before SANKARAN NAIR and AYLING, JJ., who delivered the following

SANKARAN NAIR, AND AYLING, JJ.

JUDGMENT.—In accordance with the Opinion of the Full Bench, we reverse the decrees of the Courts below and direct the District Munsif to restore the suit to his file and dispose of it according to law. Costs will abide the result.

S.V.

APPELLATE CIVIL—FULL BENCH.

Before Sir John Wallis, Kt., Chief Justice, Mr. Justice Ayling and Mr. Justice Sadasiva Ayyar.

1913, April 11 and 16. 1915, March 1 and 2 and April 1.

SUBRAMANIA AYYAR (PLAINTIFF), APPELLANT,

v.

BALASUBRAMANIA AYYAR AND OTHERS (DEFENDANTS NOS. 1 AND 2 THE LEGAL REPRESENTATIVES OF THE DECEASED FIRST DEFENDANT), RESPONDENTS. *

Transfer of Property Act (IV of 1882) ss. 61, 85 and 99—Civil Procedure Code (Act V of 1908), O. XXXIV, rr. 1 and 14—Mortgagee holding two mortgages—Suit on the second mortgage subject to his interest in a prior mortgage—Maintainability.

It is open to a mortgagee to bring a suit for the recovery of his debt by sale of the properties mortgaged to him subject to his interest in a prior mortgage.

SECOND APPEAL against the decree of F. D. P. OLDFIELD, the District Judge of Tinnevelly, in Appeal No 584 of 1911, preferred against the decree of S. SUBBAYYA SASTRI, the District Munsif of Tinnevelly, in Original Suit No 60 of 1909.

(1) (1913) I L R, 40 Calc., 615.

* Second Appeal No 734 of 1912

SUBRAMANIA v. BALASUBRAMANIA.

The facts of this case are clearly set out in the Order of Reference of SANKARAN NAIR, J., to the Full Bench.

T. R. Venkatarama Sastriyar for the appellant.

K. R. Rangaswami Ayyangar for the second and third respondents.

This Second Appeal came on for hearing before SANKARAN NAIR and TYABJI, JJ., who made the following

ORDERS OF REFERENCE TO THE FULL BENCH.

SANKARAN NAIR, J.

SANKARAN NAIR, J.—The plaintiff brought this suit for the sale of the properties which were mortgaged to him under two instruments, dated the 9th December 1894 and the 6th December 1901, respectively. In his plaint after praying for certain reliefs the plaintiff added that he would file a separate suit later on for the recovery of the debt due to him on the hypothecation bond for Rs. 2,000 executed in his favour on some of the properties specified in the plaint schedule and certain other properties.

An objection was taken in the first Court by the defendants (mortgagors) that a claim like this was not maintainable, that the plaintiff was bound to sue to recover the amounts due under all the mortgages and that he could not get a decree for the sale of certain properties subject to his claim on a mortgage. The claim which was reserved was on a prior mortgage. The District Munsif overruled the objection and passed a decree in the plaintiff's favour directing the properties to be sold for the debt which was found due on the two mortgages sued on subject to the plaintiff's claim on the first mortgage.

On appeal the District Judge arrived at the conclusion that such a suit was not maintainable. He accordingly directed the plaintiff either to amend the plaint by also praying for the relief that he might be entitled to on the first mortgage or by abandoning his claim on that mortgage in respect of these items. The plaintiff abandoned his claim but reserved his right to question the District Judge's order in appeal. The decree of the first Court was confirmed by him with certain modifications as to the debt due.

In Second Appeal, a preliminary objection is taken by the respondents' pleader that no appeal lay against the decree of the District Judge, since there was nothing in the decree

against which the plaintiff is entitled to take an objection; but the Judge holds in his judgment that the plaintiff is not entitled to reserve his claim and it is therefore impossible to say that the plaintiff has no right to appeal. Overruling this objection the question that remains for consideration is whether such a suit is maintainable. It was held by this Court in *Dorasami* v. *Venkataseshayyar*(1) and *Nattu Krishnama Chariar* v. *Annangara Chariar*(2), that it was not open to a mortgagee to bring a suit to recover the debt due under only one of the mortgages and to sell the property under the decree subject to his claim under prior mortgage. Those decisions were based upon two grounds: first, upon section 85 of the Transfer of Property Act which requires all persons interested in the mortgaged property to be made parties to the suit; and, secondly, upon the words of section 61 of the Transfer of Property Act and upon the form of decree for sale, No. 128 of schedule IV of the Civil Procedure Code (Act XIV of 1882). In a later case—*Radhakrishna Iyer* v. *Muthusawmy Sholagan*(3)—it has however been held that there is nothing to prevent a decree being passed to enforce a mortgage subject to a prior mortgage. The prior decisions in *Dorasami* v. *Venkataseshayyar*(1) and *Nattu Krishnama Chariar* v. *Annangara Chariar*(2) were not referred to and the reasons given in those judgments have not been considered. In so far as those judgments were based upon section 85 of the Transfer of Property Act, those judgments may now be disregarded, as that section has been repealed and Order XXXIV, rule 1 of Act V of 1908 now enacts that "a puisne mortgagee may sue for foreclosure or for sale without making the prior mortgagee a party to the suit;" and the rule itself says that it is only those persons having an interest either in the *mortgage-security* or in the right of redemption that need be made parties to the suit. In so far as those judgments are based upon section 61 of the Transfer of Property Act and the form of decree for sale given in the Civil Procedure Code, the reasoning still holds good. The learned Judges in *Dorasami* v. *Venkatseshayyar*(1) say that according to that form and according to that section a mortgagee cannot seek to obtain an order for sale on one of

(1) (1902) I.L.R., 25 Mad. 108. (2) (1907) I.L.R., 30 Mad., 253
(3) (1908) I.L.R., 31 Mad., 530.

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SANKARAN NAIR, J.

the mortgages only. Those provisions of law are practically reproduced now in the Civil Procedure Code, Order XXXIV, rules 2 and 4. There is no difference in this respect. We are unable to hold, therefore, that the decisions in *Dorasami* v. *Venkataseshayyar*(1) and *Nattu Krishnama Chariar* v. *Annangara Chariar*(2) have ceased to be in force on account of the repeal of the provisions of law then in force. These decisions however seem to be in direct conflict with the decision in *Radhakrishna Iyer* v. *Muthusawmy Sholagan*(3). The question is an important one which very frequently arises, and it is therefore desirable that it should be set at rest by an authoritative ruling. We would therefore refer to the Full Bench for decision the question *whether it is open to a mortgagee to bring a suit for the recovery* of his debt by sale of the properties mortgaged to him subject to his interest in a prior mortgage.

TYABJI, J.

TYABJI, J.—I agree. I only wish to add that the following points seem to me to be involved in the question which we refer to the Full Bench: first, whether the suit is defective by reason of a prior mortgage not being sued upon in the proceedings before the Court, in other words, whether the reservation purported to be made by the mortgagee of his right to sue upon the prior mortgage affects the maintainability of the suit on the later mortgage; and secondly, if a suit is so brought with such a reservation and a decree is purported to be passed with such reservation, whether the reservation can have any effect or whether a subsequent suit on the prior mortgage must be unaffected by the fact of any such reservation being made or omitted to be made. I do not wish to express any opinion on this point, but I should like it to be considered whether the decisions in *Watson* v. *The Collector of Rajshahye*(4), *Mohan Lal* v. *Ram Dial*(5) and *Sukh Lal* v. *Bhikhi*(6), have any, and if so what, bearing on this point. These decisions were not cited to us and have not been considered by me with reference to this case. This second point will also involve the consideration of the question whether, if the prior mortgage comes to the cognisance of the Court, the mortgagee

(1) (1902) I.L.R., 25 Mad., 108.
(2) (1907) I.L.R., 30 Mad., 353.
(3) (1908) I.L.R., 31 Mad., 530.
(4) (1869) 13 M.I.A., 160.
(5) (1880) I.L.R., 2 All., 843 (F.B.).
(6) (1888) I.L.R., 11 All., 187 (F.B.).

(even though he should purport to reserve his rights under the prior mortgage) must of necessity be put to the alternative either of amending the plaint by suing upon both mortgages or of abandoning his rights under the prior mortgage.

T. R. Venkatarama Sastriyar for the appellant.—The question is whether a mortgagee holding two mortgages on the same property can bring a suit on the second mortgage subject to the first mortgage. This Full Bench reference has been made because of the conflict between *Dorasami* v. *Venkataseshayyar*(1) and *Radhakrishna Iyer* v. *Muthusawmy Sholagan*(2).

[WALLIS, C.J.—Apart from authorities what are the sections of the Act bearing on the question?]

Sections 60, 61 and 62 of the Transfer of Property Act and Order XXXIV, rules 1, 2 and 4 of the Civil Procedure Code are the provisions bearing on the question. The three sections occur in the chapter headed "The rights and liabilities of a mortgagor." These disabilities attaching to the mortgagor cannot attach to the mortgagee. So far as the mortgagee is concerned there is no provision of law preventing him from suing on his second mortgage subject to the first.

[WALLIS, C.J.—Would not this work hardship to the mortgagor?]

No; he can pay up. The question has to be decided apart from considerations of hardship.

[WALLIS, C.J.—Is there anything in the statute to prevent a mortgagee from bringing a suit on the second mortgage subject to the first?]

Nothing; except the Form No. 4 to Appendix D, schedule 1 of the Code of 1908. Order XXXIV, rule 2, clause (*c*), and rule 4 and Form No. 4, do not affect the present question as they contemplate only one mortgage. It was originally thought that all the persons interested in the property in any way must be made parties—section 85. So, a second mortgagee must make the first one a defendant. If he himself was the holder of both the mortgages he must sue on both Under Order XXXIV, rule 1, which supplants section 85, the prior mortgagee is not a necessary party in a suit for sale by the puisne mortgagee. Section 99 has also been repealed and Order XXXIV, rule 14,

(1) (1902) I.L.R., 25 Mad., 108 (2) (1908) I.L.R., 31 Mad., 530.

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which has taken its place is in my favour. Under it a mortgagee who has obtained a decree for the payment of money in satisfaction of a claim arising under the mortgage shall not be entitled to bring the mortgaged property to sale. In respect of all other money claims, he can bring the property to sale.

[WALLIS, C.J.—Referred to section 61 of the Transfer of Property Act.]

Section 61 has no application. It looks at the matter from the *mortgagor's point of view. Even from the mortgagor's* standpoint, SHEPPARD and BROWN in their commentary seem to think that it is open to argument that he can bring a suit of the nature in question.

[WALLIS, C.J.—Is there any discussion of the question?]

No, but their position can be supported by a reference to sections 60 and 62 of the Transfer of Property Act. The rule of consolidation cannot apply to a case where the same property is subject to two mortgages. See sections 60 and 62 of the Transfer of Property Act. If a property is subject to a usufructuary mortgage and a hypothecation, the mortgagor's right to recover possession on the discharge of the usufructuary mortgage is not dependent upon section 60 but is specially provided for by section 62. We are therefore thrown back on the contract of the parties controlled by sections 60 and 62. The implication from section 61 is against sections 60 and 62.

[WALLIS, C.J.—Is there any decision of the High Courts since the new Civil Procedure Code?]

No new decisions. I shall now refer to the authorities.

Dorasami v. *Venkataseshayyar*(1), has been followed in *Nattu Krishnama Chariar* v. *Annangara Chariar*(2).

Narasimha v. *Koneti*(3), followed.

Dorasami v. *Venkataseshayyar*(1) and *Nattu Krishnama Chariar* v. *Annangara Chariar*(2).

Dorasami v. *Venkataseshayyar*(1) directly has no bearing on the present question. It was a suit on the first mortgage subject to the second mortgage. It is specially stated at page 114 that it is unnecessary to decide in that case whether when the prior mortgage is in his own favour the second mortgagee can

(1) (1902) I.L.R., 25 Mad., 108. (2) (1907) I.L.R., 30 Mad., 353.
(3) Second Appeal No. 10 of 1912.

bring the property to sale subject to such prior mortgage. No doubt the reasoning based on the implication from section 61 covers the present case. See page 115. The implied prohibition as regards the mortgagor's right of redemption conveyed by the words "other than that comprised in the mortgage" is made applicable to a mortgagee. These words are to be treated as a surplusage.

[WALLIS, C.J.—Why should not these be treated as containing a statement of the law ?]

Then what about sections 60 and 62 ? Are they abrogated by section 61 ? We cannot modify a real right by pure inference.

[WALLIS, C.J.—It only places a limit on the right of redemption mentioned in sections 60 and 62.]

Reference was then made to the historical explanation of section 61. This historical basis does not apply to India. In England redemption was looked upon as a favour allowed to the mortgagor by equity, the legal estate becoming invested in the mortgagee. The mortgagor who sought the equity of redemption must also do equity to the mortgagee by redeeming all the mortgagees. The distinction between the legal estate and the equitable estate does not exist in India and the mortgagor is the legal owner. Going back to the authorities, *Rengasami Nadan* v. *Subbaroya Iyen*(1) referred to in *Radhakrishna Iyer* v. *Muthusawmy Sholagan*(2), has nothing to do with the present case, because the suit was for sale free of both the mortgages. *Radhakrishna Iyer* v. *Muthusawmy Sholagan*(2) was a case of a suit for sale on two subsequent mortgages subject to the first usufructuary mortgage. It is in my favour.

[WALLIS, C.J.—*Radhakrishna Iyer* v *Muthusawmy Sholagan*(2) ignores *Dorasami* v. *Venkataseshayyar*(3). We do not know whether it was brought to the notice of the Court We are in a position of considerable freedom so far as the authorities go. What is the position in the other High Courts ?]

In Bombay *Keshavram* v. *Ranchhod*(4), follows *Dorasami* v. *Venkataseshayyar*(3). In Allahabad, *Raghunath Prasad* v *Jamna Prasad*(5), holds that a suit on the first mortgage is no bar to a

(1) (1907) I.L.R., 30 Mad., 408. (2) (1908) I.L.R., 31 Mad., 530.
(3) (1902) I.L.R., 25 Mad., 108.
(4) (1906) I.L.R., 30 Bom., 156 at pp. 161 and 163.
(5) (1907) I.L.R., 29 All., 283.

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suit on the second mortgage though both are held by the same person. The decision in *Sundar Singh* v. *Bholu*(1) is based on the peculiar view of the Allahabad High Court which has not been now accepted. Order XXXIV, rule 1, replacing the section 85, says you can omit prior mortgagee and sell puisne mortgagee's interest subject to the first mortgagee's interest being kept alive. *Gobind Pershad* v. *Harihar Charan*(2) does not really help us. Refers also to *Moro Raghunath* v. *Balaji Trimbak*(3) and the article in Madras Law Journal, volume 20, page 168.

K. R. Rangasuami Ayyangar for the respondent.

Order XXXIV, rule 1, has not changed the law. It only gave effect to the construction put upon section 85 by all the High Courts except Allahabad. In Allahabad also the view has changed. See *Binda* v. *Kaunsilia*(4) and *Ram Shankar Lal* v. *Ganesh Prasad*(5). The new rule only says that in certain circumstances the puisne mortgagee need not make a prior mortgagee a party. He is a proper party always.

[WALLIS, C.J.—What is the principle on which you must compel the plaintiff to bring his suit on both the mortgages?]

The plaintiff is before the Court as a party and he cannot say that he is a party only as a puisne mortgagee and not as a prior mortgagee. He is in the same position as regards his prior mortgage as any other stranger mortgagee who has been made a party to the suit would be. See *Nattu Krishnama Chariar* v. *Annangara Chariar*(6). What applies to the defendant must apply to the plaintiff. If a mortgagee defendant does not set up all his encumbrances, then he is barred under section 11 of Civil Procedure Code from recovering on the encumbrances left out by him. See *Sri Gopal* v. *Pirthi Singh*(7) and *Mahomed Ibrahim Hossain Khan* v. *Ambika Pershad Singh*(8).

The principle of section 85 is not in any way affected by the explanation to Order XXXIV, rule 1. The principle applies with great force to mortgage suits. To prevent multiplicity of suits, plaintiff could be compelled to consolidate several causes of action against the defendant. See *Cecil* v. *Brigges*(9), Chitty

(1) (1898) I.L.R., 20 All., 322 at p. 325. (2) (1911) I.L.R., 38 Calc., 60.
(3) (1889) I.L.R., 13 Bom., 45. (4) (1891) I.L.R., 13 All., 126 at p. 132.
(5) (1907) I.L.R., 29 All., 385. (6) (1907) I.L.R., 30 Mad., 353 at p. 354.
(7) (1902) I.L.R., 24 All., 429 (P.C.).
(8) (1912) I.L.R., 39 Calc., 527 (P.C.). (9) (1788) 2 T.R., 639.

on Pleadings, 6th edition, page 199 and Bakewell on Mortgage Suits, page 15. It is the duty of the Court when all the interested parties are before it to pass a decree which would finally deal with the rights of all the parties and prevent further litigation. See *Venkataramana Iyer* v. *Gompertz*(1).

Order II, rule 2 (section 43 of the old Code), also supports my contention. *Sri Gopal* v. *Pirthi Singh*(2) refers to section 43. See also *Keshavram* v. *Ranchhod*(3), *Hari Narain Banerjee* v. *Kusum Kumari Dasi*(4) and *Atab Pramanik* v. *Arif Tarafdar*(5). The mortgagor's right to redeem several mortgages on the same property constitutes a single cause of action, *Ramaswami Ayyar* v. *Vythinatha Ayyar*(6) as in the present case a mortgagee holding two mortgages on the same property has only one cause of action. *Manonmani Ammal* v. *Vythialinga Naicker*(7) shows that two mortgage transactions cannot constitute two causes of action. Word for word this case applies to the present one. A mortgage suit like a partition suit is a comprehensive one.

Again the present suit is against the principle of Order XXXIV, rule 14 (section 99 of the Transfer of Property Act), viz., that the mortgagee should not be allowed to sell the equity of redemption when he has the opportunity to sell property free of encumbrances. *Kamini Debi* v. *Ramlochan Sirkar*(8) and *Sundar Singh* v. *Bholu*(9).

Form No. VIII, Appendix D (to Schedule I, Civil Procedure Code), provides for the redemption of the prior mortgage.

[SADASIVA AYYAR, J.—This form applies only where the puisne mortgagee who brings a suit is a stranger.]

As the plaintiff is both the prior and the puisne mortgagee, he can be asked to redeem his own prior mortgage. Order XXXIV, rule 12 and Form No. VIII should be read together.

Dorasami v. *Venkataseshayyar*(10) is not based solely on joinder of parties. It also refers to the scheme of the Act. This case and *Nattu Krishnama Chariar* v. *Annangara Chariar*(11) have been followed in *Narasimha* v. *Koneti*(12) and this case is

(1) (1908) I L R., 31 Mad , 425 at p. 427. (2) (1902) I.L R , 24 All., 429 (P.C.).
(3) (1906) I L R., 30 Bom., 156. (4) (1910) I L R., 37 Calc., 589.
(5) (1914) 19 C L.J , 590 (6) (1903) I L.R , 26 Mad., 760 at p. 770.
(7) (1913) 25 M L.J , 481
(8) (1870) 5 B.L.R , 450 at p 460 *Foot Note* NORMAN, J.
(9) (1898) I.L.R., 20 All , 322 at p. 325
(10) (1902) I.L.R 25 Mad., 108. (11) (1907) I.L.R., 30 Mad., 353 at p. 354.
(12) (1913) M.W.N. Short Notes, 23.

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referred to as having settled the law in this Presidency in *Balasubramania Nadar* v. *Sivaguru Asari*(1).

SADASIVA AYYAR, J., refers to *Abdul Rahman* v. *Mahomed*(2).

The Bombay and Calcutta High Courts accept the same view as in *Dorasami* v. *Venkataseshayyar*(3). See *Keshavram* v. *Ranchhod*(4), *Atab Pramanik* v. *Arif Tarofdar*(5), *Hari Narain Banerjee* v. *Kusum Kumari Dasi*(6) and *Gobind Pershad* v. *Harihar Charan*(7).

T. R. Venkatarama Sastriyar in reply.

The contention based on Form No. VIII is untenable. Order XXXIV, rule 1, makes it clear that the prior mortgagee need not be added as a party in a suit by the puisne mortgagee. Suppose a second mortgagee brings a suit on his mortgage impleading defendant as the third mortgagee and not as the first mortgagee though he holds the first and the third mortgages Order XXXIV, rule 1, does not prevent him from doing so and the first mortgage need not be redeemed. Form No. VIII is adapted for a case where the prior mortgagee is impleaded and the puisne mortgagee seeks to redeem him. Form No. VIII read with Order XXXIV, rule 12, shows that the Court could not sell anything more than the equity of redemption if the prior mortgagee does not want to be redeemed. In *Dhondu* v. *Bhikaji*(8) it was held that the holder of two mortgages on the same property may reserve his first mortgage and sell it subject to the first. If he does not reserve it expressly, it is barred by *res judicata*

It is impossible to hold that the first and second mortgages constitute same cause of action so as to bar separate suits on them. *Manonmani Ammal* v. *Vythialinga Naicker*(9) is a case of partition, where there is only a single cause of action. *Dorasami* v. *Venkataseshayyar*(3) and *Keshavram* v. *Ranchhod*(4) proceed on the basis that the prior mortgagee is a necessary party to a suit by a puisne mortgagee.

[WALLIS, C.J.—What do you say to *Balasubramania Nadar* v. *Sivaguru Asari*(1) ?]

(1) (1911) 21 M.L.J., 562.
(2) (1892) 2 M.L.J., 168.
(3) (1902) I.L.R., 25 Mad., 108.
(4) (1906) I.L.R., 30 Bom., 156 at pp. 161 and 163.
(5) (1914) 19 C.L.J., 590.
(6) (1910) I.L.R., 37 Calc., 569 (P.C.).
(7) (1911) I.L.R., 38 Calc., 60.
(8) (1914) 17 Bom. L.R., 144.
(9) (1913) 25 M.L.J., 451.

It is the case of redemption of one mortgagee only and falls within section 61 of the Transfer of Property Act. Mortgagee's disability did not arise for consideration in that case. The Calcutta decisions are not in respondent's favour. *Hari Narain Banerjee* v. *Kusum Kumari Dasi*(1) refers to section 43 (Order II, rule 2), Civil Procedure Code, and does not affect the present case. *Atab Pramanik* v. *Arif Tarafdar*(2) was really a case of estoppel and the sale in that case did not refer to the first mortgage. There has been no decision in Calcutta so far as Order XXXIV, rule 1, is concerned. In Bombay *Dhondu* v. *Bhikaji*(3) represents the present law. *Mata Din Kasodhan* v. *Kazim Husain*(4), held that property meant physical property and that all persons interested should be made parties. *Ram Shankar Lal* v. *Ganesh Prasad*(5), has overruled this view and Order XXXIV, rule 1, has now been enacted. In accordance with this decision the objection to passing a decree on a second mortgage subject to the first mortgage in favour of the same person was based on sections 85 and 89 of the Transfer of Property Act and not on section 43: *Sesha Ayyar* v. *Krishna Ayyangar*(6). As regards *res judicata*, *Sri Gopal* v. *Pirthi Singh*(7) can be distinguished. There is a distinction between plaintiff and defendant. If a person is a defendant, he is bound to plead all his defences though as a plaintiff he may bring different suits on different causes of action. [Lord WESTBURY.—*Srimut Rajah Moottoo Vijaya Raganadha Bodha Gooroo Sawmy Periya Odaya Taver* v. *Katama Natchiar, Zemindar of Shivagunga*(8).]

[SADASIVA AYYAR, J.—Does not section 42, Civil Procedure Code, say that except in the case of inconsistent claims, the plaintiff must sue on all the causes of action ?]

Section 42 refers to subject in dispute. Subject of the suit means only the subject matter that is put before the Court. Refers also to Order XXXIV, rule 1.

[WALLIS, C.J.—*Venkataramana Iyer* v. *Gompertz*(9) says that when all the parties are before the Court, it is the duty of the Court to finally adjudicate between them.]

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(1) (1910) I.L.R., 37 Calc., 589 (P.C.).
(2) (1914) 19 C.L.J., 590.
(3) (1914) 17 Bom. L.R., 144.
(4) (1891) I.L.R., 13 All., 432.
(5) (1907) I.L.R., 29 All., 385.
(6) (1901) I.L.R., 24 Mad., 96.
(7) (1902) I.L.R., 24 All., 429 (P.C.).
(8) (1866) 11 M.I.A., 50 at p. 73.
(9) (1908) I.L.R., 31 Mad., 425.

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That was under section 85 of the Transfer of Property Act. The Court has to adjudicate on a particular right, viz., the equity of redemption which is a subject of the second mortgage. Order XXXIV, rule 12, gives an option to the prior mortgagee. Supposing that the first mortgagee and the second mortgagee agree that the first mortgagee's right should remain intact and the properties to be sold subject to it, can the Court compel him to be redeemed?

[SADASIVA AYYAR, J.—Yes, if the mortgagor wishes to redeem.]

The properties cannot be sold free of its encumbrance without his consent in a suit by the puisne mortgagee. The option is left with him and the mortgagor cannot compel redemption The same principle must apply when both the prior and the puisne mortgagees are one and the same person.

The passage in Bakewell at page 15 is with reference to section 85 of the Transfer of Property Act. Chitty's Old Practice need not be referred to. Refers to Dr. Ghose on Mortgages, page 589, on the question of "proper and necessary party."

This REFERENCE coming on for hearing the Court expressed the following

OPINION.

WALLIS, C.J.

WALLIS, C.J.—In support of the view taken in *Dorasami* v. *Venkataseshayyar*(1), reliance was placed on the provisions of sections 61, 85 and 99 of the Transfer of Property Act as well as on the form of decree No. 128 of Schedule IV of the Code of Civil Procedure. The modifications introduced into sections 85 and 99, when re-enacted as Order XXXIV, rules 1 and 14 in the Code of 1908, affect all these grounds except the first. Under Order XXXIV, rule 1, which is in accordance with the decision of the Full Bench of the Allahabad High Court in *Ram Shankar Lal* v. *Ganesh Prasad*(2), only parties interested in the mortgage security or the right of redemption need be joined in a suit relating to the mortgage, and the explanation makes it clear that a prior mortgagee is not to be regarded as interested in a suit brought by a puisne mortgagee for sale or foreclosure, or in a suit brought by the mortgagor to redeem a puisne mortgage.

(1) (1902) I.L.R., 25 Mad., 108. (2) (1907) I.L.R., 29 All., 385.

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Consequently he need not be made a party to such suits, and it follows that, if such a suit results in a decree for sale, the sale must be subject to his rights. It cannot therefore now be said that Order XXXIV, rule 1, requires a prior mortgagee to be joined and the property to be sold free of his mortgage whether or not the prior mortgagee be the same person as the puisne mortgagee. Secondly, the language of rule 1 shows that in the case of a puisne mortgage what is mortgaged and has to be redeemed, that is to say, the mortgaged property, consists only of the equity of redemption under the prior mortgage, and that therefore the form of decree in the Civil Procedure Code does not require that on redemption of the puisne mortgage, the land itself should be reconveyed free of the prior mortgage as well. This ground then can no longer be relied on. The argument based on section 99 also goes, as the re-enacted Order XXXIV, rule 14, only debars the mortgagee from bringing the mortgaged property to sale otherwise than by a suit in enforcement of the mortgage when such sale is in satisfaction of the mortgage debt itself, and not, as under section 99 of the Transfer of Property Act whatever the nature of the claim. This shows that the Legislature does not consider it desirable except in the case specified to prevent the mortgagee from acquiring the equity of redemption otherwise than by suit upon the mortgage itself, and affords a strong argument against the imposition of such a restriction by the Court.

Coming now to section 61 of the Transfer of Property Act the provisions of that section which is modelled on section 17 of the Conveyancing Act of 1881, are a restriction of the equitable rule regarding the consolidation of mortgages, viz., that a mortgagor seeking to redeem a particular mortgage should be required at the same time to redeem all the other mortgages created by him in favour of the same mortgagee. I am unable to say that the provisions of this section afford sufficient reason for refusing to allow a mortgagee suing on a puisne mortgage to sell subject to a prior mortgage in his favour It is no doubt laid down in *Vadju* v. *Vadju*(1), citing *Brown* v. *Cole*(2), that, in the absence of any stipulation, express or implied, to the contrary, the right to redeem and the right to foreclose must be

(1) (1881) I.L.R., 5 Bom., 22. (2) (1845) 14 Sim., 427.

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regarded as co-extensive; but those observations were made with reference to the time for bringing such suits and not to their other incidents. On the other hand it was laid down generally in *Wickenden* v. *Rayson*(1), that a sale cannot be directed against a mortgagee, that is to say, free of his mortgage without his consent whether he be a party to the suit or not; see also section 96 of the Transfer of Property Act. Lastly, with reference to the query of their Lordships in *Sri Gopal* v. *Pirthi Singh*(2), as to whether in view of the provisions of section 43, Civil Procedure Code, now Order II, rule 2, a mortgagee having several mortgages on the same property is entitled to treat them as separate causes of action or must bring one suit on all his mortgages, I think we are bound by the decisions of this Court to say that he is entitled to treat them as separate causes of action.

In the result therefore I would answer the question referred to us in the affirmative.

AYLING, J.

AYLING, J.—I agree.

SADASIVA AYYAR, J.

SADASIVA AYYAR, J.—I entirely concur with the judgment of my Lord the CHIEF JUSTICE.

The question referred to the Full Bench is "whether it is open to a mortgagee to bring a suit for the recovery of his debt by sale of the properties mortgaged to him subject to his interest in a prior mortgage." I agree with the decisions in the two cases decided by this Court in *Abdul Rakmian* v. *Mahomed*(3) (MUTHUSWAMI AYYAR and BEST, JJ.), and *Radhakrishna Iyer* v. *Muthusawmy Sholagan*(4) (MUNRO and ABDUR RAHIM, JJ.). which answered this question affirmatively.

As regards the *obiter dicta* in *Dorasami* v. *Venkataseshayyar*(5) and *Balasubramania Nadar* v. *Sivaguru Asari*(6), I agree generally with the acute criticisms found in the article beginning at page 168 of volume 20, Madras Law Journal, though I differ from the learned critic in respect of his remark (at page 170) that "it does not seem legitimate to infer" from section 61 of the Transfer of Property Act that a mortgagor cannot redeem one of two mortgages made of the same property to the same person. I also agree with the judgment of

(1) (1856) 6 De G.M.G., 210.
(2) (1902) I.L.R., 24 All., 429 (P.C.).
(3) (1892) 2 M.L.J., 155.
(4) (1908) I.L.R., 31 Mad., 530.
(5) (1902) I.L.R., 25 Mad., 108.
(6) (1911) 21 M.L.J., 664.

BEAMAN, J., in *Dhondu* v. *Bhikaji*(1). I might be permitted to suggest to the Legislature that section 61 of Act IV of 1882 might be replaced by a section enacting that all consolidation even in the case where the mortgagee and mortgagor are the same persons and the property is the same, is abolished.

O.M.N.

APPELLATE CIVIL.

Before Mr. Justice Sadasiva Ayyar and Mr. Justice Tyabji.

KARIADAN KUMBER (PLAINTIFF), APPELLANT,

v.

THE BRITISH INDIA STEAM NAVIGATION COMPANY, LIMITED, BY AGENTS, MESSRS ASPINWALL & Co (FIRST DEFENDANT), RESPONDENT.*

1913. March 19, 20 and 26 and May 2

Bill of Lading—Clause of exemption from liability after goods are free of ship's tackle, validity of—Common carriers by sea, governed by English Law and not by Indian Contract Act (IX of 1872)—Indian Contract Act (IX of 1872), sec. 23—Exemption clause not void under—Sea worthiness, definition of—Warranty of seaworthiness not extending to lighters or boats—Binding force of Privy Council decision on India, though not in an Indian case.

Carriers by sea for hire are common carriers, to whom the Carriers Act (III of 1865) does not apply.

Hajee Ismail Sait v *The Company of the Messageries Maritimes of France* (1905) I.L.R., 28 Mad, 400, followed

The duties and liabilities of a common carrier are governed in India by the principles of the English Common Law on that subject (except where they have been departed from, in the cases of some classes of common carriers, by the Carriers Act of 1865 or by the Railway Acts of 1878 and 1890), and that notwithstanding some general expressions in the chapter on Bailments, a common carrier's responsibility is not within the Indian Contract Act of 1872

The Irrawaddy Flotilla Company v. *Bugwandas* (1891) I L R, 18 Calc, 620 (P.C), followed.

A provision in a charter-party to the effect that "in all cases and under all circumstances the liability of the company (of shipowners) shall absolutely cease when the goods are free of the ship's tackle and thereupon the goods shall be at the risk for all purposes and in every respect of the shipper or consignee," affords complete protection to the shipowners against all losses in respect of goods arising from any cause at any time after the goods are free of the ship's

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(1) (1914) 17 Bom. L R, 144.

* Second Appeal No. 935 of 1913.

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tackle, whether the cause of the loss be (a) as in this case, the sinking of the boats, which conveyed the goods from the ship to the shore, a sinking occasioned by the negligent overloading of the boats by the shipowner's landing agents or (b) by the misfeasance and fraud of their landing agents.

Sheik Mahamad Ravuther v. *The British India Steam Navigation Co., Ltd.* (1909) I.L.R., 32 Mad., 95 (F.B.) and *Chartered Bank of India, Australia and China* v *British India Steam Navigation Company, Limited* (1909) A.C., 369, followed.

Such a clause as the above is according to English Law, not opposed to public policy and is valid; and section 23 of the Indian Contract Act has no application

A decision of the Privy Council though not in a case arising from India binding on the Courts in India.

Obiter.—The warranty of seaworthiness which is implied as to the ship does not extend to the lighters or boats employed to land the cargo. Even this warranty as to the ship is satisfied if the ship be originally seaworthy, i.e., when she first sails on the voyage insured; she need not continue to be so throughout the voyage.

Lane v. *Nixon* (1866) I.C.P., 412, followed.

Sparrow v *Carruthers* (1745) 2 Strange 1236, doubted.

SECOND APPEAL against the decree of A. EDGINGTON, the Acting District Judge of South Malabar, in Appeal No. 203 of 1911, preferred against the decree of J. L. JACQUES, the Subordinate Judge of Cochin, in Original Suit No. 34 of 1909.

The facts are fully given in the judgment of Mr. Justice TYABJI.

The Honourable Mr. *T. V. Seshagiri Ayyar* for the Honourable Mr. *J. L. Rozario* for the appellant.

M. O. Parthasarathi Ayyangar for the respondent.

SADASIVA AYYAR, J.

SADASIVA AYYAR, J.—Though my learned brother has prepared a separate judgment dealing fully with the facts and the law, I thought that I should add a judgment of my own as the questions raised are important and as I am differing from the conclusions arrived at by the majority of the Full Bench in *Sheik Mahamad Ravuther* v. *The British India Steam Navigation Co., Ltd.*(1). The defendant in this case is the powerful company well known as the British India Steam Navigation Company. The legal questions we have to consider are—

(a) whether they are common carriers,

(b) whether the English Common Law relating to carriers by sea applies to them or the provisions of the Indian Contract Act relating to bailees,

(1) (1909) I.L.R., 32 Mad., 95 (F.B.).

(c) if the English Common Law applies to them, whether the defendants are wholly absolved from liability for the loss caused by the negligence of their agents employed to carry in boats the goods of the plaintiff (consignee) from the mooring place of the steamer to the plaintiff's jetty in the port of Cochin, owing to the defendants having protected themselves from liability for such loss by appropriate clauses in the bill of lading,

(d) whether those general clauses could not legally absolve the defendants because the bill of lading did not contain an express provision declaring that defendants shall not be liable even if the boats procured by their agents to take the cargo from the steamer to the plaintiff's jetty were unseaworthy.

As regards the first question, *Hajee Ismail Sait* v. *The Company of the Messageries Maritimes of France*(1), clearly decides that carriers by sea for hire are common carriers The Carriers Act, 1865, does not, however, apply to them, as in that Act the term "common carrier" is confined to denoting "a person other than the Government engaged in transporting for hire property . . . . *by land or inland navigation*" and is not extended to carriers by sea. The next question is "are common carriers by sea governed by the English Common Law or by the Contract Act?" In the Full Bench case *Sheik Mahamad Ravuther* v. *The British India Steam Navigation Co., Ltd.*(2), the learned Chief Justice and WALLIS, J., evidently hold as unquestionable that, where the English Common Law and the Indian Contract Act differ, the former and not the latter applied to common carriers by sea. WALLIS, J., referred (at page 108) to the argument of the appellant's learned vakil in that case (Mr., now Mr. Justice SUNDARA AYYAR) that section 23 of the Indian Contract Act applied and that the clause in the Bill of Lading absolving the carriers by sea (the same British India Steam Navigation Company, who is the defendant in this case) from all liability arising from whatever cause, is opposed to public policy and hence is void under section 23 of the Indian Contract Act. The learned Judge, however, did not accept this argument of

(1) (1905) I.L.R., 28 Mad., 400. (2) (1909) I.L.R., 32 Mad., 95 at p. 108 (F.B.).

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the learned vakil and says at page 109, "As regards the second point I am of opinion that it is not open to us to hold that contracts exempting a carrier from liability for the negligence of his servants are void as opposed to public policy. As pointed out by WALTON, J., in *Price & Co.* v. *Union Lighterage Company*(1), 'the law of England, unlike the law of the United States of America, does not forbid the carrier to exempt himself by contract from liability for the negligence of himself and his servants; but, if the carrier desires so to exempt himself, it requires that he shall do so in express, plain, and unambiguous terms.' So far as the general question goes this is the law which has been received and applied by the Indian Courts [*Jellicoe* v. *The British India Steam Navigation Co.*(2) and *Hajee Ismail Sait* v. *The Company of the Messageries Maritimes of France*(3)]. Contracts have been made and business has been carried on for many years in India on this footing, and if the law is to be altered now it must be by the Legislature." WHITE, C.J., says on this point at page 107, "Mr. Sundara Ayyar contended that a contract which purported to relieve a shipowner from his liability as a carrier for negligence was contrary to public policy and should not be enforced. As pointed out by WALTON, J., in *Price & Co.* v. *Union Lighterage Company*(1), the law of the United States of America forbids a carrier to exempt himself by contract from liability for negligence, whilst the law of England does not. I am of opinion that on a question of this character Courts in India ought to follow the law of England." Mr Seshagiri Ayyar, who argued the present appeal before us, contended that WHITE, C.J., and WALLIS, J., did not, in their judgments in *Sheik Mahamad Ravuther* v. *The British India Steam Navigation Co., Ltd.*(4), consider the question whether the Indian Contract Act applied or not, but I am unable to accept this argument. It is no doubt true that SANKARAN NAIR, J., in that case elaborately considered the provisions of the Contract Act, which he assumed to be applicable to common carriers by sea even when such provisions conflicted with the English Common Law (see page 121). Mr. Seshagiri Ayyar invited us to refer this question to a Full Bench, as,

(1) (1903) 1 K B., 750 at p. 752.
(2) (1884) I.L.R., 10 Calc., 489.
(3) (1905) I.L.R., 29 Mad., 400.
(4) (1909) I.L.R., 32 Mad., 95 at pp. 107 and 109 (F.B.).

though WHITE, C.J., and SANKARAN NAIR, J., agreed in their ultimate conclusion in that case, they differed on this question of the applicability of the provisions of the Indian Contract Act, and the agreement between the views of the Chief Justice and WALLIS, J., about the non-applicability of the provisions of the Contract Act did not affect the result of that case, as the learned Chief Justice differed from WALLIS, J., also as to the result of applying the English Common Law. As I am myself always inclined not to travel beyond Indian cases and Indian Statutes unless I am convinced that they are clearly not applicable, I would have gladly referred the question of the applicability of the Contract Act, where it differs from the English Common Law to a Full Bench, if I did not feel that I am concluded by the pronouncement of the Privy Council on this question. In *The Irrawaddy Flotilla Company* v. *Bugwandas*(1), their Lordships have clearly approved of the decision of the Full Bench in *Moothora Kant Shaw* v. *The India General Steam Navigation Co.*(2) and disapproved of the contrary decision in *Kuverji Tulsidas* v. *The Great Indian Peninsula Railway Company*(3). The effect of their Lordships' decision in *The Irrawaddy Flotilla Company* v. *Bugwandas*(1) seems to me to be "that the duties and liabilities of a common carrier are governed in India by the principles of the English Common Law on that subject" (except where they have been departed from in the case of some classes of common carriers by the Carriers Act of 1865 or by the Railway Acts of 1878 and 1890) and "that notwithstanding some general expressions in the chapter on Bailments, a common carrier's responsibility is not within the Indian Contract Act of 1872."

Taking it, then, that the English Common Law applies to the rights and liabilities of the defendant company, the Bill of Lading (Exhibit BB) in this case contains the following two clauses:—

1. "Accidents, loss or damages from any *act, neglect or default whatsoever* of the pilot . . . . *or other servants of the company excepted* and the company is to be at liberty to tranship the goods on shore or afloat and reship or forward the same at the company's expense but *at shipper's or consignee's risk.*"

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(1) (1893) I.L.R., 18 Calc., 620 (P.C.). (2) (1884) I.L.R., 10 Calc., 166.
(3) (1878) I.L.R., 3 Bom., 109.

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2. "In all cases and under all circumstances, the liability of the company shall absolutely cease when the goods are free of the ship's tackle and thereupon the goods shall be at the risk *for all purposes and in every respect of the shipper or consignee.*"

As regards these very wide clauses, WHITE, C.J., and SANKARAN NAIR, J., held in *Sheik Mahamad Ravuther* v. *The British India Steam Navigation Co., Ltd.*(1), that they did not absolve the company from liability for loss occasioned by the negligence of their servants before delivery and after landing. WALLIS, J., held otherwise. [I might remark that Sir S. SUBRAMANIA AYYAR, J., and MILLER, J., similarly differed in the earlier stage of the same case *Sheik Mahamad* v. *The British India Steam Navigation Company*(2).] I am bound, of course, by the judgment of the majority unless it is opposed to a judgment of the Privy Council, not brought to the notice of the majority, or reported after the Full Bench decision. Such a judgment of the Privy Council, it seems to me, has been pronounced in *Chartered Bank of India, Australia and China* v. *British India Steam Navigation Company, Limited*(3). The defendant in that case was this very same British India Steam Navigation Company. The Bill of Lading which had to be construed in that case contained this very same clause about the liability of the company ceasing absolutely when the goods were free of the ship's tackle, etc., and the defendants' landing agents (as in this case) received the goods into lighters to be carried to jetties. The only difference between the facts of this case and the facts of that case is that, whereas the goods were lost in the present case through the negligent overloading of the lighter by the defendant's landing agents, the goods were lost in the other case by the misfeasance and fraud of the landing agents. Their Lordships of the Privy Council applied the English Common Law relating to common carriers by sea in that case as we have to do in this case. I shall just quote the concluding sentences of their Lordships' judgment :—"Now it may be conceded that the goods in question were not delivered according to the exigency of the bills of lading by being placed in the hands of the landing agents, and *it may be admitted that bills of lading cannot be said to be spent or exhausted until the goods covered by them are placed*

(1) (1909) I.L.R., 32 Mad., 95 (F.B.). (2) (1907) I.L.R., 30 Mad., 79.
(3) (1909) A.C., 369 at pp. 374 and 375.

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under the absolute dominion and control of the consignees. But their Lordships cannot think that there is *any ambiguity* in the clause providing for cesser of liability. *It seems to be perfectly clear.* There is no reason why it should not be held operative and effectual in the present case. They agree with the learned Chief Justice that it affords complete protection to the respondent company." It seems to me that this decision of the Privy Council pronounced on the 31st March 1909 (about 3½ months after the pronouncement of the Full Bench decision in *Sheik Mahamad Ravuther* v. *The British India Steam Navigation Co., Ltd.*(1), on the 15th December 1908) clearly overrules the decision in the latter case, unless we are to accede to the ingenious argument of Mr. Seshagiri Ayyar that we are not bound by the decision of the Privy Council unless it was given in a case which went up on appeal from an Indian tribunal. (The Appeal Case of 1909 was an appeal from the decision of the Supreme Court of the Straits Settlements.) I am wholly unable to hold that the binding nature of a decision of the Privy Council depends on the locality of the tribunal which pronounced the decision from which the appeal was preferred to the Privy Council, any more than the binding nature of a decision of this Madras High Court upon a Madras District Court depends on the question whether the High Court's decision was pronounced in an appeal preferred in a case which arose in that particular district. (The tribunal which decided *Chartered Bank of India, Australia, and China* v. *British India Steam Navigation Company, Limited*(2), consisted of Lord MACNAUGHTEN, Lord ATKINSON, Lord COLLINS and Sir ARTHUR WILSON who have taken part in deciding many Indian appeals.) The last question I have to consider is whether this case can be distinguished from the case decided by the Privy Council by reason of the fact that the boat in which the goods were placed by the defendant's landing agent was unseaworthy Having regard to the language of their Lordships of the Privy Council that the clause in the bill of lading absolutely absolving the defendant as soon as the goods are free of the ship's tackle protects the defendant from liability *for whatever happens afterwards*, I do not think the question whether what happened afterwards was negligent overloading by, or fraudulent

(1) (1909) I.L.R., 32 Mad., 95 (F.B.). (2) (1909) A.C., 369.

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dishonesty of, the landing agents is of the least importance. If it is necessary to decide this question, I should be inclined to follow the English Law on this question also, whatever may be the American Law. [See, as to the American Law, Carver's Carriage by Sea, section 251 (*a*), last paragraph.] Arnould on Marine Insurance, volume II, page 846, says: "The warranty of sea-worthiness which is implied as to the ship *does not extend to lighters employed to land the cargo*". "It is enough to satisfy this warranty (of seaworthiness) that the ship be *originally seaworthy* for the voyage insured *when she sails on it*; the assured makes no warranty that the ship *shall continue seaworthy in the course of it.* 'Every ship,' says Lord MANSFIELD, 'must be seaworthy *when she first sails on the voyage insured but she need not continue so throughout the voyage*'" [Arnould in footnote (*b*) at page 848 refers to the cases decided by Lord MANSFIELD and Lord ELDON establishing the above proposition].

In *Lane* v. *Nixon*(1), it was clearly held by ERLE, C.J., BYLES, J., KEATING, J., and MONTAGU SMITH, J., that the warranty of the ship's seaworthiness does not extend to lighters employed to land goods. KEATING, J., says "the employment of lighters to land the goods seems to be a usual and ordinary incident of such a voyage, and *has no reference whatever to the implied warranty of seaworthiness. I think it would be a dangerous step to extend that warranty.*" MONTAGU SMITH, J., said "There is nothing to justify the extension of the implied warranty of seaworthiness to lighters so employed as in a fresh stage of the voyage. It would, I think, be extremely inconvenient if it could be done." If there is no implied warranty of seaworthiness for lighters and boats (or catamarans or coolies or elephants, as ERLE, C.J., put it) the clause about negligence in the bill of lading is "express, plain and unambiguous" and clearly exempts the defendants from liability even if we adopt the "artificial rule of construction" (as WALLIS, J., puts it at page 109 in *Sheik Mahamad Ravuther* v. *The British India Steam Navigation Co., Ltd.*(2), "enunciated by WALTON, J.", in *Price & Co.* v. *Union Lighterage Company*(3).

Mr. Seshagiri Ayyar quoted several English cases relating to the question whether, when the safety of the goods was insured till landing, the assurer is liable—

(1) (1866) 1 C.P., 412. (2) (1909) I.L.R., 32 Mad., 95 (F.B.).
(3) (1903) 1 K.B., 750.

(*a*) in the case when the boat which goes to the ship's side for landing belongs to some person other than the owner of the goods and the goods are lost before landing.

(*b*) in the case when the said boat belongs to the owner of the goods and hence delivery to him may be said to be complete *though the goods are not then actually landed.*

I think these cases whether belonging to class (*a*) or class (*b*) have little relevancy as they are concerned with the question whether delivery into the owner's boat is *equivalent to landing so as to terminate the assurer's liability* and not to the question of the shipowner's liability when the shipowner has protected himself from all liability after the goods have left the ship's tackle. (I may, however, state that I find it difficult to accept the decision in *Sparrow* v. *Carruthers*(1), as correct and the correctness of that decision has been, in a manner, doubted in *Hurry* v. *Royal Exchange Assurance Company*(2). For all these reasons I would dismiss the Second Appeal with costs.

TYABJI, J. TYABJI, J.—The question to be determined in this appeal is whether or not the respondent shipowners are liable to the plaintiff for the loss of the goods mentioned in the bill of lading, Exhibit BB. The goods were lost by the sinking of the boats in which they were put after being taken out of the ship; the cause of the sinking was that the boats were overloaded. The shipowners claim to be protected by the following clause in the bill of lading: "in all cases and under all circumstances the liability of the company shall absolutely cease when the goods are free of the ship's tackle and thereupon the goods shall be at the risk for all purposes and in every respect of the shipper or consignee." This clause in itself seems to be sufficiently clear and unambiguous to save the shipowners from any liability after the goods are free of the ship's tackle; and it is admitted that the loss occurred after they were so free The point does not seem to arise here whether, when the cause of loss is such as we have to deal with, the liability imposed by law upon the shipowners can be limited only by an express and specific stipulation referring in direct terms to the cause of the loss or whether general words limiting the liability will suffice provided their terms are wide enough clearly and unequivocally to include the

(1) (1745) 2 Strange, 1236. (2) (1801) 2 B.&P. 430; s.c., 126 E.R., 1367.

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cause of loss in question; because in the clause before us the liability of the shipowners is limited by reference to a point of time, after which the shipowners are no more responsible for the loss of the goods. It is not contended that any doubt arises, with reference to the facts of the present case, as to the point of time when the clause must come into operation having been reached when the loss occurred, nor is it questioned that after the clause comes into operation its terms in their natural meaning remove all responsibility from the shoulders of the shipowners. The rules of law and construction which prevail when the clause is so framed as to limit the liability of the shipowners against particular causes of damage by providing exceptions to the general responsibility of the shipowners, which general responsibility is to survive subject to the excepted cases, can have but a remote bearing where the clause is so framed as to purport to leave no responsibility whatever on the shipowners after a particular point of time has been reached, after which it is stipulated in effect that the voyage must be taken to have been completed so far as the responsibility of the shipowners is concerned. In the first mentioned clauses the cases in which the shipowners are saved from liability consist of exceptions to the general rule; in the latter the relative function of the rule and the exception are interchanged.

It seems, however, necessary to refer to two decisions which were cited to us. The shipowners rely on *Chartered Bank of India, Australia, and China* v. *British India Steam Navigation Company, Limited*(1), where their Lordships of the Privy Council had to determine the liability of the same shipowners, who are the present respondents, under a clause in identical terms. The cause of the loss there was that the goods had been taken away without the production of the bill of lading or delivery order through the fraud of the representatives of a third party acting in collusion with the representatives of the landing agents of the shipowners.

The arguments before us were, first, that the present case is distinguishable from the decision of the Privy Council above referred to inasmuch as the cause of the loss in the present case, it was contended falls under the denomination of the unseaworthiness

(1) (1909) A.C., 369.

of the boats, and that though the clause in question must (in accordance with the said decision of the Privy Council) be taken to be sufficient to protect the shipowners against the fraud of their agents, it is not sufficient to protect them against the unseaworthiness of the boats in which the goods are placed when they are taken out of the ship in order to be carried to the jetties.

Assuming that the overloading of the boats could, in such circumstances as we have before us, be considered to render the boats unseaworthy—and that assumption requires us to apply the word "unseaworthy" in a rather unusual sense—there is nothing to prevent the shipowners from limiting their liability against the unseaworthiness of the ships, any more than there is anything to prevent their limiting their liability against the fraud of their agents The principle in the one case seems to have features common with the principle in the other case. In the case of unseaworthiness, it is assumed that the parties enter into the contract on the basis that the carriers are in a position to carry the goods and that their ships are capable of doing so—to use the words of Lord BLACKBURN in *Steel* v. *State Line Steamship Company*(1), "there is a duty on the part of the person who furnishes or supplies that ship, or that ship's room, unless something be stipulated which should prevent it, that the ship shall be fit for its purpose. That is generally expressed by saying that it shall be seaworthy; and I think also in marine contracts, contracts for sea carriage, that is what is properly called a 'warranty,' not merely that they should do their best to make the ship fit, but that the ship should really be fit." If, therefore, the shipowners wish to enter into a contract in which they do not warrant that their ships are seaworthy, they must make it clear to the persons with whom they contract that they do not so warrant; similarly the carriers would, ordinarily, be supposed to be responsible for the honesty of their agents who are under their own control, and if they wish to restrict their liability so that they are not responsible for loss caused by the dishonesty or the fraud of their agents, equally must they make that restriction plain. It seems, however, unnecessary in this case to consider whether the duty cast upon the shipowners to employ honest agents and the duty (if any) cast upon the shipowners to prevent loss arising

(1) (1877) 3 A.C., 72 at p 86.

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from the causes with which we have now to deal, are each, or either of them a warranty properly so called or whether the duty in either of the cases consists merely in that the shipowners should do their best to prevent loss. We have primarily to deal with the words of the clause and the facts of this case; and not much help is obtained in construing a clause by the circuitous method of reasoning which has to be followed before any aid can be had from the fact that the Privy Council considered a similar clause to save the shipowners from liability in the particular case before them. For if we wish to follow this method of reasoning we should have to determine the further questions whether the liability under the circumstances which were befo the Privy Council is of the same extent and nature as t liability under the facts now before us, and in order to will be necessary to determine whether the cause ular which we are dealing falls under the head of uns ted in

It has, however, seemed necessary to refer pleted Council decision, as it has been pointed out to u . In *Mahamad Ravuther* v. *The British India Stea rs are Co., Ltd.*(1), a bench consisting of the CHIEF Ju rule; and SANKARAN NAIR, JJ., held that a clause in the ption as the one that is before us did not protect the against loss by sweat damage through the neglect hich owners after the goods were free of the ship's ta k of case is not a decision of a Full Bench of this Court n ion J., dissented from the view taken by the other two J ncil the other hand we are of opinion that we are bound by are of the Privy Council so far as that decision is he notwithstanding that it was not pronounced in appea y Indian Court.

The next head of argument before us was that the question is of no effect inasmuch as the Indian Contr section 151, lays down the liability of bailees in express te that it does not permit the parties to contract themselves such liability: section 151 does not contain the words " absence of any special contract" as the next section does, a are contained in a great number of other sections of the Contrac Act—not less than 25, as the learned pleader for the appellan

(1) (1909) I.L.R., 32 Mad., 95 (F.B.)

pointed out to us. In *Sheik Mahamad Ravuther* v. *The British India Steam Navigation Co., Ltd.*(1), to which reference has already been made, SANKARAN NAIR, J., expressed the view that the term "bailee" in section 151 of the Indian Contract Act must be taken also to refer to carriers. But that view was not alluded to and, apparently, not accepted by the other Judges composing the bench Assuming that the clause we have to deal with does not end the relationship of the shipowners as carriers of the goods after the goods are free of the ship's tackle and that the bill of lading is not spent or exhausted until the goods covered by it are placed under the absolute control and dominion of the consignee [see *Chartered Bank of India, Australia and China* v *British India Steam Navigation Company, Limited*(2)] it is not open to of theirourt to say that the liability of such carriers as we have to features co in this case is governed by section 151 of the Indian case of unseaw after the decision of the Privy Council in the case of the contract ory *Flotilla Company* v. *Bhuguanda*(3). In that case carry the goodancil had to decide whether the view of the Bombay use the words as expressed in *Kuverji Tulsidas* v. *The Great Indian ship Company Railway Company*(4) was correct or the view of the furnishes or High Court in *Moothora Kant Shaw* v. *The India* thing be stip *am Navigation Company*(5) and they said that they fit for its pupelled to decide in favour of the view of the Calcutta shall be seaw t and against that of the High Court of Bombay." In for sea carr gainst the view of the High Court of Bombay, they merely that gainst the argument on which the appellant relied. that the shided that the liability of carriers such as we have to deal wish to enot governed by the sections of the Indian Contract Act, their ships to bailees.

with whour these circumstances there is no reason why the plain the carrie of the clause should not be given effect to, and why the the honeers should be held to be responsible for the loss of the if they after the time when it was stipulated that the goods respond for all purposes and in every respect be at the risk of the their per or consignee

seem We therefore dismiss the appeal with costs

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(1) (1909) I L R. 32 Mad., 95 (F B) (2) (1909) A C 369

(3) (1891) I L.R., 18 Calc., 620 (P C.) (4) (1878) I.L.R., 3 Bom., 109.

(5) (1884) I L.R., 10 Calc., 166

N.R

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Under section 48, Transfer of Property Act, when there are various alienations, they take effect in the order of their dates. Again under section 106, a lease is a transfer. So a lease created after a hypothecation is subject to it.

[SANKARAN NAIR, J.—The hypothecatee is not entitled to possession. The lease will be invalid only if he is entitled to possession. If the lease stands in his way of getting possession of the land by bringing it to sale, it is invalid as against the hypothecatee. Is there any case, English or Indian, which says that a lease is invalid as against the hypothecatee? The hypothecator can do anything consistent with the rights of the hypothecatee.]

So far as I know there is no case. According to Form VII of the Civil Procedure Code, in Appendix D the property could be sold, if money is not paid. There is no reservation made for the rights and claims of subsequent alienees. The tenant is not a lessee so far as the mortgagee is concerned.

[SANKARAN NAIR, J.—Then how do you get over the Malabar Tenants Compensation Act?]

"Tenant" is defined in section 3, clause (2). My contention is that he is not a tenant. He does not believe in good faith that he is entitled to possession.

[SANKARAN NAIR, J.—The object of the Act is to give the tenants compensation for value of improvements, even though they are ejected. It is enough, to bring them under the definition, that they believe in good faith that they are tenants.]

The tenant claims only value for improvements. He does not claim the right to retain possession. If instead of the other defendants being lessees, they are usufructuary mortgagees, it is anomalous to say that the first mortgagee is to be prejudiced by subsequent alienations.

[SANKARAN NAIR, J.—In such cases also the value of the improvements will be allowed. It is really anomalous but for the provisions of the Act. You may say that the Act departs very much from the ordinary rules governing landlords and tenants. The Act was meant to be so.]

Order XXI, rule 95, Civil Procedure Code, says that if a lease is created after an attachment of the judgment-debtor's property, the lessee could be physically turned out. So that in this suit

the hypothecatee is entitled to have the property sold free of any claims by subsequent alienees.

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Ryru Nambiyar for the respondents argued that the case was governed by the Act itself and that hence the tenant was entitled to get compensation for the improvements when ejected.

Cur ad Vult.

WHITE, C.J., AND SANKARAN NAIR AND OLDFIELD, JJ.

JUDGMENT.—The question for decision is whether the defendants, tenants holding under the mortgagor the first defendant are entitled to get the value of improvements made by them on eviction by the purchaser in execution of the mortgage decree obtained by the plaintiff. We proceed on the footing that the lease to the defendants is subsequent to the creation of the mortgage. The plaintiff's case is that it was not open to a mortgagor to create any right in derogation of the mortgage. The defendants claim the value of improvements under the Madras Act I of 1900 Section 5 of that Act declares the right of "every tenant" to receive compensation for improvements on ejectment. It is argued that this section entitles the tenant to receive compensation only from his lessor. There is no such restriction in the section itself. The definition of the term (see section 3) shows that it includes persons other than those included in the word as defined in the Transfer of Property Act and includes persons who did not enter into possession under any agreement with, or with the consent of, the person, entitled to obtain possession of the property. The customary law leaves no doubt on the point.

In Major Walker's Report on the Land Tenures of Malabar (1801), a recognized authority, it is stated: "should there be a paramba without any known owner and a kudian (tenant) believing that it was without a master settled on it and made considerable improvements, on the return of the jenmkar or any one producing sufficient proofs that he was the owner of the paramba, the kudian must in that case, without dispute, accede to the demand, provided the jenmkar pays *kuli kanom* or the value of the improvements."

Accordingly the "tenant" according to section (3) includes any person who enters into possession of waste land without the consent of the owner but with the *bona fide* intention of paying

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the customary rent to the owner when ascertained. Similarly the holders of land under cowles granted by Government received before the passing of the Act the value of improvements on surrendering the land to the jaumi: so also tenants holding under invalid kanoms, leases or mortgages granted by the karnavan when surrendering the lands to the tarwad; tenants let into possession by a person claiming jenm title on eviction by the person found to be the true janmi of the land also received compensation. The section accordingly defines tenants to include mortgagees as well as persons who in good faith believed themselves to be mortgagees or tenants. It is clear therefore that the defendants who are in possession as tenants under the mortgagor are "tenants" within the definition and accordingly entitled to get compensation for improvements on eviction. It is not contended before us that the defendants are entitled to hold possession against the purchaser. The decrees of the lower Courts which direct the sale of the first defendant's interest in the property will be modified by ordering the sale of the property subject to the right of the defendants to receive compensation for the value of improvements.

With this modification the decree is confirmed and the appeal dismissed with costs.

N.R.

APPELLATE CIVIL.

Before Mr. Justice Ayling and Mr. Justice Sadasiva Ayyar.

S. SABAPATHY PILLAY (DIED) AND OTHERS (THE LEGAL REPRESENTATIVES OF THE DECEASED APPELLANT-PLAINTIFF), APPELLANTS,

1913. February 20 and 1914. January 15.

v.

VANMAHALINGA PILLAY AND ANOTHER (DEFENDANTS NOS. 2 AND 3), RESPONDENTS.*

Civil Procedure Code (Act V of 1908), O. XXIII, r. 3—Compromise—Terms outside the scope of the suit, recorded in the decree—Decree so far as it relates to the suit, effect of—Terms forming consideration for those relating to the subject-matter of the suit—Decree, not ultra vires*—Objection in execution, maintainability of—Contract Act (IX of 1872), ss. 38 and 54—Reciprocal promises—Non-performance by one party wrongfully—Consequent non-performance by the other, rightfully, effect of—Contract at an end—Compensation—Offer of performance, essentials of—Conditional offer—Offer to release without executing release deed, insufficient.*

The plaintiff sued to recover a sum of money on a simple money-bond executed by the first defendant and the father of the second and third defendants. The parties entered into a compromise by which the disputes between them, including the claim in the suit, were adjusted, and a decree was passed in the suit in accordance with the compromise, "so far as it related to the suit." Under the compromise the defendants agreed to get a release of certain properties which had fallen to the share of the plaintiff in a partition between the plaintiff and the first defendant and some other properties purchased by the former from the latter, from the claims of a mortgagee (decree-holder) of the same, on the plaintiff depositing in Court within a certain time a sum of money for payment to the mortgagee towards his decree. The plaintiff failed to deposit the amount. The defendants gave notice to the plaintiff, by a posted letter offering to get a release of the properties if the plaintiff paid the amount in one week, but the plaintiff did not pay the amount. The third defendant took an assignment of the mortgage-decree, brought the properties to sale in execution and purchased them in auction. The defendants applied in execution of the compromise-decree to recover a sum of money as due to them under the compromise, alleging that they had performed or offered to perform the conditions laid on them by the compromise. The plaintiff contended that the defendants could not recover the amount as the claim for it could not be deemed to have been included in the decree, and if it were included the decree was *ultra vires*, and further that the defendants, having failed to fulfil their part of the agreement, were not entitled to enforce the other terms of the compromise.

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* Appeal Against Order No. 230 of 1911.

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Held, that all the terms recorded in the compromise-decree, which formed part of the consideration for the adjustment of the subject-matter of the suit, must be deemed to be part of the decree and can be enforced in execution proceedings.

A compromise-decree, even if it includes matters beyond the scope of the suit, is not *ultra vires*, and no objection can be taken to the enforcement of the same in execution proceedings.

When the parties to a contract fail to perform their reciprocal promises, the one wilfully and the other because he was not bound to filfil his part unless the former had fulfilled his preliminary part, the contract itself comes to an end by the acts of both the parties except for the purpose of enabling the innocent party to claim compensation from the other.

An offer of performance must be unconditional, if it is to have the same effect as performance.

A mere offer by a posted letter that the party liable was ready to execute a release without having a document of release ready, is not a valid offer under section 38 of the Contract Act

Held (on the facts of the case) that though the plaintiff failed to pay the money into Court, as the defendants failed to fulfil their part of the agreement or to make a valid unconditional offer to perform the same, and as the defendants disabled themselves from performing their part by reason of the purchase of the properties by the third defendant, the defendants were not entitled to enforce the other terms included in the compromise-decree.

APPEAL against the order of C. KRISHNASWAMI RAO, the Subordinate Judge of Māyavaram, in Execution Petition No. 193 of 1910 in Original Suit No. 29 of 1907.

This is an appeal against an order passed by the Sub-Court of Mayavaram in an application for execution of a razinamah decree passed in Original Suit No. 29 of 1907 in the said Court. The original suit on which the razinamah decree was passed, was instituted by the plaintiff to recover a sum of money on a simple bond executed by the first defendant (the uncle of the plaintiff), and the father of the second and the third defendants. There were certain disputes between the parties with reference to certain lands which fell to the share of the plaintiff in a partition said to have been made between the plaintiff and the first defendant and some other lands purchased by the former from the latter. The said disputes as well as the claim forming the subject-matter of the present suit were adjusted by a razinamah and a decree was passed in accordance therewith so far it related to the suit. The material terms of the razinamah decree were as follows:—

(a) That within 10 months from this date (i) the defendants herein should get the properties which fell to

the plaintiff's share at the partition, and which are concerned in the decree in Original Suit No. 69 of 1902, on the file of the Kumbakonam Sub-Court, free from the liability of the said decree, (ii) that they should get a registered voucher showing the discharge of the hypothecation bond executed for Rs. 8,000 on 20th November 1896 by the first defendant to Ramachendraiyar, late Sarishtadar of the Negapatam Sub-Court, from the said Ramachendraiyar's heirs, (iii) and that if upon plaintiff depositing into Court within four months from this date the sum of Rs. 13,000 which the plaintiff has in the sale-deed executed for Rs 13,000 to the plaintiff by the first defendant on 19th January 1903 in respect of the properties which fell to the plaintiff's share at the partition and which are concerned in Original Suit No. 66 of 1905 on the file of the Kumbakonam Sub-Court, undertaken to pay to the plaintiff in the said Original Suit No. 66 together with interest due from the date of the said sale-deed according to the terms of the plaint-bond in the said suit No. 66, the defendants get the properties which fell to the plaintiff's share at the partition as aforesaid and the properties mentioned in the said sale-deed, free from the liability of the said decree and even subsequent thereto, this suit shall be dismissed ;

(b) that after the defendants have got things done as required in paragraph (a) hereof the plaintiff shall deduct from the sum of Rs. 16,000 shown above as payable by the plaintiff to the defendant, the amount which has accrued till 22nd May 1899, on account of the items specified in the bond in this suit and on account of the hypothecation-bond executed to the plaintiff by the first defendant for Rs. 3,343–2–0 on 16th October 1897, and pay to the second and third defendants the sum of Rs. 2,200, the balance found to be due, with interest at 11 annas per cent per mensem from 22nd May 1899 till the date of payment of the amount ;

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land, all the 34 items had been mortgaged by the first defendant before the partition in favour of a third person whom I will call the mortgagee. This mortgagee brought suit No. 66 of 1905 on the file of the Kumbakonam Sub-Court for sale of those 34 items against both the plaintiff and the first defendant; the plaintiff (without protest apparently from the first defendant) seems to have raised the plea in the mortgagee's suit that one-half share in all the 34 items belonged to him and that the said half share was not liable for the mortgage as the sum advanced by the mortgagee to the first defendant was not a debt incurred by the first defendant for the benefit of both the plaintiff and the first defendant. The plaintiff, if the debt was not a proper debt, might have had those particular items (out of the 34 mortgaged items) which fell to the plaintiff's share released from liability under the mortgage, but, as I said above, he seems to have attempted to get one half share in every one of the 34 items released from the mortgage. One other complication in the case is that in January 1903, the first defendant seems to have sold some of those properties which fell to his share (out of the 34 properties) to the plaintiff for Rs. 13,000 and asked the plaintiff to pay that Rs. 13,000 to the mortgagee in part satisfaction of the mortgage debt. The plaintiff had failed to pay that Rs. 13,000 to the mortgagee and hence the mortgagee brought his suit No. 66 of 1905 to recover the entire amount due under his mortgage by sale of all the 34 properties.

That Suit No. 66 of 1905 was decreed only for the sale of one half share in all the 34 properties and the Court released the other half share on the footing that the plaintiff was entitled to the said half share in all the 34 properties. The partition under which the plaintiff got certain specific items out of the 34 properties was thus ignored by that decree. It is not clear whether it was ignored because the partition was held invalid or not proved or because the partition was not relied upon and put forward by any of the parties.

The present suit was brought by the plaintiff in 1906 as Original Suit No. 38 of 1906 (in the Kumbakonam Sub-Court) on the simple bond for Rs. 10,000 executed in June 1899 by the first defendant and the father of the defendants Nos. 2 and 3 for the recovery of Rs. 18,000 and odd due under that bond. This Suit No. 38 of 1906, of the Kumbakonam Sub-Court,

afterwards became Suit No. 29 of 1907 on the file of the Mayavaram Sub-Court. On the 9th April 1908, a razinamah petition was filed in this suit by the plaintiff and by the defendants Nos. 1 to 3 compromising all the disputes between the plaintiff and the defendants. The Court on that same date decreed in terms of the razinamah "so far as those terms related to the suit as detailed below." It is doubtful (and it is a matter of dispute between the parties) whether by detailing all the terms of the razinamah in the decree after stating that the Court decreed in terms of the razinamah in "so far as those terms related to the suit" whether all those terms were intended by the Court as relating to the suit and as decreed in the suit or whether all the terms were detailed merely for the purpose of recording the terms of the razinamah and only those terms which directly related to the right to recover moneys due under the bond of 1899 were intended to be decreed in that suit.

Now the terms of the razinamah are again of a complicated character, but as it is necessary to refer to them for understanding the dispute, I shall set them out briefly. The terms are (A1), that, within the 9th August 1909, the three defendants should fulfil a condition which I will call condition No. 1; (A2), that the three defendants should before that same date (9th August 1909) fulfil another condition which I will call condition No. 2; (A3), that upon plaintiff depositing Rs. 13,000 and interest thereon from January 1903 into Court for payment to the mortgagee the decree-holder in No. 66 of 1905, the defendants Nos. 1 to 3 should within the 9th August 1909 get released from liability under that decree the two sets of properties which belonged to the plaintiff out of the 34 mortgaged properties, those two sets being (firstly) the properties which fell to the plaintiff's share in the division of 1899 and (secondly) the properties which had been included in the sale to the plaintiff by the first defendant in January 1903, (B), that if the three defendants fulfilled the above conditions (A1, A2 and A3) the amount due to the plaintiff under the simple bond of 1899 for Rs. 10,000 and the sum due to the plaintiff of Rs 3,000 and odd should be set off against the sum of Rs. 16,000 and interest due to the first defendant by the plaintiff and that the plaintiff *should pay Rs 2,200 to the defendants Nos 2 and* 3 (which sum would be the balance due to the defendants Nos. 2 and 3 after such set off) with interest

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from May 1899; (C), that if the defendants failed to fulfil conditions A1, A2 and A3 the plaintiff should recover Rs. 20,000 as due to him under the plaint bond with interest from the date of the razinamah by execution against defendants Nos. 1 to 3. (There are certain other minor terms in the razinamah which need not be stated here.)

Now, the defendants Nos. 1 to 3 have fulfilled the conditions A1 and A2. They say that they offered and were ready and willing to fulfil the condition A3 and that their such offer, readiness and willingness should be treated as legally of the same effect as if they had actually fulfilled the condition A3 also. Then, they contend that under clause (B) of the razinamah decree, the plaintiff ought to pay Rs. 2,200 to them and that the defendants Nos. 2 and 3 are entitled in execution of this same decree to recover this Rs. 2,200 and interest from the plaintiff. On these contentions, they filed the execution petition No. 193 of 1910 on the 26th November 1910 and prayed for the arrest of the plaintiff for the recovery of the Rs. 2,200 and interest. The plaintiff raised several objections to the grant of the prayer of this execution petition of the defendants Nos. 2 and 3. Two of these objections, namely, that the defendants Nos. 1 to 3 did not fulfil conditions A1 or A2 are useless, as the Sub-Court and also a Bench of this Court (when this appeal came on first before this Court) have found that the conditions A1 and A2 had been fulfilled by the defendants before this execution petition was put in. Two other objections of the plaintiff remain to be considered. The first objection is that the third condition (A3) had not been fulfilled by the defendants before this execution petition was filed and not only that the third condition had not been fulfilled before the execution petition was filed *but the defendants had precluded themselves from fulfilling that condition by certain acts of the third defendant.* The second objection was that even if the defendants had fulfilled all the three conditions, the term (B) of the razinamah petition, namely, that on the defendants fulfilling those conditions, the second and third defendants should recover Rs. 2,200 from the plaintiff was not a term which related to the dispute in the plaintiff's suit brought on the bond of Rs. 10,000 and that therefore there was and could be no decree passed for that amount in the Suit No. 29 of 1907; in other words, the gist of

that objection is that the defendants Nos. 2 and 3 should bring a separate suit on the promise recorded as term (B) in the razinamah decree and cannot claim that an executable decree for that amount has been passed in this suit No. 29 of 1907.

I shall shortly deal with the second objection. Having regard to the nature of the pleadings in the suit No. 29 of 1907, I think that the term (B) of the razinamah was intended to be one of the considerations which moved the defendants Nos. 1 to 3 in consenting to the term (C) of the razinamah which directly related to the plaintiff's claim. It has also to be noted that the amount of the plaintiff's claim is set off even under the provisions of the term (B) against the plaintiff's claim. I therefore hold that the term (B) is a part of the decreed provisions in the suit No. 29 of 1907 and not merely one of the recorded provisions. In this view, the law laid down in the cases reported in *Joti Kuruvetappa* v. *Izari Sirusappa*(1) and *Purna Chandra Sarkar* v. *Nil Madhub Nandi*(2) applies and the term (B) can be lawfully made part of the decree and the liability created by that term can be enforced in execution proceedings. As, on this question, I agree with the observations in *Gobinda Chandra Pal* v. *Dwarka Nath Pal*(3), I shall quote certain passages therefrom —

"The question whether any particular term of a petition of compromise incorporated in a decree, made under a power given by section 375 of the Code of Civil Procedure, relates to the suit, or is covered by its subject matter must be decided from the frame of the suit, the relief claimed, and the relief allowed by the decree on adjustment by lawful agreement. The mutual connection of the different parts of the relief granted by a consent decree is an important element for consideration in each case in deciding whether any portion of the relief is within the scope of the suit. No hard-and-fast rule can be laid down, each case being governed by its own facts." "In *Jasimuddin Biswas* v. *Bhuban Jelini*(4) BRETT and SHARFUDDIN, JJ., recognized the binding effect of the term in a decree which was the consideration for the relief granted in a suit as decreed on agreement of parties. The same view was taken in *Gupta Narain Dass* v.

(1) (1907) I.L.R., 30 Mad., 478. (2) (1901) 5 C.W.N., 455.
(3) (1908) I.L.R., 35 Calc., 837 at pp. 841 and 842.
(4) (1907) I.L.R., 34 Calc., 456.

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performance in the eye of the law must be unconditional. In the present case, the offer under letter Exhibit D is not unconditional as it says that the third defendant was ready to release the plaintiff's properties under the decree in suit No. 66 of 1905 only if the plaintiff *paid Rs.* 13,000 *and the interest within one week's time.* Further, an offer under section 38 (see clause 3 of section 38) must be such that the promisee must have a reasonable opportunity of seeing that the thing offered is the thing which the promisor is bound by his promise to deliver. Now the English and Indian cases have established that a mere offer by registered posted letter to deliver something or rather, the expression by a letter of a willingness or readiness to deliver is not a proper offer. As SHEPHARD, J., says in his Contract Act, " A sufficient tender of money is not made if the money is locked up in a box, nor of goods if they are enclosed in a cask which the other party is not allowed to open." Following that analogy, a mere offer by posted letter that the third defendant is ready to execute a release and without having a document of release ready to be delivered, is not a proper offer. Again as said in *Haji Abdul Rahman* v. *Haji Noor Mahomed*(1) and *Behari Lal* v. *Ram Ghulam*(2) the plea of tender is incomplete as an answer to an action (and, by analogy, as an answer to a defence) unless accompanied by a tender in Court.

In the present case, the third defendant who obtained the transfer of the decree in suit No. 66 of 1905 did not execute a release deed, did not show it to the plaintiff and did not offer any such deed unconditionally or even make his mere expression of willingness and readiness unconditional. Hence the offer under Exhibit D was not a legal or proper offer. When the plaintiff failed to pay the Rs. 13,000 the defendants had two courses open to them. They might refuse to perform their part of the promise (namely, the procuring of the release), and claim compensation for plaintiff's breach of contract (see section 54 of the Contract Act) or they might, notwithstanding the plaintiff's breach fulfil their (defendants') part of the contract by performing their reciprocal promise and then claim all their rights under the contract as a subsisting contract. The plaintiff in not having paid the money broke the contract wrongfully and the third

(1) (1889) I.L.R., 16 Bom., 141. (2) (1902) I.L.R., 24 All., 461.

defendant in not having got the plaintiff's properties released and in obtaining transfer of the decree and executing it also broke *the contract though rightfully and must be deemed under section* 54 of the Contract Act as having also himself avoided the contract. In the result, I hold that the defendants Nos. 2 and 3 cannot obtain any relief in pursuance of the term (B) of the razinamah decree as they have not fulfilled the condition (A3) which is preliminary to their obtaining that relief, as they have never made an unconditional offer to fulfil that condition, as they have never made an offer which gave a reasonable opportunity *to the plaintiff of seeing that the thing offered is the thing* which he was entitled to get (section 38, clause 3 of the Contract Act) and lastly as the offer has not been a continuing offer, the defendants having, by the third defendant's conduct, precluded themselves from fulfilling that condition which involves the release of the plaintiff's properties from a decree which subsists no longer as a decree but has resulted in the fruits which have been gathered by the third defendant. In the result, in reversal of the lower Court's order which allowed the execution of the decree in favour of the second and third defendants, I would direct that their execution petition shall stand dismissed. As the plaintiff relied upon several invalid and even dishonest pleas besides the pleas on which he has succeeded I would make no order as to costs in either Court.

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AYLING, J.—I agree.

AYLING, J.

K.R.

APPELLATE CIVIL.

Before Sir Charles Arnold White, Kt., Chief Justice, Mr. Justice Sankaran Nair and Mr. Justice Oldfield.

1912, July 30, August 30 and 1914. January 7, 12 and 19.

YELLAMMAL (APPELLANT), APPELLANT,

v.

AYYAPPA NAICK (RESPONDENT), RESPONDENT.*

Limitation Act (IX of 1908), sch. II, arts. 29, 62 and 120—Attachment of debt—Wrongful seizure of moveable property—Suit by claimant to the debt against the decree-holder—Article applicable.

Neither attachment of a debt nor voluntary payment of it into Court, constitutes seizure of moveable property under legal process within the meaning of article 29 of the Limitation Act. A suit by a claimant to the debt attached against the decree-holder to whom the amount of the debt was paid is governed by either article 62 or 120.

Narasimha Rao v. *Gangaraju* (1908) I L R., 31 Mad., 431, distinguished.

APPEAL under article 15 of the Letters Patent (24 & 25 Vict., cap. 104), against the decision of SUNDARA AYYAR, J, in Second Appeal No. 101 of 1911 (†), preferred against the decree of A. S. BALASUBRAHMANIA AYYAR, the acting Subordinate Judge of Tuticorin, in Appeal No. 385 of 1909, filed against the decree of C. RANGANAYAKULU, the District Munsif of Tuticorin, in Original Suit No. 310 of 1908.

The facts appear from the judgment of the learned Chief Justice.

V. S. Govinda Achariar and *V. S. Kallabhiram Ayyangar* for the appellant.

T. R. Venkatrama Sastriyar for the respondent.

† [SECOND APPEAL No. 101 of 1911.]

SUNDARA AYYAR, J.

SUNDARA AYYAR, J.—The question for decision in this Second Appeal is whether the plaintiff's suit is barred by limitation. The facts on which the question has to be decided are not disputed. The fourth defendant obtained a decree against one Perumal Naick in Original Suit No. 37 of 1904. In execution of that decree she attached on the 1st of

* Letters Patent Appeal No 166 of 1912.
(Along with † Second Appeal No. 101 of 1911.)

July 1905 a debt due to Perumal Naick from the first defendant in connection with a chit fund. The first defendant, after the debt became payable to Perumal on the 29th July 1905 paid the money into Court on the 15th June 1906, having obtained an order permitting him to do so on the 6th November 1905. The plaintiff put in a claim petition objecting to the attachment and asserting that the debt was payable to himself by virtue of an assignment made to him by Perumal prior to the fourth defendant's attachment. The claim petition was rejected. He then instituted a suit, Original Suit No. 458 of 1905, under section 283 of the Civil Procedure Code, to establish his right to the debt. In the meanwhile the fourth defendant on the 3rd November 1906 drew from Court the money which had been deposited by the first defendant. The plaintiff's suit, Original Suit No. 458 of 1905, was dismissed by the Court of First Instance but he obtained a decree on appeal. The present suit for the recovery of the money drawn by the fourth defendant from Court was instituted in 1908 within three years after it was drawn by the fourth defendant.

Both the lower Courts have held that the suit is not barred by limitation. The Subordinate Judge is of opinion that article 62 or 120 of the first schedule to the Limitation Act is applicable to the case.

The contention in Second Appeal is that the suit is governed by article 29. That article is in these terms :—

"For compensation for wrongful seizure of moveable property under legal process."

The period fixed is one year from the date of the seizure. The fourth defendant has several difficulties to overcome before she could make out that this article is applicable Was the debt seized under legal process? Was the alleged seizure of any moveable property? Is the suit one for compensation? and, if so, is it one for compensation for wrongful seizure? If any one of these questions is answered in the negative, the contention must fail. I shall deal with each one of them in order.

I am of opinion that there was no seizure under legal process in this case. The debt was attached presumably according to the procedure laid down in the Civil Procedure Code for the attachment of debts, that is, by giving notice to the debtor directing him not to pay it to the creditor, and to the creditor

APPELLATE CIVIL.

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T. R. Venkatrama Sastriyar for the respondent.

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SUNDARA AYYAR, J.

SUNDARA AYYAR, J.—The question for decision in this Second Appeal is whether the plaintiff's suit is barred by limitation. The facts on which the question has to be decided are not disputed. The fourth defendant obtained a decree against one Perumal Naick in Original Suit No. 37 of 1904. In execution of that decree she attached on the 1st of

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decree against him is different from the method adopted for making available for the same purpose moveable property which the Court can immediately lay hold of through its officers. The article applies, in my opinion, only where the Court through its officers is able to reduce the property to its possession, and does so on the motion of the judgment-creditor. I see no reason for straining the words of the section so as to make it applicable to cases where a very different method of realizing property belonging to the judgment-debtor is prescribed.

The third question is whether this can be regarded as a suit for compensation at all. The word "compensation" has been interpreted very widely in the decisions of the High Courts, even in the case of suits to which other articles of the Limitation Act not relating to compensation might appropriately be applied. This has been particularly the case in the application of article 116 which make provision for suits "for compensation for the breach of a contract in writing registered." Thus it has been applied to a suit for rent upon a registered contract [*Vythilinga Pillai* v. *Thetchanamurthi Pillai*(1)], to which article 110 would in terms apply, to suits against agents provided for in specific articles, *Harender Kishore Singh* v *The Administrator-General of Bengal*(2) and *Jogesh Chandra Ghose* v. *Benode Lal Roy*(3) to a suit on a bond, *Magaluri Garudiah* v. *Narayana Rungiah*(4). See also *Ranga Reddi* v. *Chinna Reddi*(5), which was a suit for settlement of accounts. The Allahabad High Court has to apply article 116 to suits for rent. *Ram Narain* v. *Kamta Singh*(6) and *Juggi Lal* v. *Sri Ram*(7). I may with all humility state that it appears to me that the scheme of the Limitation Act has been inadequately considered in the view that has been adopted with respect to the scope of article 116 The Act has prescribed specific articles for suits on various kinds of contract, such as, for the balance of money advanced in payment of goods to be delivered ; for the price of goods sold and delivered, for the price of trees or growing crops sold ; for the price of work done ; for money lent, for money deposited under an agreement

(1) (1880) I.L.R., 3 Mad., 76.
(2) (1886) I.L.R., 12 Calc., 357.
(3) (1909) 14 C.W.N., 122.
(4) (1881) I.L.R., 3 Mad., 359.
(5) (1891) I.L.R., 14 Mad., 465.
(6) (1904) I.L.R., 26 All., 138.
(7) (1912) 10 A.L.J., 1.

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enjoining him not to receive it from the debtor. It is hardly necessary to say that every attachment by a Court is not a seizure. It is not so where immoveable property is attached; nor is it so in the case of attachment of a debt. It was suggested that when the first defendant paid the money into Court on the 6th November 1905, it must be taken to have been seized by the Court. I do not agree with this argument. The money was paid into Court by the first defendant voluntarily after obtaining permission to do so. The Procedure Code gave him the right to make such an application. On the other hand the Court could not have compelled him to make the payment. The word "seize" in my opinion means taking hostile possession and not taking possession of what another voluntarily gives, as the first defendant did in this case in order to get rid of his own responsibility whoever might be entitled to the money. In Webster's Dictionary the word is interpreted thus:—" to take possession by force with or without right; to take possession by virtue of a warrant or legal authority." The Court used no force in this case; nor was the debt taken hold of under a warrant of Court. To seize is the same as to capture. It is impossible to speak of a thing which is freely given as being captured. In *Rupabai* v. *Audimulam*(1) KERNAN and PARKER, JJ., refused to uphold the contention that money deposited in Court and received by it and subsequently paid over to a party could be taken to have been "seized" within the meaning of article 29. In *Jagjivan Javherdas* v. *Gulam Jilani Chaudhri*(2), which was a case where an allowance due to the judgment debtor from Government was attached, no question was raised as to whether there was a seizure. No authority has been cited in support of the defendant's position that there was a seizure in this case.

The next question is whether a debt due can be regarded as moveable property within the meaning of this article. I am of opinion that it cannot. It is not necessary to consider whether, if money is actually seized by the Court in execution of a decree, it could not be regarded as moveable property under the article. The method by which a Court makes a debt due to the judgment debtor available for the satisfaction of the judgment creditor's

(1) (1888) I.L.R., 11 Mad., 345. (2) (1884) I.L.R., 8 Bom., 17.

really belongs. Not until the proceeds are paid away, is the person really entitled deprived of his property and its value. I entirely agree with the observation of SANKARAN NAIR, J., on this point in *Narasimha Rao* v. *Gangaraju*(1), and I am with all deference unable to agree with the view taken by the learned Chief Justice in that case. It would not be open to the real owner of property seized by the Court to sue for the value of the property on the mere ground that it has been seized. Again, if A's property is attached in execution of a decree against B, A cannot sue for its value until he has established his right by a claim petition, or by a regular suit if the claim petition fails, and nothing but the adoption of this procedure would prevent the Court from selling the property and directing the proceeds of the sale to be applied for the satisfaction of the judgment debt. Further article 29 gives only one year's time from the date of the seizure A person failing in a claim petition has one year from the date of the order on the petition for filing a suit to establish his right. It seems to be unreasonable to hold that he has only one year from a suit to recover the value of the property from the date of the seizure, seeing that he could not within that time establish his right to the property. Such a suit in many cases would take more than a year from the date of the seizure.

It may take a considerably longer time; for he may fail in his claim petition and he may fail also in his regular suit in the first Court or even in two Courts before achieving success finally.

SANKARAN NAIR, J., points out another serious difficulty in upholding the defendant's contention. The learned Judge observes: "If the owner of the moveable property gets his compensation from the plaintiff who attached these crops before judgment, and that the plaintiff's suit is dismissed, to whom is the Court to deliver the property? Not to the owner who has got his compensation, not to the defendant as whose property it was attached, because it has been declared not to belong to him in the suit which awarded compensation; not to the plaintiff who failed in the suit and never claimed it to be his property." The learned Chief Justice in the judgment in *Narasimha Rao* v. *Gangaraju*(1), refers to the articles 30 and 31

(1) (1908) I.L.R., 31 Mad., 431.

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in support of his construction of article 29; but both these articles expressly refer to cases where goods entrusted to a carrier are lost or not delivered at all as well as to cases where they are injured or where their delivery is delayed. The learned Judge says that the injury to the plaintiff is the seizure of his property. But his property is not lost by the seizure. How then can there be a cause of action for damages which would accrue only if and when it is lost? I cannot treat the question as only one of the measure of the damages sustained by the seizure. In *Ramaswamy Ayyar* v. *Muthusamy Ayyar*(1), SUBRAHMANYA AYYAR and MILLER, JJ., held that where property is seized by a Magistrate and reduced to his custody and is afterwards delivered to some other person, time will begin to run in a suit for the recovery of its value only after the Magistrate's delivery to the defendant and that limitation will not commence so long as the Magistrate retains the custody of the property. The learned Chief Justice's Judgment does not show how that case was distinguishable from the case before His Lordship. The dictum in *Murugesa Mudaliar* v. *Jattaram Davy*(2) that article 29 is applicable to a suit for the recovery of the value of goods attached is opposed to the pronouncement in the later case of *Ramaswamy Ayyar* v. *Muthusamy Ayyar*(1). Another case which is strongly relied on by the learned vakil for the defendant is *Jagjivan Javherdas* v. *Gulam Jilani Chaudhri*(3) already referred to. There the allowance due to the judgment-debtor was drawn by the judgment-creditor several years after the attachment; and the suit was for the recovery of the amount so received. WEST and NANABHOI HARIDAS, JJ., held that article 29 was applicable. WEST, J., held that section 283 of the Civil Procedure Code would be applicable to a suit for the recovery of an ox or a goat wrongly seized in execution, but to a suit for compensation for damage done to it or for the plantiff's loss of the use of it or for the recovery of the value of the thing article 29 was applicable and that the value of the thing was only one of the elements making up the damages. The learned Judge regarded all suits for money as claims for compensation. He says that in a claim for compensation for wrongful seizure the value

(1) (1907) I.L.R., 30 Mad., 12. (2) (1900) I.L.R., 23 Mad., 621.
(3) (1884) I.L.R., 8 Bom., 17.

of the article seized blends with other items of damages, such as, the loss of the use of the article or damage sustained by injury to it. It is difficult to see how any blending can take place when the cause of action for the recovery of the value arises only after the expiry of the period of limitation provided in article 29. With all respect I am unable to agree with the opinion of WEST, J.

In *Lakshmi Priya Choudhurani* v. *Rama Kanta Shaha*(1), the Calcutta High Court held that a suit to recover the surplus proceeds of a sale held under Regulation 8 of 1819 wrongfully taken out by the defendant in execution of a decree against a third party was not governed by article 29 dissenting from *Jagjivan Javherdas* v. *Gulam Jilani Chaudhri*(2) and that that article applies only to suits where a person is damnified by the seizure itself. I am of the same opinion for the reasons I have already stated. Apart from the meaning of the article and the question whether the damage sustained by the loss of the article may not be claimed as part of the damages sustained by the seizure, I am of opinion that the plaintiff is entitled to waive the seizure and to sue the defendant for money belonging to him and wrongfully received by the defendant.

"If a man's goods are taken by an act of trespass and are subsequently sold by the trespasser and turned into money, he may maintain trespass for the forcible entry, or waiving the force he may maintain trover for the wrong or waiving the tort he may sue for money had and received. Thus though a trespass to reality is committed and portions of it, such as, minerals, timber or fixtures are severed, the injured party waiving the unlawfulness of the severence may sue in trover for the value of the severed chattels; or if a man is unlawfully deprived of the possession of his property which is afterwards sold or pledged, the owner may affirm the transaction and sue the wrong-doer on a contract implied in law to refund the proceeds" Clerk and Lindsell on Torts (Third edition) page 121. See also Bullen and Leake on Precedents of Pleadings (Fifth edition), p. 300, where the English cases are collected. In *Danmull* v. *British India Steam Navigation Company*(3), WILSON, J., observes: "Suppose a

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(3) (1886) I.L.R., 12 Calc., 477 at p. 481.

Appellate Court in his suit instituted under section 283. I hold that article 29 is not applicable to this case. It is unnecessary to decide whether the article applicable is 62 or 120, as in either case the suit is in time. I would therefore dismiss the second appeal with costs.

SADASIVA AYYAR, J.—In this case I have the misfortune to differ from my learned brother. The facts have been stated in the judgment of my learned brother which I have had the advantage of perusing and I need not repeat them. The short question in this case is whether a suit for recovery of money from fourth defendant on the ground that the fourth defendant wrongfully carried away from the Court money belonging to plaintiff, money which was paid into Court owing to fourth defendant's having effected a wrongful attachment in execution of the fourth defendant's decree against one Perumal Naik, is barred by limitation. It is contended by plaintiff and found by the lower Court that the attachment was wrongful The first defendant who owed the debt to fourth defendant's judgment debtor Perumal Naicken paid the attached money into Court in June 1906 and the Court took the money into its custody, the deposit of the money being undoubtedly the result of the wrongful attachment made by the fourth defendant. The plaintiff who claims the money as the assignee of Perumal Naik has brought this suit in September 1908, more than two years after the money came into the possession of the Court

In my opinion article 29 of the Limitation Act must be applied to this case. It was argued by the respondent's learned vakil that it does not come under article 29 because there was no "seizure" of the money by the Court. That the attachment and taking possession by the Court of the moveable property of a third party at the instance of the decree-holder would amount to a wrongful seizure of that property by the Court has been held in *Murugesa Mudaliar* v *Jattaram Davy*(1) That a wrongful attachment of money is also a wrongful seizure of moveable property and is governed by article 29 has been held in *Jagjivan Javherdas* v *Gulam Jilani Chaudhri*(2) In law, the word "seize" means "to make possessed," "to put in possession of" (See Annandale's English Dictionary). "Seize" also means "to take

(1) (1900) I.L.R., 23 Mad., 621 at p 626. (2) (1884) I.L.R., 8 Bom., 17.

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hold of," "to take possession of." I do not deny that frequently the idea of *suddenly* laying hold, the idea of taking by force is also in many cases connected with the word "seize"; but after consulting Webster's and the Century Dictionaries, I am satisfied that the word "seize" when used both by lawyers and laymen has also frequently the meaning of mere taking possession of and reducing to custody. Even if the verb "seize" is more frequently connected with the idea of force or suddenness, the noun "seizure" is not so frequently employed with that implication. The word in article 29 of the Limitation Act is the noun form "seizure." The mere taking into possession can in my opinion be called "seizure" especially if a claim of legal right is also put forward as justifying such possession even if no force is used. Webster says that the root meaning of "seize" is "put (oneself) in possession of." One of the first set of meanings given by him is "to reach and grasp." In law, he says that it means "to have possession or right of possession." As regards the noun form "seizure," one of the first set of meanings given by him is "a taking into possession." The second set of meanings is "Retention within one's own grasp or power; hold; possession; ownership." The Century Dictionary says that "seizure" means also the "act of seizing; the facts of being seized or in possession of anything; possession; hold." I think therefore that the words "wrongful seizure" in article 29 includes mere wrongful taking of possession. (See also *Multan Chand Kanyalal* v. *Bank of Madras*(1) which shows that article 29 applies to a case where the attaching officer made the attachment without "taking physical possession of" the attached jaggery kept inside locked warehouse). *Rupabai* v. *Audimulam*(2) where it was held that money which had been deposited in Court by a mortgagor who had sued for redemption and who voluntarily paid the money for the redemption of the mortgaged property in pursuance of the redemption decree obtained by him was not property wrongfully seized by the Court is not relevant to the question now in dispute. There was no order for attachment in that case and the money was not paid into Court in consequence of any order for attachment wrongfully made as against the plaintiff of the subsequent suit. Under Order XXI, rule 52, if

(1) (1904) I.L.R., 27 Mad., 346. (2) (1888) I.L.R., 11 Mad., 345.

the property of the judgment-debtor is in the custody of any Court or public officer, the attachment is made by a notice to the Court or officer requesting that the property may be held subject to the further orders of the Court. If a further order is passed to send such property to the Court which issued the order of attachment and if this latter Court takes possession of the property on its being so sent, does not this latter become "seized of the property?" If the attachment was wrongful as against the plaintiff of the latter suit, will not the possession of the property by the Court be wrongful "seizure" by legal process? Let us take the case where the moveable property attached was in possession of the judgment-debtor himself in his house though the property really belonged to a third party. When the process-server tells the judgment-debtor that he has come to attach the property in the judgment-debtor's house as the judgment-debtor's, the judgment-debtor voluntarily and in order to injure the owner and not because he fears any force or violence at the hands of the process-server, hands over the property to the process-peon. Can it be held that because there was no force used, there was no "seizure"? I am clearly of opinion that money which comes into the hands of the Court in consequence of legal process of attachment is money "seized" by the Court and the definition in Webster "to take possession by legal authority" covers the taking possession by the Court of such money. In *Rupabai* v. *Audimulam*(1), the Court took possession of money which was deposited by the decree-holder in the former suit in order that he might obtain the benefit of his redemption decree and not on account of any threatened legal process against him or on account of any order of Court directed against him.

The other question argued by the respondent's learned vakil is whether the present suit can be regarded as a suit for compensation for the wrongful seizure of money by the Court (as if such money was available to satisfy fourth defendant's decree against Perumal Naicken). Both in *Jagjivan Jatherdas* v. *Gulam Jilani Chaudhri*(2) and in *Narasimha Rao* v. *Gangaraju*(3), it was held that a suit for money claimed as damages caused to the plaintiff by the act of defendant in making a Court wrongfully seize the money or moveable property belonging to the plaintiff

(1) (1888) I.L.R., 11 Mad., 345. (2) (1884) I.L.R., 8 Bom., 17.
(3) (1908) I.L.R., 31 Mad., 431.

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SADASIVA AYYAR, J.

and by the subsequent disbursement of the money or the sale-proceeds of the moveable property to a person other than the plaintiff is a suit for compensation for wrongful seizure of moveable property governed by article 29 to which the one year's rule of limitation applies. There is only one cause of action for the plaintiff, viz., the wrongful seizure by the Court of property belonging to plaintiff and all subsequent and consequential events and the damages arising from those events are properly attributed to the original wrongful seizure. I am aware that a good deal can be said to support the dissentient judgment of SANKARAN NAIR, J., in the case in *Narasimha Rao* v. *Gangaraju*(1). But on the principle of *stari decisis* and having regard to the fact that in *Narasimha Rao* v. *Gangaraju*(1), the observations in the earlier case in *Murugesa Mudaliar* v. *Jattaram Davy*(2) are followed, I do not think it advisable to try to change the course of the decisions on this question. There is also this question of public policy to be considered, that persons who are aggrieved by a wrong done under the protection and in consequence of legal process should come into Court within a short time to pursue all their remedies and to obtain all their reliefs for such wrong. The argument based on section 283 of the Civil Procedure Code which makes provision for a special procedure whereby a claimant to attached property can establish his right by a suit brought within a year of the attachment was relied upon by the respondent's learned vakil to found an argument on the score of hardship, viz., that if the claim proceedings and the suit to establish his title are pending for more than a year from the date of seizure as in the present case, the plaintiff would be put to a hardship when he brings his suit for damages after he establishes his title. This argument was also advanced in *Narasimha Rao* v. *Gangaraju*(1) but the learned Chief Justice failed to see how the provisions of section 283 could have the effect of postponing the time for a suit governed by the express provisions of article 29 of the Limitation Act. *Ramaswamy Ayyar* v. *Muthusamy Ayyar*(3) was not a case of the seizure by a Civil Court at the wrongful instance of a decree-holder but it was by a Magistrate partly under his own search-warrant and partly by the

(1) (1908) I L R, 31 Mad., 431. (2) (1900) I.L.R, 23 Mad., 621.
(3) (1907) I L R, 30 Mad, 12.

police. The custody of the Magistrate under those circumstances was held to be for the benefit of the owner whether plaintiff or defendant and it was further held that plaintiff's cause of action for recovery of the paddy wrongfully delivered to defendant by the Magistrate was governed by article 49 of the Limitation Act. Article 29 was never relied upon in that case and was not even quoted in the judgment. This case *Ramaswamy Ayyar* v. *Muthusamy Ayyar*(1) seems to have been distinguished by the learned Chief Justice evidently on the ground that the seizure by a Magistrate is not the wrongful seizure contemplated by article 29. See *Narasimha Rao* v. *Gangaraju*(2). I am aware that *Jagjivan Javherdas* v. *Gulam Jilani Chaudhri*(3) has been disapproved in *Lakshmi Priya Chowdhurani* v. *Rama Kanta Shaha*(4) but it has been approved in *Narasimha Rao* v *Gangaraju*(2) and, until *Narasimha Rao* v. *Gangaraju*(2) is properly overruled by a decision of the Full Bench of this Court, I do not think myself at liberty to hold that article 29 does not apply to this case or to hold that the plaintiff obtains another distinct cause of action on the date when the fourth defendant withdrew the money from the Court and could save himself from the bar of limitation by putting forward this latter date as the date of an alternative cause of action. This article 29 seems to have been applied in *Ramasawmy Iyengar* v. *Venkatatanjeri Chetty*(5), a case decided by ABDUR RAHIM and PHILLIPS, JJ., who applied a liberal interpretation to its terms following the principle of the ruling in *Narasimha Rao* v. *Gangaraju*(2). In the result I would reverse the judgments of the lower Courts and dismiss the plaintiff's suit but under the circumstances, I would make no order as to costs in any of the Courts.

YELLAMMAL v. AYYAPPA NAICK. SADASIVA AYYAR, J

My learned brother is of opinion that the suit is barred by limitation. The result is that under section 98, Civil Procedure Code, the appeal is dismissed with costs

LETTERS PATENT APPEAL NO 166 OF 1912.

V. C. Sesha Achariyar and *V. S Govinda Achariyar* for the appellant

T. R. Venkatarama Sastriyar for the respondent.

(1) (1907) I L R, 30 Mad, 12.
(2) (1908) I L R., 31 Mad, 431 at p. 434.
(3) (1884) I.L.R, 8 Bom, 17
(4) (1903) I.L.R., 30 Calc, 440.
(5) (1911) 12 I C., 406.

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would have been made against the judgment-debtor's alleged debtor if he had not asked to be allowed to make the payment. In *Jagjivan Jaherdas* v. *Gulam Jilani Chaudhri*(1) the question whether the attachment of the debt constituted a seizure does not seem to have been considered.

On behalf of the appellant it has been contended, in the alternative, that article 36 applies. I am clearly of opinion that it does not.

I think this case is distinguishable from *Narasimha Rao* v. *Gangaraju*(2) where the majority of the Court were of opinion that article 29 applied. There the attached property was ordinary moveable property.

I am of opinion that either article 62 or article 120 applies and I would dismiss this appeal with costs.

SANKARAN NAIR, J.

SANKARAN NAIR, J.—I agree.

OLDFIELD, J.

OLDFIELD, J.—I agree.

S. V.

ORIGINAL CIVIL.

Before Mr. Justice Bakewell.

1915. September 22.

ALAMELAMMALL, PLAINTIFF,

v.

P. N. K. SURYAPRAKASAROYA MUDALIAR, DEFENDANT.*

Indian Succession Act (X of 1865), sec. 187—Conditional order of Judge for grant of probate—Non-issue of probate owing to non-payment of Court fees—Heir of legatee, same as legatee—Probate or Letters of Administration alone, evidence of right under section 187.

A Hindu executing a will in the town of Madras made a bequest in favour of his son. After the death of the father the son died leaving his mother, the plaintiff, as his heir.

On the application of the executor (the defendant) for a probate, the *fiat* of the Judge was obtained but there was no actual order for the issue of the probate and the probate was not issued owing to the failure of the executor to pay the requisite Court fees for the same. In a suit by the testator's widow as mother of his deceased son for an order of the Court directing the defendant to apply for probate of the will and for an administration of the estate:

(1) (1884) I.L.R., 8 Bom., 17. (2) (1908) I.L.R., 31 Mad., 431.

* Civil Suit No. 64 of 1915.

ALAMELAMMALL v. SURYAPRAKASAROYA MUDALIAR.

Held, (*a*) for the purposes of section 187 of the Indian Succession Act which governed the case, the plaintiff, though only an heir of a legatee, was in the position of a legatee, (*b*) that the fiat of the Judge for grant of Probate was only conditional and was not equivalent to an actual grant of the Probate within the meaning of section 187, (*c*) that in the absence of a grant of Probate or Letters of Administration which was the only proof of right allowed by the section the plaintiff was debarred from claiming any rights flowing from the will and (*d*) that the mere production, proof and exhibition of the will as an ordinary exhibit in the case, were not equivalent to proof of the right by the production of the Probate or the Letters of Administration as required by the section

Lakshmamma v. *Ratnamma* (1915) I.L R., 38 Mad, 474, followed.

Munqniram Maruari v. *Gursahai Nand* (1889) I L R, 17 Calc., 347 (P.C.), distinguished.

The facts of the case appear from the judgment.

C. P. Ramaswami Ayyar and *N. Chandrasekhara Ayyar* for the plaintiff.

V. V. Srinivasa Ayyangar for the defendant.

BAKEWELL, J.

JUDGMENT —The plaint in this suit alleges that the husband of the plaintiff died in 1911 possessed of certain properties and having made a will appointing the defendant as his Executor, who entered into possession and management of the properties immediately after the testator's death but has taken no steps to obtain Probate of the will. It alleges various acts of mismanagement by the defendant and that the plaintiff is interested as the mother of the testator's son, who died subsequently to the testator and to whose interest the plaintiff has succeeded as heir. The prayer of the plaint is that the defendant may be directed to apply for Probate of the will, that he may be ordered to account for the administration of the estate of the deceased and the monies collected by him or that ought to have been collected by him but for his wilful default or negligence, and that an account may be taken of the estate and the same be duly administered under the orders of this court.

It is stated that the defendant did apply for Probate and that the fiat of the Judge was obtained upon his application, but that the actual grant has not been issued through the failure of the defendant to pay the stamp duty leviable under the Court Fees Act, 1870. The will is one to which the Probate and Administration Act and the Hindu Wills Act apply, and, therefore, the case is governed by section 187 of the Indian Succession Act which applies to wills of Hindus under the Hindu Wills Act. In the first place, I think that the fiat of the Judge upon the

ALAMELAM MALL v. SURYA-PRAKASAROYA MUDALIAR

BAKEWELL, J.

defendant's petition can only be read as an order that Probate shall issue to the petitioner upon his complying with the statutory provisions and the rules of the Court. One of the statutory provisions with which the petitioner must comply is that he must bring in the necessary stamps. Section 4 of the Court Fees Act directs that no document of the kind specified in the schedules to the Act shall be received or furnished by any of the High Courts unless the prescribed fees have been paid.

The decision of their Lordships of the Privy Council reported in *Mungniram Marwari* v. *Gursahai Nand*(1), is strongly relied upon by the learned vakil for the plaintiff as showing that the order of the Court is sufficient without an issue of the actual grant. But it is clear from the observations of their Lordships at page 357 that they were interpreting a particular Act—Act XL of 1858—which was passed prior to the Court Fees Act of 1870 and that they disregarded the latter Act in putting a construction upon the former. The decision may also be distinguished on the ground that in the present case there has been no actual order for the issue of probate; and also the point in that case was as to whether a minor had been properly represented or not and their Lordships held that he was, as a matter of fact, represented in the proceedings and they refused to treat them as invalid merely because the formal order had not been carried out. I do not intend to discuss the English cases which have been cited by the learned vakil for the plaintiff. They relate to cases of executors *de son tost* in which the Court has evidently strained its powers in order to prevent misapplication of the assets of a testator. I do not think that it is useful to refer to cases decided under a totally different system from that which obtains in India and under statutes different in wording.

The term "Probate" is defined in section 3 of the Probate and Administration Act as "the copy of a will certified under the seal of a Court of competent Jurisdiction, with a grant of administration to the estate of the testator," and Section 187 of the Indian Succession Act provides that, "No right as executor or legatee can be established in any Court of Justice unless a Court of competent Jurisdiction within the province shall have

(1) (1889) I.L.R., 17 Calc., 347 (P.C).

granted probate of the will under which the right is claimed, or shall have granted Letters of Administration under section 180." The words, I think, are perfectly plain, and the intention of the Legislature is clear that the party claiming an interest under a will must prove the execution of the document and its terms by the particular procedure which has been laid down by the Legislature. *Lakshmamma* v. *Ratnamma*(1) supports this construction. It is not sufficient if the actual document be produced in the suit and the plaintiff prove it in the way in which ordinary documents are proved; that is what the plaintiff apparently sought to do in this case—to go into Court and to put the document in as an ordinary exhibit. The plaintiff claims as heir of a legatee, and is, therefore, under the section only in the position of legatee, and I hold that she must establish her title by production of the evidence required by the section, that is, a grant of Probate issued by a Court of competent Jurisdiction. On this ground the suit fails and must be dismissed with costs.

N.R.

ORIGINAL CIVIL.

Before Mr. Justice Bakewell.

V. RAMASWAMI IYER (PLAINTIFF),

1915 September 29.

v.

THE MADRAS TIMES PRINTING AND PUBLISHING COMPANY, LIMITED (DEFENDANTS) *

Company—Directors—Appointment of a director as officer under the company—Personal interest of a director clashing with his duty to shareholders—Meeting of directors—No right for such director to vote on his appointment—Invalidity of appointment if no quorum of directors without counting him—Duties of an editor of a newspaper—Incapacity to perform—Propriety of dismissal for incapacity

The directors of a company are agents of the company and trustees for the shareholders of the powers committed to them A director who has an interest in a matter which is the subject of discussion of a meeting of the directors, in which his interests conflict with his duty to the shareholders is incompetent to vote.

Hence even when the articles of association of a company permit a director to hold any other office under the company in conjunction with his directorship

(1) (1915) I.L.R., 38 Mad., 474.

* Civil Suit No. 71 of 1914.

RAMASWAMI IYER v. THE MADRAS TIMES PRINTING AND PUBLISHING CO., LTD.

and on such remuneration as the directors may fix, yet the appointment of a director to any other office at a meeting of the directors at which the quorum was made up only by counting him also as one present, is not a valid appointment as the company did not have the unbiassed and independent advice of at least such a number of the directors as would without him have made a quorum.

A person appointed as co-editor of a newspaper should put forth or publish the paper and exercise a general supervision over the matter which is written for the paper or extracted as news. For this, certain literary and business qualifications are necessary. If he is absolutely incapable of performing these duties which the company has a right to expect of him, his dismissal on that account from co-editorship is right.

THE facts are given in the judgment.

C. P. Ramaswami Ayyar, C. K. Mahadeva Ayyar, V. V. Srinivasa Ayyangar and *A. Duraiswami Ayyar* for the plaintiff.

E. R. Osborne and *R. N. Ayyangar* for the first defendant.

A. Suryanarayanayya for the second defendant.

T. Narasimha Ayyangar for the third defendant.

BAKEWELL, J. JUDGMENT.—In December 1912, the plaintiff and two other persons were directors of the defendant company, which carries on the business of a newspaper called the "Madras Times." The plaintiff had been appointed managing director of the company at a meeting of himself and another director, on the 7th January 1912. At a meeting of the same two directors, on the 31st December 1912, it was resolved that the plaintiff in addition to his duties as managing director should be co-editor of the "Madras Times." At a subsequent meeting of the same two directors held on the 28th February 1913, it was resolved that the plaintiff should receive, with effect from the 31st December 1912, a sum of Rs. 250 *per mensem*, for his duties as co-editor of the "Madras Times," and that the above resolution should be in operation for a period of ten years. On the 19th October 1913 a resolution was passed by the same two directors and the third director of the company that the plaintiff should be given, with effect from the 15th October 1913, a carriage allowance of Rs. 100 as managing director and co-editor. The last resolution was not passed at a meeting, but, under a special power in the articles of association, was circulated to the directors and signed by them.

It has been argued that this last resolution is a confirmation and ratification of the previous resolution passed by only two directors, but the resolution does not refer to the terms of the previous resolutions, and it does not appear that they were before the three directors at the time when the last resolution was

passed; and the resolution of October 1913 might as well have reference to the resolution of the 31st December 1912, whereby apparently the plaintiff was appointed co-editor without remuneration, as to that of the 28th February 1913. Article 89 of the articles of association declares that a director may hold any other office under the company, in conjunction with the office of director; and on such terms as to remuneration and otherwise as the directors may arrange; and article 90 declares that no director shall be disqualified by his office from contracting with the company either as vendor, editor, purchaser or contributor to the paper or otherwise. These articles constitute an exception to the general rule of law that "a director cannot enter into a contract with the company for profit to himself. The directors of a company are agents of the company and trustees for the shareholders of the powers committed to them" (See Buckley on Companies and Limited Partnerships, 9th edition, page 626); and as such trustees the general rule applies that "no one who has a duty to perform shall place himself in a situation in which his interest conflicts with his duty, and he must not make profit by the trust. (See Lewin on Trusts, 12th edition, page 310). The company is entitled to the unbiassed advice of every director upon matters which are brought before the board for consideration, and a contract made by a director with the company for profit to himself is generally invalid. (See Buckley, pages 640, 641). The members of a company may have such confidence in their directors as to exempt them from this salutary rule, but any such exemption is an exception from the general law, and a director who claims a special authority must show that any particular arrangement falls precisely within it. This principle is well exemplified by three English cases In *Yuill* v. *Geymouth Point Elizabeth Railway Coal Co., Ltd.*(1), the facts were very similar to those in this case, but the articles provided that the director interested should not vote on any matter relating to his contract, and it was held that, as one of the directors did vote, his vote should not be counted, there was no quorum and consequently there was no valid contract for the issue of debentures. Mr. Justice FARWELL in that case says, "I think the other directors would have been justified in asking them to retire while the

(1) (1904) 1 Ch., 32.

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and on such remuneration as the directors may fix, yet the appointment of a director to any other office at a meeting of the directors at which the quorum was made up only by counting him also as one present, is not a valid appointment as the company did not have the unbiassed and independent advice of at least such a number of the directors as would without him have made a quorum.

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the directors generally. Therefore, the agents by whom the company can act are first the directors, or, if all the directors are not available, at least two. I think that the intention of the articles is that the company shall only be bound if two of the directors exercise authority, consider its interests and act on its behalf. For the reasons which I have given, I hold that at the meetings in question there was, in law and in fact, only one director acting on behalf of the company, the plaintiff being incapacitated by his interest from acting in the particular matters that were discussed. It follows that the appointment of the plaintiff as managing director and co-editor was not made with the authority of the company and is, therefore, invalid.

The second issue in the case is as to whether the plaintiff was wrongfully dismissed. In the original plaint he joined two other persons as defendants, and it contained allegations that one of these persons, the second defendant, purported to be the only other director with the third defendant and that these defendants had not been validly appointed. A question arose as to the joinder of these persons with the defendant company and the plaint was amended by striking out those allegations. The plaintiff at the trial desired to call evidence to show that these persons had not been validly appointed as directors of the company, that they were not authorised to act on behalf of the company and, in particular, that he was not bound by their orders. I think that the allegations as to the position of the directors were withdrawn by the amendment of the plaint, and that the plaintiff cannot in these proceedings raise any question either as to their appointment or as to their acts. It appears that the two persons mentioned became directors of the company in December 1913 and that one of them, Mr. Ormerod, was appointed managing director and that the plaintiff was requested to hand over charge of his position to him, and, after some delay, it appears that this was done and the plaintiff acquiesced in Mr. Ormerod assuming his position as managing director. Shortly afterwards, Mr. Ormerod gave directions to the plaintiff as to the manner in which he should carry out his duties as co-editor of the company. The plaintiff now alleges that his duties were to exercise a general supervision over the policy of the company. I intimated to the learned vakil for the plaintiff that I had extreme difficulty in understanding what the claim was

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and I asked Mr. Ormerod what, in general, the duties of an editor are, and I understand that an editor has to put forth o publish the papers and to exercise a general supervision over the matter which is written for the paper or which is extracted as news. It is obvious that, for duties of this kind, certain literary and business qualifications are necessary. It is possible, of course, that the plaintiff may have been retained simply as a gentleman of eminence in the political, scientific or literary world, to keep the paper in touch with current opinion. He has not gone into the witness-box to prove that this was the purpose for which he was retained, and the only thing before the Court is the resolution appointing him as co-editor of the company. As such officer he should have been possessed of at least some literary and business qualifications. His own evidence apparently is that he possesses no qualifications whatever. It has not been explained how the plaintiff remained as managing director of the company for a considerable period and also acted as co-editor without qualifications, but I cannot accept the argument that the company in any way condoned the absence of these qualifications or ratified his appointment in those offices. The plaintiff has not gone into the witness-box to explain what took place during the period he held those offices or who, in fact, performed the work. The evidence that has been put in shows that Mr. Ormerod, as managing director, endeavoured to persuade the plaintiff to perform the duties of his office and that his endeavours failed, and they failed, I think, because the plaintiff was absolutely incapable of performing the duties which the company had a right to expect of him. On the second issue I hold that the plaintiff was rightly dismissed.

The plaintiff appears, in the view I take, to have obtained his position under the company in a manner which is unexplained and extremely suspicious. I think that he has no shadow of claim against the company and this litigation is ill-advised. For these reasons, I direct the suit to be dismissed with costs on the higher scale.

I certify for two counsel.

Messrs. *King and Partridge*, attorneys, for the first defendant.

N.R.

APPELLATE CIVIL.

Before Mr. Justice Ayling and Mr. Justice Sadasiva Ayyar.

1913, August 11, 12, 13 and 22 and September 19.

KANDALAM RAJAGOPALACHARYULU *et al* (PLAINTIFFS), APPELLANTS,

v.

THE SECRETARY OF STATE FOR INDIA IN COUNCIL *et al* (DEFENDANTS), RESPONDENTS.*

Madras Irrigation Cess Act (VII of 1865), sec 1—"Engagements," construction of—Undertaking by Government to supply water for wet lands free of charge—Engagements at the time of the Permanent Settlement—Subsequent engagements, express or implied, if included under the section—Unauthorised acts of subordinate officers, how far binding on Government—Ratification, essentials of—Communication of, to the other party, if necessary—When complete—Government Orders, how far ratifications—Indian Contract Act (IX of 1872), ss 196 to 200 and 3 to 6

In all cases of permanently-settled estates, where the incomes derivable from wet lands have been taken into consideration in settling the peshkash payable to Government, there is an implied undertaking of the nature of an enforceable contract on the part of the Government to allow the use of Government water to such wet lands without charge and this implied undertaking amounts to an engagement within the meaning of the Act. There is a similar implied engagement as regards inams

The word "engagements" in section 1 of Act VII of 1865 is not qualified in any way and is not limited to the cases of engagements deducible from the circumstances under which the peshkash (or quit-rent in the case of an inam) was determined at the time of the Permanent Settlement, but includes all engagements between the Government and the landholder that might have been made or be deducible from the circumstances, at any time after the Permanent Settlement.

Per AYLING, J.—*Held* (on a construction of the Government Orders and other proceedings), that no implied engagement of the latter kind or a ratification thereof by the Government was established

An express ratification by one party, within the meaning of section 197 of the Indian Contract Act, cannot become complete until it is communicated to the other party Till then it is liable to revocation This is in accordance with the principles embodied in the provisions of sections 3 to 6 of the Act, which deal with proposals, acceptances and revocations

An order of Government which stated that an unauthorised act of a subordinate officer should not be repudiated must be treated as an incomplete

* Second Appeals Nos. 1368, 1398 to 1401, 1438, 1563, 1770 and 1774 of 1911

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BAKEWELL, J.

and I asked Mr. Ormerod what, in general, the duties of an editor are, and I understand that an editor has to put forth o publish the papers and to exercise a general supervision over the matter which is written for the paper or which is extracted as news. It is obvious that, for duties of this kind, certain literary and business qualifications are necessary. It is possible, of course, that the plaintiff may have been retained simply as a gentleman of eminence in the political, scientific or literary world, to keep the paper in touch with current opinion. He has not gone into the witness-box to prove that this was the purpose for which he was retained, and the only thing before the Court is the resolution appointing him as co-editor of the company. As such officer he should have been possessed of at least some literary and business qualifications. His own evidence apparently is that he possesses no qualifications whatever. It has not been explained how the plaintiff remained as managing director of the company for a considerable period and also acted as co-editor without qualifications, but I cannot accept the argument that the company in any way condoned the absence of these qualifications or ratified his appointment in those offices. The plaintiff has not gone into the witness-box to explain what took place during the period he held those offices or who, in fact, performed the work. The evidence that has been put in shows that Mr. Ormerod, as managing director, endeavoured to persuade the plaintiff to perform the duties of his office and that his endeavours failed, and they failed, I think, because the plaintiff was absolutely incapable of performing the duties which the company had a right to expect of him. On the second issue I hold that the plaintiff was rightly dismissed.

The plaintiff appears, in the view I take, to have obtained his position under the company in a manner which is unexplained and extremely suspicious. I think that he has no shadow of claim against the company and this litigation is ill-advised. For these reasons, I direct the suit to be dismissed with costs on the higher scale.

I certify for two counsel.

Messrs. *King and Partridge*, attorneys, for the first defendant.

N.R.

APPELLATE CIVIL.

Before Mr. Justice Ayling and Mr. Justice Sadasiva Ayyar.

KANDALAM RAJAGOPALACHARYULU *et al* (PLAINTIFFS), APPELLANTS,

1913. August 11, 12, 13 and 22 and September 19.

v.

THE SECRETARY OF STATE FOR INDIA IN COUNCIL *et al* (DEFENDANTS), RESPONDENTS.*

Madras Irrigation Cess Act (VII of 1865), sec 1—"Engagements," construction of —Undertaking by Government to supply water for wet lands free of charge—Engagements at the time of the Permanent Settlement—Subsequent engagements, express or implied, if included under the section—Unauthorised acts of subordinate officers, how far binding on Government—Ratification, essentials of—Communication of, to the other party, if necessary—When complete—Government Orders, how far ratifications—Indian Contract Act (IX of 1872), ss. 196 to 200 and 3 to 6

In all cases of permanently-settled estates, where the incomes derivable from wet lands have been taken into consideration in settling the peshkash payable to Government, there is an implied undertaking of the nature of an enforceable contract on the part of the Government to allow the use of Government water to such wet lands without charge. and this implied undertaking amounts to an engagement within the meaning of the Act There is a similar implied engagement as regards inams

The word "engagements" in section 1 of Act VII of 1865 is not qualified in any way and is not limited to the cases of engagements deducible from the circumstances under which the peshkash (or quit-rent in the case of an inam) was determined at the time of the Permanent Settlement, but includes all engagements between the Government and the landholder that might have been made or be deducible from the circumstances, at any time after the Permanent Settlement.

Per AYLING, J.—*Held* (on a construction of the Government Orders and other proceedings), that no implied engagement of the latter kind or a ratification thereof by the Government was established

An express ratification by one party, within the meaning of section 197 of the Indian Contract Act, cannot become complete until it is communicated to the other party Till then it is liable to revocation This is in accordance with the principles embodied in the provisions of sections 3 to 6 of the Act, which deal with proposals, acceptances and revocations

An order of Government which stated that an unauthorised act of a subordinate officer should not be repudiated must be treated as an incomplete

* Second Appeals Nos. 1368, 1398 to 1401, 1438, 1562, 1770 and 1774 of 1911.

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ratification before communication to the landholders concerned, and the same, having been revoked by a later Government Order, is not binding upon the Government.

It is not advisable to interpret the plain words of an Act in the light of expressions of the views of Government before its enactment.

Administrator-General of Bengal v. *Premlal Mullick* (1895) I.L.R., 22 Calc., 788 (P.C.), *Kadir Bakhsh* v. *Bhavani Prasad* (1892) I.L.R., 14 All., 148, *Queen-Empress* v. *Bal Gangadhar Tilak* (1898) I.L.R., 22 Bom., 112 and *Hilder* v. *Dexter* (1902) A.C., 474, referred to.

Per SADASIVA AYYAR, J.—A deliberate and considered ratification by Government reduced into a formal Government Order is conclusive just as a person's declaration in a registered document would stand even if not directly communicated to third persons.

Ratification by a long course of conduct is not less effective than a ratification by a formal declaration.

Construction of orders of Government and acts of public officers and ratifications of such acts as well as the mode of their communications considered.

Chidambara Row v. *The Secretary of State for India in Council* (1903) I.L.R., 26 Mad., 66, *Lutchmee Doss* v. *Secretary of State for India* (1909) I.L.R., 32 Mad., 456, *Kanduluri Mahalakshmamma Garu* v. *The Secretary of State for India* (1911) I.L.R., 34 Mad., 295, *Sri Raja Venkata Rangayya* v. *The Secretary of State for India* (1913) M.W.N., 417, *Kesari Venkatasubbiah* v. *The secretary of State for India* (1913) 14 M.L.T., 131, *Secretary of State for India* v. *Ambalavana Pandarasannadhi* (1911) I.L.R., 34 Mad., 366, *Maria Susai Mudaliar* v. *The Secretary of State for India in Council* (1894) 14 M.L.J., 350, *The Secretary of State for India in Council* v. *Perumal Pillai* (1901) I.L.R., 24 Mad., 279 and *Venkata Rangayya Appa Rao* v. *Secretary of State for India* (1913) 24 M.L.J., 680, referred to.

SECOND APPEALS against the decrees of F. A. COLERIDGE, the Acting District Judge of Kistna, in Appeals Nos. 146, 238, 242, 239, 240, 127, 147, 241 of 1909 and 458 of 1910, presented against the decrees of N. LAKSHMANA RAO, the Subordinate Judge of Kistna at Ellore, in Original Suits Nos. 47 of 1906, 22 of 1905, 14 of 1906, 24 of 1905, 27 of 1905, 46 of 1906, 40 of 1908, 21 of 1906 and 27 of 1909, respectively.

These Second Appeals arose out of suits instituted by the plaintiffs who were either Zamindars, inamdars or other proprietors of the suit lands against the Secretary of State for India in Council for a declaration that they were entitled to enjoy the suit lands as mamool wet lands free of charge and for a permanent injunction restraining the Government from levying water-cess thereon. The plaintiffs relied on an engagement embodied in an order of Government and on its subsequent ratification of the proceedings of one of its subordinate officers in pursuance of

the order. The material portions of the order in question which is referred to in the judgment were as follows:—

"7. The last 24 paragraphs of the Board's *Proceedings* relate to the subject of inam and zamindari 'mamool nunja'.

"8. The rules hitherto in force have been held, the Board state, to require the levy of the half water rate on 'mamool nunja,' on the ground that it was formerly imperfectly irrigated; but the rule has not been uniformly observed in the Gōdāvari and Kistna deltas, the practice in the former bearing harder upon the inamdars than that observed in the latter.

"9. The Board have, after mature consideration, come to the conclusion that the impost is in every respect an objectionable one. There cannot be donbt, of course, about the benefit which all wet lands under the influence of the anicut channels have derived from these works, the difficulty is to determine the exact amount of that benefit. Besides this, it is to be remembered that, when these irrigation works were commenced, the old tanks and channels had been for years neglected, hence the apparent present improvement is much greater than would have been the case if the existing tanks, etc., had been duly maintained. The Board notice in regard to *zamindaris*, that the assets on which their peshkash was based included the nunja assessment receivable from 'mamool wet lands,' and that the sanads granted to the proprietors declared that the assessment of the public revenue on their lands should never be liable to change under any circumstances. In the case of *nunja inams* too the grant was intended to secure the grantee the revenue derivable from lands under wet cultivation. A charge for improved irrigation interferes with these rights. The Board further argue that such a demand is in opposition to the expressed intentions of the Home Government, and they quote several despatches from the Secretary of State on this point, specific instances of the hardship entailed by the present practice have been brought to their notice, and they finally recommend that the demand of half water rate on 'mamool nunja' should be relinquished, 'leaving it to the local authorities to deal with exceptional cases in which the equity of the demand may be unquestionable.'

"10. The principle on which exemption might be allowed they consider should be the following:—

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'In the zamindaris and inams the nunja ayacut proved to the satisfaction of the local authorities to have been customarily cultivated as such in times past under old channels and tanks without the aid of the anicut works shall in future be exempt from all water rate for a single crop.'

"11. The Board add that 'adoption of this rule will ensure to Government a revenue but little if at all less' than would be obtained under the present orders.

"12. On further consideration of the subject and the weighty arguments adduced by the Board, the Government are of opinion that the minor charge for *improved* irrigation should be abandoned, wherever it can be shown that land, whether inam or zamindari, is entitled to irrigation, at the cost of Government. But the mere designation of 'mamool nunja' is not sufficient proof of this right; the real criterion is the rate of assessment which the accounts show the land to be liable to. If this indicates the title of the land to water, or if other reasonable proof can be adduced, then no charge should be made for irrigation, as the engagement to supply water manifestly implied a full and not an imperfect supply."

The other material facts and the contentions of parties appear from the judgments.

The Honourable Mr. *T. V. Seshagiri Ayyar*, *V. Ramadoss* and *P. Narayanamurti* for the appellants.

The *Government Pleader* and *T. Prakasam* for the respondents.

AYLING, J.

AYLING, J.—The suits out of which these Second Appeals arise are all of a similar character. They are brought by various proprietors of land under the Gōdāvari anicut system for declaration of their right to irrigate their lands *with anicut* water free of water rate, for an injunction restraining Government from levying water rate under Act VII of 1865, and, except in Second Appeal No. 1774 of 1911, for a refund of the amounts collected.

The substantial question involved in each is the extent to which Government is bound to allow the irrigation free of water rate. It is not denied that the water used is Government water, the only question is whether Government is bound by an "engagement" within the meaning of section 1 of Act VII of 1865 to allow the irrigation free of charge.

Some of the suits deal with mokhasa villages, others with minor inams, and such may conveniently be treated separately.

Second Appeals Nos. 1398 to 1401 and 1770 and 1774 of 1911 all arise out of suits relating to mokhasa villages, all in the Ellamanchili Zamindari with the exception of one (that resulting in Second Appeal No. 1398 of 1911) which relates to a village in the Nidadavole Zamindari. These suits will be considered first.

All these suits are laid on the basis of an alleged engagement with Government embodied in an order of Government (G.O. No. 101, Revenue, dated the 16th January 1864) to the effect that Government water would be supplied free of charge to all those lands, whose pre-existing sources of irrigation were cut off by the anicut works. This general engagement, or undertaking, on the part of Government is said to have been subsequently given practical effect by the proceedings of a Deputy Collector named Subba Rao who in 1876 determined the actual extents to be allowed rate free in each case, and the proceedings of Mr. Subba Rao are said to have been ratified by Government in its Order No. 661, Revenue, dated the 13th September 1894.

Government denies both the alleged engagement and the ratification.

The first point for determination is as to the meaning of the word "engagement" in section 1 of Act VII of 1865. It has been repeatedly held, and is not now disputed, that in all cases of permanently-settled estates where the income derivable from wet lands has been taken into consideration in settling the peshkash payable to Government, there is an implied undertaking of the nature of an enforceable contract on the part of Government to allow the use of Government water to such wet lands without charge; and that this implied undertaking amounts to an engagement within the meaning of the Act. There is a similar implied engagement as regards enfranchised inams. If I understand the learned Government Pleader aright, he contends that these undertakings deducible from the circumstances under which the peshkash (or quit-rent in the case of an inam) was determined are the only engagements contemplated by, or within the meaning of, the Act. I can find nothing in the Act tending however remotely to justify such

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a narrow construction. The word "engagements" is not qualified in any way, as it would have been, had it been intended to limit it to the cases just referred to. An imaginary case may be taken: suppose that Government had, prior to the Act, constructed a channel through a Zamindar's land for the benefit of Government lands on the understanding that, in consideration of the Zamindar allowing the use of the ground through which the channel was dug, he should be allowed to irrigate his own lands from it, free of charge; can it be contended that such an agreement could not be pleaded under the Act as a bar to the subsequent imposition of water-rate?, or would it not rightly be held to be an "engagement" within the meaning of section 1?

I am content to rest my decision on the plain wording of the Act, and do not propose to follow in detail the arguments of the learned Government Pleader and vakils for the appellants based on previous rulings of this Court or on various Government Orders and other official documents written shortly before the passing of the Act, and referred to as showing the probable intention of Government. As regards the former, it is true that the earlier cases [*Chidambara Row* v. *The Secretary of State for India in Council*(1), *Lutchmee Doss* v. *Secretary of State for India*(2) and *Secretary of State for India* v. *Ambalavana Pandarasannadhi*(3)], only deal with what I may call permanent settlement engagements; but they contain nothing suggesting the exclusion of other engagements. In *Kandukuri Mahalakshmamma Garu* v. *The Secretary of State for India*(4) (Urlam case), the learned Judges discuss the evidence of another engagement, though they find it not proved; and in two other cases, *Secretary of State* v. *Kameswaramma*(5) and *Sri Raja Venkata Rangayya* v. *The Secretary of State for India*(6), they find a similar engagement to that now set up as coming within the scope of the section. The most recent case, *Kesiri Venkatasubbiah* v. *The Secretary of State for India*(7) is also a distinct authority in support of my view.

In the last named case one of the learned Judges has to some extent based his conclusions on a consideration of antecedent

(1) (1903) I.L.R., 26 Mad., 66.
(2) (1909) I.L.R., 32 Mad., 423.
(3) (1911) I.L.R., 34 Mad., 360.
(4) (1911) I.L.R., 34 Mad., 245.
(5) (1904) Appeals Nos. 152 to 154.
(6) (1913) M.W.N., 417.
(7) (1913) 14 M.L.T., 131.

official correspondence Before us much argument has been devoted to this line of reasoning, and the Government Pleader was permitted to file some fresh exhibits in the shape of Government Orders and Board's Proceedings connected with the documents considered in that case, but not referred to in the judgment. The admission of these documents was allowed on the understanding that they were to be referred to only as bearing on the interpretation of the term "engagement." I do not propose to discuss any of these documents or their effect, inasmuch as, with all deference, I doubt whether it is either necessary or advisable to interpret the plain words of the Act in the light of expressions of the views of Government before its enactment —*vide Administrator-General of Bengal* v. *Premlal Mullick*(1), *Kadir Bakhsh* v. *Bhavani Prasad*(2) judgment of EDGE C.J.,—and *Queen-Empress* v. *Bal Gangadhar Tilak*(3). I may remark that, if debates in the legislature should not be referred to, it seems still less legitimate to refer to expressions of the antecedent views of Government, which may have been modified during the passage of a Bill through the legislature. I may also refer to the remarks of Lord HALSBURY in *Hilder* v. *Dexter*(4).

Assuming, then, that an engagement of the kind alleged by the appellants would be an engagement within the meaning of the Act, has such an engagement been proved? It is, of course, entirely distinct from, and independent of, the engagement deducible from the condition of permanent settlement and inam grants, to which reference has been made and which is admitted by Government. The District Judge has held that it has not been proved; and, although his finding, based chiefly on the interpretation of documents, is open to question in this Court, I am of opinion that he is right. The plaint in the suit ending in Second Appeal No 1398 of 1911 (with which the other plaints are identical or practically so) sets out the engagement as follows:—

"That prior to the introduction of the anicut system of irrigation into the Gōdāvari delta the mokhasa village of China

(1) (1895) I L R, 22 Calc., 788 (P C)
(2) (1892) I.L R., 14 All., 145 at p 148. (3) (1898) I L.R., 22 Bom., 118.
(4) (1902) A.C, 474.

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Nindrakolanu had a wet ayakut of katties 24 watered under old and independent sources of irrigation. The introduction of the anicut system interfered with those sources of irrigation and rendered them useless for irrigation purposes; Government were therefore bound to compensate the mokhasadars (plaintiff's predecessors-in-title) for the loss either in money or otherwise and to cover up all such cases. Government in its Order No. 101, Revenue, dated the 16th January 1864, declared that Government water would be supplied free of charge to all those lands whose pre-existing sources of irrigation were cut off by the anicut works. Agreeably with the said declaration of Government and under the orders of his departmental superiors M.R Ry. Subba Rao Pantulu Garu, then in charge of the division, recognized on 17th July 1876, acres 546·86 as mamool wet, i.e., as land entitled to Government water free of charge, fixing the old wet ayacut at katties 22—6 and converting it into acres at the average conversion rate of acres 24·53 per katti. Though full justice was not done to the mokhasadars (plaintiffs and their ancestors) they submitted to the above settlement and it has now been in force for nearly 30 years having been ratified by the Board and Government. There is thus an engagement between the plaintiffs and the defendant in regard to the extent of mamool wet in China Nindrakolanu and it is not now open to the defendant to go behind it and re-open the question."

A copy of G.O. No. 101, Revenue, dated 16th January 1864, is filed as Exhibit XXIV in Original Suit No. 24 of 1600 of 1905 (Second Appeal No. 1400 of 1911); and as this is alleged to contain the "engagement," it obviously calls for very careful consideration. The Government Order was passed on a letter from the Board of Revenue which was not filed in the lower Courts. A copy was filed and exhibited before us, but subject to the conditions that it was only to be used, as already stated, in connection with the interpretation of the word "engagement" in the Act. Fortunately, however, the purport of the Board's letter is set forth very fully in the Government Order itself. It apparently dealt with two subjects—

(1) the submission of a draft Act for levy of water-cess.

(2) a proposal to modify the rules previously in force in Godāvari and Kistna for the levy of water-cess.

We are only concerned with the second of these, which is dealt with in paragraphs 7 to 12 of the Government Order as follows:—

[His Lordship then set out the Government Order (*vide* pp. 999–1000 *infra*) and proceeded as follows:—]

The decision of Government is set forth in paragraph 12 to confine the concession to "land whether inam or zamindari shown to be entitled to irrigation at the cost of Government" It is not a very happy phrase, but I can only understand it as meaning "land entitled to be irrigated with Government water without charge." It cannot be contended that a right to the use of Government water without charge was enjoyed by lands which were brought under wet cultivation between the time of Permanent Settlement and the introduction of the amcut system; and the reference to an "engagement to supply water" in the last sentence of the paragraph cannot have referred to such lands

It is, of course, in the order of Government and not in the proposals of the Board that the alleged "engagement" must be sought, and it is to be noted that Government do not accept the Board's proposal as quoted verbatim in paragraph 10; but formulate the terms of the concession themselves

I can find nothing in the Government Order relied on by the appellants more than a resolution to abandon the charge of half water-rate on wet lands so cultivated at the time of Permanent Settlement or inam grant on the ground that the charge was arbitrary, impolitic and an infringement of rights acquired at the Permanent Settlement, or under the terms of the inam grant. This is a totally different thing from the engagement pleaded in the plaint.

It is true that, as appears from various exhibits, in later years some misapprehension prevailed as to the reasons which influenced Government in passing its Order of the 16th January 1864, as well as the exact definition of the concession. The Board in drafting rules (which were duly approved by Government) followed the wording of their original proposal, as set forth in paragraph 10 of the Government Order; and this naturally led to some confusion. But I may refer to Exhibit XXIX in Original Suit No. 24 of 1905 (Second Appeal No. 1400 of 1911), from which it will be quite clear that in 1858 both the

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Board and Government entertained no doubt that the concession allowed by Government in 1864 was limited to the "Gudikat wet area," that is, the area entered as wet in the Permanent Settlement accounts. It is unnecessary to discuss these later documents in detail, inasmuch as it is not suggested that any of them constitute an addition to the "engagement" which has to be found within the four corners of G.O. No. 101, Revenue, dated the 16th January 1864. As a matter of fact, the question of whether the wet area at the time of Permanent Settlement or at any later time before the introduction of the anicut system should be adopted as the test was never viewed as a matter of any practical importance, probably for the simple reason that no general increase or material variation of wet ayacut took place in the interval.

It is necessary however to consider another argument put forward on behalf of the appellants. It is said that, whatever may have been the intention of Government in passing G.O. No 101, Revenue, dated the 16th January 1864, the concession was interpreted by their officers and given practical effect in a particular way, and this procedure was approved and ratified by Government in 1894, so that as thus given effect to it must now be treated as a binding engagement.

The officers in question are Messrs. Hope, Collector of Gōdāvari in 1875–76, and K. Subba Rao, Deputy Collector on General Duty. Mr. Subba Rao, under instructions from Mr Hope's predecessor, made an investigation in sixteen villages, including those now in question, and submitted proposals to Mr. Hope for the determination of the "usual wet area" on which exemption was to be allowed. Copy of Mr Subba Rao's report is filed as Exhibit IX in Original Suit No. 46 of 1906 (Second Appeal No. 1463 of 1911). He took the "highest" area of wet cultivation in any one year before the villages were brought under the anicut as the basis of his recommendation: and converted this area (recorded in the Bhuband accounts only in terms of seed grain, into acres on a system of calculation of his own. The appellants contend that his procedure in both particulars has been ratified by Government and cannot now be called in question. It embodies the exemptions they now claim. It was not argued before us that Subba Rao was acting under the authority of Government, or that, in

the absence of ratification by Government, Government would be bound by his action. A clear authority against such a view, if it were needed, is to be found in *The Secretary of State for India in Council* v. *Kasturi Reddi*(1). The only question is whether his settlement was ratified by Government. There was certainly no ratification by Government at the time, Exhibit X (in the same suit) shows that the Collector Mr. Hope (influenced apparently by the sole idea of saving himself trouble) told Subba Rao to dispose of the matter himself, and let parties aggrieved appeal to him. No appeals seem to have been filed: and no further question was raised till 1892, when Mr. Higgins, then Collector of Gōdāvari, raised the question of whether the unauthorised settlement of Mr. Subba Rao should be repudiated. The Board in a resolution, dated the 31st March 1894, recommended that it should, on the ground that Subba Rao's conversion rate was excessively high: but Government in its Order No. 661, Revenue, dated the 13th September 1894, directed that "having regard to the official position held by that officer when he made the settlement and to the circumstance that in fixing the rates, he proceeded under the orders of the then Collector of the district and followed the sanctioned rules on the subject, the settlement made by him should not now be repudiated."

This is the order, which is now put forward as a ratification which is irrevocably binding on Government.

The District Judge states that the order "was never communicated to the parties concerned and was not in fact acted upon." This statement appears to be correct and it has not been traversed before us. The whole question was reconsidered shortly afterwards on receipt of a further report, and on the 17th June 1895 Government passed a fresh order (copy filed as Exhibit XII in Second Appeal No. 1468 of 1911) directing that in all cases in which the rates of conversion had not been accepted for at least 20 years they might be revised. This, in effect, repudiated Subba Rao's settlement, which was only submitted for the Collector's orders on 31st December 1875, and this was Government's final decision in the matter.

In these circumstances, I do not consider that the order dated the 13th September 1894 can be treated as a ratification which

(1) (1903) I.L.R., 26 Mad., 268 at p. 272.

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would bind the hands of Government. There can be no estoppel, for it was never communicated to the landholders, much less acted upon by them. Mr. Seshagiri Ayyar for the appellants contends that no communication of the ratification is necessary, and that any expression (written or oral) of a resolve to ratify a contract is absolutely irrevocable even though uncommunicated and though the ratifier may change his mind a moment later. This is a startling proposition and one in support of which no authority has been cited.

The sections of the Contract Act which deal with ratification (sections 196—200) are silent on this point, and no rulings which have any bearing upon it have been quoted before us. But on a consideration of the principles which seem to underlie the Act, it seems to me that an express ratification within the meaning of section 197 cannot become complete until it is communicated to the other party. Till then it is liable to revocation. This is in accordance with the principles embodied in the provisions of sections 3—6 of the Act, which deal with proposals, acceptances and revocations (*vide*, in particular, section 5).

The Government Order, dated the 13th September 1894, in so far as it purports to ratify Subba Rao's settlement, must therefore be treated as an incomplete ratification, having been revoked before communication, and is therefore not binding upon Government.

I therefore agree with the District Judge in holding that the plaintiffs have failed to prove the engagement set up by them, and that the suits as framed must fail. In one case only (Second Appeal No. 1774 of 1911) the appellant's vakil has in this Court applied for, and been granted, permission to amend his plaint by basing his claim not on the engagement first pleaded, but on the usual engagement to allow free irrigation to all the wet ayakat at permanent settlement. In the other appeals the appellant's vakil on mature consideration elected not to apply for a similar amendment. This case (Second Appeal No. 1774 of 1911) will have to be considered separately. The other appeals (Second Appeals Nos. 1398—1401 and 1770 of 1911) must be dismissed with costs.

[His Lordship then dealt with Second Appeal No. 1774 of 1911, and reversed the decree in the same and then disposed of Second Appeals 1308 1403 and 1503 of 1911 which were

dismissed; but the judgment relating to the same has been omitted herein as not material to be reported.]

SADASIVA AYYAR, J.—Of the nine suits out of which these nine second appeals have arisen six fall under one class and three under another class. The latter three are the suits out of which Second Appeals Nos. 1363, 1468 and 1563 have arisen. The other six suits form a distinct though connected class, the allegations in the plaints in those six suits being very similar. But during the arguments before us, the plaint in suit No. 1774 was allowed to be amended and hence the suit out of which the Second Appeal No. 1774 arose has to be separately dealt with from the other five suits. I shall first, therefore, shortly deal with the Second Appeal No. 1774.

As amended, the material allegations in the plaint in that suit are as follow :—

(a) The plaintiff is the proprietor of the village of Navarasapuram, Narasapur taluk, Kistna district.

(b) Prior to the introduction of the anicut system of irrigation into the Gōdāvari delta, the plaintiff's proprietary village of Navarasapuram had a wet ayacut of P. 48—19 (T).—11 M irrigated under independent sources of irrigation. The construction of the river embankment by the Government intercepted those sources and rendered them useless for irrigation purposes.

(c) Under such circumstances, the Government were bound to compensate the proprietor, and they declared by a *general order* (*G.O. No. 101, dated 1864*) that in all cases where the pre-existing sources of irrigation were cut off by the anicut works Government water would be supplied free of charge.

(d) Under the orders of his departmental superiors, M.R.Ry. K. Subba Rao Pautulu Garu, the officer in charge of the division, in 1875, settled the extent entitled to free irrigation in the plaintiff's village to be 603 acres 48 cents by converting the old wet ayacut (P. 48-19-11) into acres at the average conversion rate of the village, viz., acres 12·32 per putti, and it is not open to the Government to go behind this settlement of Kanchi Subba Rao and re-open the

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mamul wet as 49—101 × 1131—93 acres *i.e.*, about 550 acres. I might add that in Maclean's Manual of Administration (Volume II, Glossary, page 711), the area of a putti is admitted to be not a uniform area but to vary between 8 and 11¼ acres in different villages. In the case decided by BENSON and MILLER, JJ., a putti was found to be 11 to 16 acres. In *Mahalakshmamma* v *Secretary of State for India*(1), a putti was found equal to 20 acres We think that on the question of the conversion rate of a putti we are bound by the finding of the District Judge as it is a question of fact, and the learned District Judge has given good reasons for his finding, based on the evidence and probabilities. The District Judge, however, has dismissed the plaintiff's suit on the ground that the plaint was based upon an implied engagement at the time of the construction of the Gōdāvari anicut (about 1855) instead of on an engagement at the time of the Permanent Settlement of 1837, and that, as the implied engagement of 1855 has not been proved, the suit failed though the plaintiff was really entitled to free irrigation for 550 acres by reason of the engagement at the time of permanent Settlement. As we have allowed the plaint to be amended so as to enable the plaintiff to rely upon the engagement at the time of the Permanent Settlement, we must set aside the decree of the District Judge dismissing the suit wholly, and a decree will issue in plaintiff's favour declaring his right to irrigate his lands by the Gōdāvari anicut works to the extent of 550 acres and granting the injunction prayed for against Government. As the plaintiff has substantially succeeded in this case I was rather inclined at first to allow some costs to the plaintiff against the Government, but I do not think it necessary to differ from the opinion on this point of my learned brother that each side should bear its own costs throughout.

SECOND APPEALS NOS. 1398 TO 1401 AND 1770 OF 1911.

In the suits out of which these 5 appeals arose, the plaintiffs are mokhasadars and proprietors of villages containing wet lands irrigated by the Gōdāvari anicut system. In the plaints, the plaintiffs set up implied engagements with the Government as regards their right to free irrigation. To avoid confusion, we have to distinguish between two implied engagements made at

(1) (1910) M.W.N., 595 at p. 603.

two separate times. This distinction has not been uniformly recognized in the numerous proceedings of the Board of Revenue and the Government Orders, which have been adduced in evidence in these cases, and hence much confusion has arisen. The first engagement was admittedly at the time of the Permanent Settlement. The Permanent Settlement as regards the village in dispute in Second Appeal No. 1398 was made in 1802, that village being in the Nidadavole estate. In the four other Second Appeals, the villages in dispute are in the Elamanchili Zamindari, which was granted by a sanad of 1837. Both sides agree that at the time of the Permanent Settlement (1802 in one case and 1837 in the other four cases), Government did impliedly engage not to charge water-tax upon the wet area cultivated as mamul wet at the time of the said Settlement (1802 or 1837 as the case may be). The learned Government Pleader further conceded (he could not but make this concession in view of the proceedings of the Board of Revenue and the Government Orders filed as evidence on the side of the defence itself) that, even if the area cultivated as wet at the time of the Permanent Settlement in 1837 or 1802 had become diminished by neglect of tanks and channels by the proprietor when the Gōdāvari anicut system was established in 1855, the proprietors were entitled to free irrigation from the new works for the whole wet area mentioned in the Gudicat accounts prepared at the time of the Permanent Settlement. So much as to the first or primary engagements which took place at the time of the Permanent Settlement The next implied engagement had (according to the plaintiffs) its birth about the time of the construction of the Gōdāvari anicut works, that is about 1855. As I understood the Government Pleader, he admitted that the introduction of the anicut system interfered with the older sources of irrigation and rendered those older sources of irrigation useless for the purposes of irrigation of all the wet lands which were under cultivation as wet in 1855 He further admitted that the Government were bound to compensate the proprietors to a certain extent on account of such obstruction to the old sources of irrigation, but he contended that they were bound to compensate only to the extent of the area which was *mamul wet at the time of the Permanent Settlement* (in 1802 or 1837) but not to the extent of the further area which might have been brought under cultivation as wet land by the proprietors between the date of

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as contended for by the plaintiffs would be identical. If the mamul wet area at the time of the anicut works was less than the mamul wet area at the time of the Permanent Settlement, the engagement contended for by the plaintiffs will be less burdensome on Government than the engagement as contended for by Government. (I may add that on the strength of some observations in one of the proceedings of the Board of Revenue, filed as evidence in these cases, the learned Government Pleader admitted that the mamul wet area at the time of the construction of the anicut works was probably less than the area at the time of the Permanent Settlement in most cases, as many zamindars had allowed a portion of the mamul wet area at the time of the Permanent Settlement to lapse into dry or waste land through the neglect of their ancient irrigation works.) If, however, the mamul wet area in 1855 had become larger than the mamul wet area at the time of the Permanent Settlement owing to the proprietor or the tenants under the proprietor having brought fresh dry or waste land into wet cultivation, then the engagement as set up by the plaintiffs would be more burdensome on Government than the engagement as contended for by the plaintiffs.

The learned Government Pleader relied upon the well-known Urlam case *Kandukuri Mahalakshmamma Garu* v. *The Secretary of State for India*(1) in support of his contention that the only engagement which could be relied on by a proprietor was the engagement at the time of the Permanent Settlement enabling the proprietor to irrigate free of separate charge the extent of land which was classed as wet at the time of such settlement. If I understood him rightly, his contention was that, though Government had admitted that there was an implied modification of that engagement at the time of the construction of the anicut works in consequence of such construction having interfered with the anicut irrigation works and even though the written statement (paragraph 6) in one of the suits admitted an obligation on Government which arose in 1855, he was technically entitled to plead that there was no engagement of any kind, even an implied engagement, in 1855. The judgment in the Urlam case, in my opinion, does not state that the only engagement which can be relied on by a proprietor is the engagement impliedly given by the

(1) (1911) I.L.R., 34 Mad., 295.

Government at the time of the Permanent Settlement. Section 1 of Act VII of 1865 speaks of engagements (in the plural); the plaintiffs agree that there was an engagement at the time of the Permanent Settlement also; the Government itself, in my opinion, has practically admitted that there was an engagement at the time of the anicut works which supplemented the engagement at the time of the Permanent Settlement, supplementing the first engagement in the sense that the proprietor was entitled to substitute irrigation by the new works as regards the Permanent Settlement wet area for the irrigation under the old irrigation source. *Kandukuri Mahalakshmamma Garu* v. *The Secretary of State for India*(1) is therefore no authority for the proposition contended for by the learned Government Pleader, there having been no question raised in that case connected with the obligation of the Government to compensate the proprietor for the destruction of the older irrigation works, serving the wet area at the time of the construction of the new anicut works by Government. The case in *Secretary of State for India* v. *Ambalavana Pandarasannadhi*(2), quoted by the learned Government Pleader, is also not of much use as that case merely laid down the proposition that it is not the area at the time of the grant or the Permanent Settlement (grant in the case of inams and Permanent Settlement in the case of zamindaris and proprietary estates) that governs the engagement but the quantity of water which was being supplied at the time of the grant or settlement. That case lays down that where a larger area is irrigated by the inamdar subsequent to the grant, it will be open to him to show that the increase in wet area is not due to any increase *in the quantity of water used by him*, but to a more economical use of the same quantity of water, in which case no water-rate can be levied for the increased extent of area.

I do not think it necessary to dwell at length on the cases which establish that the engagement mentioned in the Permanent Settlement is not confined to an express agreement between the Government and the landlord or inamdar. In *Secretary of State for India* v. *Ambalavana Pandarasannadhi*(2), the learned CHIEF JUSTICE and my learned brother Mr. Justice AYLING inferred implied engagements by the Government (see pages 370

(1) (1911) I.L.R., 34 Mad., 295. (2) (1911) I.L.R., 34 Mad., 298.

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and 371). In one place (see page 371), the engagement is called an "implied undertaking." The learned Judges refer in that case with approval to the principles established in *Maria Susai Mudaliar* v. *The Secretary of State for India in Council*(1). The legislature has evidently used the comprehensive word "engagement" instead of the word "agreement" or "contract" in order that implied undertakings (based on equitable considerations) made by Government and not merely the ordinary contracts based on regular deeds signed by parties or arising out of formal proposals and acceptances made orally or to be gathered from correspondence might be relied on by landlords, proprietors and inamdars in support of thier claims for exemption from water-cess.

In *Maria Susai Mudaliar* v. *The Secretary of State for India in Council*(1), it was held, following *The Secretary of State for India in Council* v. *Perumal Pillai*(2), that where a proprietor had been customarily obtaining supply to his tanks from Government sources, he was entitled to use that customary supply for extension of cultivation by virtue of his "engagements with the Government" without being liable to pay water-tax for any portion of that supply, when he had made extensions of wet cultivation with that supply. The meaning of the term "engagement" has been considered by my brother SANKARAN NAIR, J., and myself in the separate but substantially concurring judgments which we pronounced in *Venkata Rangayya Appa Rao* v. *Secretary of State for India*(3). Referring to the argument of the learned Government Pleader in that case that the only engagement intended by the Act of 1865 is the one to be implied from the grant of the Permanent Sanad, SANKARAN NAIR, J., says: "The section itself is not restricted to any engagement at the time of the permanent settlement. And I have no doubt it was open to the parties to enter into any engagement at any time they liked. . . . He" (the proprietor) "is entitled to exemption if his pre-existing source of supply is interfered with *or* if the accounts show a *nanja* assessment or if the title-deed supports the claim. *The one is not exclusive of the others.* The Act, as rightly pointed by the Judge" (District Judge), "being only an embodiment, so

(1) (1894) 14 M.L.J., 350. (2) (1901) I.L.R., 24 Mad., 279.
(3) (1913) 24 M.L.J., 650 at pp. 659 and 690.

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the construction of the anicut works and not merely that area which might have been irrigated as wet at the time of the grant by the Permanent Settlement to the proprietor (or the grant by inam title-deed to the inamdar). The few new Government Orders and Board's Proceedings which have not been referred to by SANKARAN NAIR, J., in his judgment in *Venkata Rangayya Appa Rao* v. *Secretary of State for India*(1), and which have been strenuously relied upon by the learned Government Pleader in this case are not inconsistent, in my opinion, with the conclusion of SANKARAN NAIR, J. The judgment of SANKARAN NAIR, J., was very freely, though of course with due and proper respect, criticised by the learned Government Pleader in his arguments before us in this case, but in my opinion, while Mr. Justice SANKARAN NAIR, might have placed the riparian or easement rights of proprietors in waters belonging to Government on a higher footing than I might be inclined to do it and while his inference from rule 7, paragraph 6, *Venkata Rangayya Appa Rao* v. *Secretary of State for India*(1), may not follow from that rule, the general conclusions which he arrived at so far as the particular now in dispute is concerned, seem to me to follow irresistibly from, and to be fully supported by, the general tenor of the Government Orders and Board's Proceedings discussed before us. I do not say these orders and proceedings are quite clear and logical throughout. Even judicial pronouncements fail to be completely logical or consistent in not a few cases. The Government Orders are many of them rather too brief and too tersely worded, and generally appear at the end of a long recital of the papers read by the Government before those brief orders are passed, and as might be expected, the brevity sometimes, nay, very often, leads to obscurity. The distinctions between the implied engagement at the time of the Permanent Settlement, the right of the Zamindar to get supply for the wet area as it stood at the time of the Permanent Settlement, though such area might have diminished at the time of the anicut works by reason of his own neglect of the irrigation tanks, etc., his right to get the same supply of water without liability for water rate where he and his ryots by prudence have used the same supply of water for bringing a larger area under cultivation, his

(1) (1913) 24 M.L.J., 650 at p. 686

right to get water from the new works for all lands which he had made customary wet between the dates of the Permanent Settlement and the date of the new works without liability to pay further water-tax, the distinctions between all these several rights have not been clearly kept in view in the several Government Orders and even in some of the Board's Proceedings; but the general impression left on my mind is the same as was left upon the two very learned Judges BENSON and MILLER, JJ. (who had varied revenue experience in the beginnings of their long official careers) and upon SANKARAN NAIR, J. (who, as Government Pleader, had very close acquaintance with these matters) I need not say that I am differing from my experienced and learned brother AYLING, J., in this case with very great reluctance, but I feel constrained to do so as, in the view I take of the decision of BENSON and MILLER, JJ., in Appeal No. 182 of 1904, it is a precedent binding on me till it is overruled by a Full Bench. The Revenue Board took the same view when Sir Murray Hammick was the Secretary of that Board. The G.O. No. 623, dated the 4th September 1888, printed at the end of Exhibit XXIX, adopted even a more liberal view, namely, that "the highest Gudicat wet area entered in any reliable account as entitled to free irrigation *whether previously cultivated or not*" should get free irrigation from the new works and not merely the area "*usually irrigated at the time of the introduction of anicut irrigation.*" *Thus, so far as the latter area is concerned, Government had evidently no doubt whatever as to the right of the proprietor to irrigate the same free.* I shall now refer to certain facts which seem to me to be almost conclusive in the plaintiffs' favour as establishing the rights claimed by them in these suits. Kanchi Subba Rao, General Duty Deputy Collector, Gōdāvari, with the special approval of his Collector, decided as regards these five proprietors (and several others) the extents of the areas to the free irrigation of which they were entitled from the new works by reason of these new works having cut off the old sources of irrigation. This was in 1875–76. (See Exhibits VIII to X) In accordance with the decision of Kanchi Subba Rao, these proprietors enjoyed irrigation for the said areas free of water-cess for about 30 years till 1905. I need not say that the views of one Collector frequently differ from those of another, of one Board of Revenue from those of another Board of

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Revenue formed of different individuals, and of one Government assisted by one Revenue Secretary from those of a succeeding or even the same Government served by another Secretary. In 1893, Mr. Wynne, the then Collector of the Gōdāvari district, seems to have thought it necessary in the interests of the Government revenue to repudiate Kanchi Subba Rao's actions in allowing certain areas as entitled to free irrigation, such areas being based on the rates of conversion of a Gudicat putti which Kanchi Subba Rao considered as the true rates. The letter of Mr. Collector Wynne was forwarded to the then Government Pleader, Sir S. Subrahmania Ayyar (afterwards a distinguished Judge of this Court), for his opinion by the Revenue Board. That distinguished lawyer formulated thus the question on which his views were called for (see paragraph 4 of his letter printed in Exhibit XI). "The question therefore is whether this action of the Deputy Collector" (Kanchi Subba Rao) "in 1875-76 precludes the Government from reopening the matter and claiming cess for water supplied to lands over and above the extents, *really covered by its engagements with the proprietors.*" (That is, as shown on a perusal of the whole of Exhibit XI, the true area in acres of the putti extents cultivated at the time of the construction of the anicuts, if such area is found to have been mistakenly exaggerated by the alleged wrong conversion rates adopted by Mr. Kanchi Subba Rao.) This letter of Sir S. Subrahmania Ayyar clearly shows that that eminent lawyer was undoubtedly of the opinion that there *were* engagements with the proprietors for free irrigation for the areas cultivated as wet *at the time* of the anicut works. Sir S. Subrahmania Ayyar's opinion was that Kanchi Subba Rao's calculation of the area based on what he (K. Subba Rao) considered to be the proper conversion rates was not binding on the Government for ever, if the true conversion rates were different. The Government was entitled to ascertain the true area and if that true area was less than Kanchi Subba *Rao's* area, they could in future charge assessment on the difference. The Board of Revenue advised the Government to repudiate Kanchi Subba Rao's calculation of the area to be recognised as free from wet assessment, and it is again to be noted *that they did not question the right of the proprietors to irrigate the true area from the new works free of assessment.* On the 13th September

1894, the Government over the signature of Mr. E. Gibson, acting Secretary to Government, passed the following order :— "The Board's proposals are approved *except as regards the 16 villages dealt with by the Deputy Collector Kanchi Subba Rao* for which the Government considers that, having regard to the official position held by that officer when he made the settlement and to the circumstance that in fixing the rates he proceeded under the orders of the then Collector of the district and followed the sanctioned rules on the subject, *the settlement made by him should not now be repudiated.*" It seems to me that this G.O. No. 661, Revenue, dated the 13th September 1894, precludes the Government thereafter from repudiating Kanchi Subba Rao's figures. It is true that in June 1895 the Government passed fresh orders (see Exhibit XII) over the signature of Mr. Forbes, the then acting Secretary to Government, giving instructions to Mr. Venkatachalam Pantulu Garu, the Special Deputy Collector, to ascertain the mamul wet areas to be allowed according to the true rates of conversion of puttis into acres in all cases where the rates of conversion have not been accepted for at least 20 years. This Government Order does not refer to the Government Order of September 1894 which directed that Kanchi Subba Rao's conversion rates for 16 villages should not be re-opened. The Deputy Collector Mr. Venkatachalam Pantulu naturally felt doubts as to whether this Government Order of June 1895 was not inconsistent, so far as regards Kanchi Subba Rao's 16 villages, with the Government Order of September 1894. He wanted instructions from the Collector who wrote to the Board of Revenue and the Board of Revenue wrote in their turn to the Government and the Government in a short sentence passed orders on the 16th September 1895 as follows :—"The instructions contained in Government Order, dated 17th June 1895, No. 2416, supersede those in Government Order, dated 13th September 1894, No. 661." It seems to me (with great respect) that it was rather a strong course for the Government to take to repudiate the very deliberate and considered proceedings of September 1894 within nine months of the passing of that order.

Supposing that they were legally entitled to do so, the later proceedings merely expressed their intention to find out the actual area and to correct any of the mistakes which Kanchi Subba Rao fell into as regards the conversion rates of the putti

area entitled to free irrigation at the time of the anicut works. The new Deputy Collector, Venkatachalam Pantulu Garu, adopted Kanchi Subba Rao's area; but the Government was still not satisfied, and again another Deputy Collector was appointed, and he adopted the Inam Commissioner's rule of thumb formula of 8 acres per putti. Some officers of Government are, of course, influenced in forming their opinions as to the rights of Government by a very natural and proper zeal for the interests of the Government revenue; others are influenced by an equally proper zeal for the fair name of the Government, namely, that the Government should not lightly repudiate the undertakings and promises made by itself or by its responsible officers and accepted as an undertaking of the Government for a long time by the people to whom those promises were made directly or indirectly. The result of the latter kind of zeal is seen in the Government Order of 1894, while that of the other kind is found in the Collector's letter of 1895. Surely the proprietors of landed estates are not bound by the decision of the third Deputy Collector, Mr. Nageswara Rao, as to the true rates of conversion, and as I have shown in my judgment in Second Appeal No. 1774, the learned District Judge for very good reasons practically adopted Kanchi Subba Rao's figures and rates as correct in six of the nine cases in dispute. I therefore adopt the learned District Judge's figures, rejecting Nageswara Rao's figures as incorrect.

On the question whether the Government having ratified after mature consideration and after having been fully informed that Kanchi Subba Rao might have made mistakes in the conversion rates, whether the Government, after all this knowledge, having ratified Kanchi Subba Rao's settlement of 1875 in 1894 could afterwards repudiate it, I shall only quote a few passages from two standard works. Pollock and Mulla in pages 538 to 541 of their Indian Contract Act say: "A ratification is in law equivalent to a previous authority." "That an act done for another by a person not assuming to act for himself, but for such other person, though without any precedent authority whatever, becomes the act of the principal, if subsequently ratified by him, is the well known and well established rule of law. In that case, the principal is bound by the act, whether it be for his detriment or his advantage, and whether it be founded

on a tort or a contract, to the same extent as by and with all the consequences which follow from the same act done by his previous authority." "An act done by an agent in excess of his authority may also be ratified." "Ratification, if effective at all, relates back to the date of the act ratified." "Acts done by public servants in the name of the Crown, or of the Government of India, may be ratified by subsequent approval in much the same way as private transactions." Story on Agency says in paragraphs 242 to 250:—"A ratification, also, when fairly made, will have the same effect as an original authority has, to bind the principal, not only in regard to the agent himself, but in regard to third persons." "In short, the act is treated throughout as if it were originally authorized by the principal; for the ratification relates back to the time of the inception of the transaction and has a complete retroactive efficacy; or, as the maxim above cited expresses it, "*Omnis ratihabitio retrotrahitur.*" "And a ratification once deliberately made with a full knowledge of all the material circumstances cannot be recalled." "Ratification once deliberately made upon full knowledge of all the material circumstances, becomes, *eo instanti*, obligatory, and cannot afterwards be revoked or recalled." I do not intend to lay down that a mere mental ratification of an agent's unauthorized acts by a principal or a ratification in soliloquy is enough to bind the principal. But it seems to me that a deliberate and considered ratification by Government reduced into a formal Government Order surely stands on a quite different footing just as a person's declaration in a registered document would stand even if not directly communicated to third persons. If such a ratification in 1894 is not conclusive against Government, why should its unobtrusive repudiation of the ratification in 1895 be held conclusive or final? As I said already, the engagement of Government has to be gathered, not from formal communications passing in large numbers between the Governor in Council and each of the landholders, inamdars and ryots but from formal declarations of Government acted upon by Government officers, from the conduct of parties evidently based on such declaration and from the implied acceptances of such conducts on both sides. I find it difficult to believe that the land-holders and inamdars would have kept silent for so long as they did, if Mr. Kanchi Subba Rao's settlement had not been

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acted upon for so many years. Ratification by a long course of conduct is not less effective than a ratification by a formal declaration. The orders of Government are public acts of the highest public functionaries, and those interested in such orders relating to revenue matters affecting large classes (as distinguished from particular individuals) obtain knowledge of such orders, not by direct written communication from the Government Office itself to each of the individuals of the large affected class but from the acts and omissions of the Revenue Officers at the time of jamabandi (in the case of ryots) and from the information given and declarations made by Revenue Officers at such times or on occasions of visits to and interviews with the Revenue Officers in the case of proprietors and the larger inamdars and from entries in village and other revenue records giving effect to such Government Orders. The result is that the District Judge's decrees dismissing these five suits should be reversed and judgments given in favour of the plaintiffs, the plaintiff or plaintiffs in each case being entitled to a declaration that the area as found by the District Judge as mamul wet at the time of the anicut works is entitled to free irrigation and not merely the area incorrectly mentioned as mamul wet by Mr. Nageswara Rao. The plaintiffs will get their costs in all Courts from the Secretary of State, three months being given to the latter to pay the said costs. In Second Appeals Nos. 1398 to 1401 and 1770 of 1911, the Government should also refund to the appellants the respective sums claimed to be refunded as wrongly collected.

SECOND APPEALS NOS. 1368, 1648 AND 1563 OF 1911.

In these cases, the questions are substantially the same; but the plaintiffs are inamdars under title-deeds issued about the years 1860 and 1869, whereas in the other six cases the plaintiffs were proprietors or mokhasadars who got their lands under Permanent Settlement sanads of 1802 and 1837. The principles involved however are practically the same. The learned District Judge admits that, as regards the areas shown in the inam title-deeds, the Government is bound to supply them with water from the new anicut works free. Now the area in an inam title-deed is mentioned in acres and not in puttis. But it is admitted that the Inam Commissioner instead of the puttis entered in the

old accounts converted the putties into acres at 8 acres per putti and entered the extent in acres so found in the respective title-deeds. The title-deeds do not definitely say that the extent in acres is accurate. The village is mentioned and the wet area is entered as "said" to be of so many acres. These three villages are three of the 16 villages settled by Kanchi Subba Rao. The learned District Judge in his judgment in Second Appeal No. 1398 of 1911, which governed six of the nine suits, found that the Inam Commissioner's conversion rate at 8 acres per putti was arbitrary, and yet in these three suits the learned District Judge has come to a different finding on the ground that "the Inam Commissioner specially made experiments to fix the commutation rate for each taluk, and arrived at 8 acres for this taluk; further there is evidence adduced that 8 acres was the rate prevailing in the taluk." I can find no such evidence, and I think the learned District Judge erred in disturbing the finding of the learned Subordinate Judge as regards the true area granted as inam to the plaintiffs in these cases and accepting the area in acres put down in a very rough manner in the title-deed as unimpeachable by the plaintiff. I might further state that the Government Order of September 1894 (Exhibit XI) in which the Government accepted and ratified Kanchi Subba Rao's engagements with the proprietors and inamdars of the 16 villages as regards the respective areas to which they were entitled to free irrigation is conclusive in plaintiff's favour. Reversing therefore the District Judge's judgments, I would allow the Appeals Nos. 1368 and 1468 of 1911 with costs and grant to the plaintiffs decrees declaring their right to enjoy as mamul wet the areas mentioned in their plaints free of water-cess and ordering refunds. In Second Appeal No. 1563 of 1911, it is found that the plaintiff was wrong in having claimed 16 tooms 1 manikat and 8 giddas as wet extent and that his family was entitled to only 5 tooms, i.e., ¼ putti. For reasons already stated, I hold that this ¼ putti is not 2 acres as taken by the Inam Commissioner and by Mr. Nageswara Rao but is of the extent of 3 acres 40 cents according to the true mode of conversion of puttis adopted by Mr. Kanchi Subba Rao (this rate of conversion is found by me on the basis that one putti 16 tooms 1 manikat 8 giddas has been found at the survey to measure 24 acres 51 cents). It is further found that the plaintiff is entitled

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only to 147/220 of the area belonging to his family. I would declare in this case that the plaintiff is entitled to free irrigation for 147/220 of 3 acres 40 cents. As the plaintiff has grossly exaggerated in his plaint the area he was entitled to irrigate free of water-cess, I would direct him to pay the Secretary of State's costs throughout in this case.

As a result the Second Appeals except Second Appeal No. 1774 of 1911 are dismissed with costs: and the Memorandum of Objections in Second Appeal No. 1563 of 1911 is dismissed without costs.

[Letters Patent Appeals Nos. 111 to 117 and 121 of 1913 were preferred against the decisions in the above cases and their Lordships (WALLIS, C.J., KUMARASWAMI SASTRIYAR and PHILLIPPS, JJ.,) who heard the appeals allowed the plaintiffs in Letters Patent Appeals Nos. 111 to 115 of 1913 to amend their plaints by alleging an implied agreement between the plaintiff and the Government at the time of the Permanent Settlement and granted a decree to the plaintiffs as prayed for the extents found by the District Judge and dismissed Letters Patent Appeals Nos. 116, 117 and 121 of 1913.]

K R.

APPELLATE CRIMINAL.

Before Mr. Justice Miller and Mr. Justice Spencer.

1914, January, 9 and 22

Re SINNU GOUNDAN AND ANOTHER (ACCUSED IN CALENDAR CASE NO. 612 OF 1913 ON THE FILE OF THE STATIONARY SECOND-CLASS MAGISTRATE OF GINGEE IN THE SOUTH ARCOT DISTRICT).*

Criminal Procedure Code (Act V of 1898), sec. 436—High Court will not interfere with an acquittal in revision where an appeal might have been preferred by Government

In a case in which the complainant being absent, the Magistrate acquitted the accused under section 247, Criminal Procedure Code, it subsequently

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* Referred Case No. 95 of 1913 (Criminal Revision Case No. 673 of 1913).

transpired that the absence of the complainant had been procured by the fraud of the accused who had had him arrested and kept in custody on a false charge. *Re* SINNU GOUNDAN.

No appeal against the acquittal was preferred by Government but the District Magistrate referred the case to the High Court under section 438, Criminal Procedure Code.

Held, that the High Court as a Court of Revision would not, on the District Magistrate's report, set aside an order of acquittal where an appeal lay by Government against such an order.

CASE referred for the orders of the High Court under section 448, Criminal Procedure Code, by M. AZIZ-UD-DIN SAHIB BAHADUR, Khan Bahadur, I.M.O., the District Magistrate of South Arcot, in his letter, dated 12th October 1913.

The facts of the case appear from the judgment of SPENCER, J.

J. C. Adam for the Public Prosecutor for the Crown.

None represented the accused.

MILLER, J.—As the Criminal Procedure Code does not permit a magistrate to review his judgment in the light of evidence subsequently obtained or to readmit to his file a case in which the accused has been acquitted under section 247 owing to the absence of the complainant, even if good reasons be shown for his non-appearance, I should hesitate without further consideration to hold that the Legislature intended to permit this Court in appeal or revision to set aside an acquittal merely on the ground that fresh evidence is available which could not be produced at the trial, or on the ground that a complainant has shown sufficient reason for his failure to appear and prosecute his complaint, before the magistrate in a summons case. But in the present case we must take it that the acquittal of the accused under section 247 was procured by his own trick. he himself is responsible for the complainant's failure to appear. The order was, we may say, obtained by a fraud on the Court and though even in those circumstances the Code does not permit the Court which made the order, to vacate it on proof of the fraud interference by this Court may be a proper exercise of our powers in revision or possibly in appeal, to avoid a miscarriage of justice MILLER, J.

We have not been referred to any case in England in which *certiorari* has been had to quash an order of acquittal made by an inferior Court for fraud in the person procuring the order. There is a case *R.* v. *Unwin*(1) [referred to in Archbold's

(1) (1839) 7 Dowl., 578.

Re SINNU GOUNDAN. —— MILLER, J.

Criminal Pleadings, 23rd edition, page 132; 10 Halsbury's Laws of England, page 197, foot-note] which seems to have been something like the present case and in which *certiorari* was refused but I have not been able to see the report of that decision. But we have the authority of Archbold's Criminal Pleadings (23rd edition, page 292) for saying that a new trial after acquittal in a case of misdemeanour would be granted if the verdict had been obtained by irregularities committed by the defendant himself and though no case is there cited in which a new trial has actually been allowed on these grounds, the authority of Archbold's treatise is so high that it is not unsafe to accept it as correctly stating the principle on which the Court would have acted in England in former days.

In India we have power to revise an order which is improper (section 435 of the Code of Criminal Procedure) and an order, though strictly in accordance with the law as in the present case, may, I think, be said to be improper if it was procured by the fraud or trick of the party asking for it and would not have been made but for that fraud or trick. The order before us is one which but for the accused's deceit would not have been made in the circumstances, and so may be said to be an improper order though the Magistrate's action was strictly correct.

Our powers in appeal are not defined by the Code, further than this, that an appeal may lie on a matter of fact as well as on a matter of law except in a case tried by a jury (section 418). The Code does not expressly state whether these matters are matters appearing upon the record matters, that is, which the inferior Court has or might have determined, or whether we are at liberty to admit an appeal on some extraneous matters which ought to have affected the decision had it been known at the time of the trial but which was not before the inferior Court.

I have not found a case in any of the High Courts which decides the point. In *Queen-Empress* v. *Prag Dat*(1) the learned Judges state as one of the requirements of an appeal that the ground for interference should be apparent on the record but it cannot be said that they were deciding the present point.

But there is nothing in the Code of Criminal Procedure to suggest that so far as the right of appeal is concerned there is

(1) (1898) I.L.R., 20 All., 459 at p. 461.

any difference between the case of an appeal from a conviction and from an acquittal and I should not like to hold that an appeal from a conviction could not be entertained if based on the concealment of a material fact from the Court which conducted the trial. I agree therefore that in this case the Local Government might have directed the filing of an appeal against the acquittal and that being so I agree also that we ought to refuse to interfere on the District Magistrate's report of the case.

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The District Magistrate is, no doubt, not the party entitled to appeal from an acquittal, but his report to the High Court is intended to move the Court to act under section 439 of the Criminal Procedure Code that is to act as a Court of Revision and though it is made at the instance of the complainant it contains the District Magistrate's presentation of the case and it seems to me that to entertain proceedings by way of revision on a District Magistrate's report in a case where an appeal would lie from an acquittal is contrary to the spirit if not to the letter of sub-section 5 of section 439 of the Criminal Procedure Code.

SPENCER, J.

SPENCER, J.—In this case the complainant preferred a complaint of mischief under section 426, Indian Penal Code, on June 14th against two individuals, process was issued against them and the complainant was informed of the date of hearing in person. On June 23rd, the date fixed for the trial, the Magistrate acquitted the accused under section 247, Criminal Procedure Code, owing to the complainant not being present in Court when the case was called on. It subsequently transpired that the complainant had been kept out of the way by the action of the accused in getting a constable to arrest him on a false charge of committing nuisance after he had come to Gingee, where the Magistrate's Court was situated (see the judgment in Calendar Case No. 638 of 1913 on the file of the Second-class Magistrate of Gingee). Under these circumstances the District Magistrate has under section 438 referred the case to the High Court for setting aside the order of acquittal and for directing a new trial.

The question for our decision is whether, assuming that the Second-class Magistrate would have exercised his discretion differently by adjourning the hearing to another day had he

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The question for our decision is whether, assuming that the Second-class Magistrate would have exercised his discretion differently by adjourning the hearing to another day had he

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been aware of the cause of the complainant's failure to appear, this Court acting as a Court of Revision will set aside the acquittal and order a fresh trial.

Upon the materials before him when the order under section 247 was passed the Magistrate's procedure was strictly proper and in accordance with law. This section declares that the Magistrate shall acquit the accused unless for some reason he thinks proper to adjourn the hearing of the case to some other day. Such an acquittal after the accused has appeared and answered to the charge will operate as a bar to his being again tried for the same offence as he is a person "tried" by a Court within the meaning and for the purposes of section 403, Criminal Procedure Code—*Suraiya Sastri* v. *Venkata Rao*(1). The Magistrate has no power to revive the proceedings, as there is no provision in the Code of Criminal Procedure resembling Order 9, rule 4 of the Civil Procedure Code, by which a case can be restored to file by the Court which dismissed it; nor can the District Magistrate order a rehearing [*Narayanasami Ayyar* v. *Janaki Ammal*(2), *Rangasami* v. *Narasimhulu*(3) and *Empress* v. *Hardeo Singh*(4)].

Coming next to a consideration of what are the powers of the High Court in such a matter, I think there can be hardly any doubt that if this matter came up for determination in a Court governed entirely by English law the answer to the question whether the acquittal could be interfered with would be in the negative.

In English Courts the maxim of *Nemo bis vexari debet* is given full scope. It has been repeatedly held in England that if an accused person has been once tried and acquitted upon the merits by a Court of competent jurisdiction so as to have been put in peril of conviction he cannot again be tried upon the same charge but if charged he can successfully plead *autrefois acquit*. It is true that in *Regina* v. *Scaife*(5), a new trial was ordered in a case where one of the accused indicted for felony procured the absence of a witness whose evidence taken before a Magistrate was read against himself and others jointly tried with him.

(1) (1856) 2 Weir's Cr. R., 457.
(2) (1891) 2 Weir's Cr. R., 303.
(3) (1885) I.L.R., 7 Mad., 213.
(4) (1891) 11 A.W.N., 120.
(5) (1851) 17 Q.B., 238; s.c., 117 E.R., 1271.

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But *Regina* v. *Scaife*(1) was dissented from in later cases *Reg.* v. *Bertrand*(2) and *R.* v. *Murphy*(3). In England the Courts have resolutely set their face against granting new trials after acquittals for murder and felony on the ground of misreception of evidence, misdirection or that the verdict was against evidence and the same principle has been extended to misdemeanours also. See *Reg.* v. *Duncan*(4). It has been further held that acquittals and dismissals cannot be quashed by *certiorari* even though the justices who tried the cases were disqualified by interest or bias—*R.* v. *Galway Justices*(5) and *R.* v. *Antrim Justices*(6). The latest case on the point is *Rex* v. *Simpson*(7) in which the doctrine has been stretched to the length of holding that a dismissal of information could not be disturbed even though one of the five justices who acquitted the accused was disqualified and though the Court might be said to that extent not to be a competent tribunal.

In India however matters stand upon a different footing. Here appeals against orders of acquittal are allowed by section 417, Criminal Procedure Code, a provision of law which is quite alien to the principles upon which English Courts administer the law against criminals. We have also section 403 which prohibits a second trial for the same offence provided that the conviction or acquittal at the first trial remains in force. If the conviction or acquittal is set aside by a Court of competent jurisdiction, it follows that the accused cannot successfully plead the original decision in bar of further proceedings.

The safeguard of the subject consists in the fact that no appeal against an acquittal will be except at the instance of Government and that Government only exercise this power in cases in which there has been in their opinion a substantial failure of justice.

It appears *prima facie* that there was a failure of justice in the present case if the complainant was prevented from presenting his complaint and obtaining the redress that the criminal law allows, owing to a circumstance beyond his control, namely his wrongful arrest and detention on a false charge, a fact which the

(1) (1851) 17 Q.B., 238, s.c., 117 E.R., 1271. (2) (1867) L.R., 1 P.C.C., 520.
(3) (1869) L.R., 2 P.C.C., 535. (4) (1881) 7 Q.B.D., 198.
(5) (1906) 2 W.R., 499. (6) (1895) 2 Ir. R., 603.
(7) K.B.D., Oct. 23, 1913, reported in the Law Journal of Nov. 8 at p. 646; s.c. (1914) (Q.B.) 1 K.B.D., 66, s.c., 138 L.T., 10.

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Court which tried the case of nuisance found to be true. But this was a circumstance which was not in evidence at the time when the Court passed the order of acquittal under section 247, Criminal Procedure Code, on the complaint of mischief. Of course he may have his remedy in an action in tort for malicious arrest against the constable or against the accused if he instigated the constable or he may proceed criminally against them, if so advised for offences under sections 211 and 341, Indian Penal Code; but he will still have a grievance that his complaint of mischief has not been heard.

Now there is nothing in the language of section 417, Criminal Procedure Code, to limit appeals against acquittals to cases in which Courts have owing to some error of law or misappreciation of evidence come to a wrong decision on the evidence before them.

It has been held that the Legislature has allowed by this section an appeal by the Local Government in the widest terms and without any limitation whatever [see *Empress of India* v. *Judoanath Gangoaly*(1)], and that there is no distinction in the Code between the right of appeal against an acquittal and the right of appeal against a conviction, both being governed by the same rules and being subject to the same limitations. See *The Queen Empress* v. *Bibhuti Bhusan Bit*(2) and *Queen-Empress* v. *Prag Dat*(3) and *King-Emperor* v. *Chattar Singh*(4).

Section 428, Criminal Procedure Code, allows additional evidence to be admitted in appeals against acquittal as well as in appeals against convictions, although cases in which this power is exercised will naturally be rare.

I would therefore be prepared to set aside the order of acquittal in this case and order a retrial if the matter had come before the Court by way of appeal presented by the Local Government under section 417.

But in revision it has always been regarded as a sound rule of practice not to interfere when there is no error in law or on the face of the record [*Emperor* v. *Sakharam*(5), *Keshab Chunder Roy* v. *Akhil Metey*(6) also *Emperor* v. *Mirth Das Newalram*(7)]

(1) (1877) I.L.R., 2 Calc., 273.
(2) (1892) I.L.R., 17 Calc., 485.
(3) (1898) I.L.R., 20 All., 459.
(4) (1904) 39 Punjab Record 15 (Cr.).
(5) (1902) 4 Bom. L.R., 686.
(6) (1895) I.L.R., 22 Calc., 998.
(7) (1913) 1 Cr.L.R., 15.

and not to interfere in cases of acquittal in which Government might have applied under section 417 Criminal Procedure Code, but has not done so, see *In the matter of Aurokiam*(1), also *Thandavan* v. *Perianna*(2), *Emperor* v. *Madar Bakhsh*(3) and *Empress* v. *Miyaji Ahmed*(4). In the former respect the Courts in India conform to the practice of the English Courts when dealing with merits of *certiorari* and the now obsolete merits of error; for the latter practice there is now the authority of clause 5 of section 439, Criminal Procedure Code.

Empress v. *Hardeo Singh*(5), STRAIGHT, J., acting in revision, ordered a new trial upon a reference by the Sessions Judge when the accused had been acquitted under section 247 on a complaint of mischief and assault owing to the complainant's absence through fever, but this is the only reported instance that I have been able to discover of a High Court in exercise of their revisional powers setting aside an order of acquittal upon facts not before the Court that tried the case. Even that instance was prior to the introduction of clause 5 of section 439 by Act V of 1898.

I therefore consider that our proper course is to refuse to interfere with the acquittal on the District Magistrate's reference.

J.C A

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(1) (1878) I.L.R., 2 Mad., 38
(2) (1891) I L R, 14 Mad., 363
(3) (1903) I L R., 25 All, 128.
(4) (1879) I.L.R, 3 Bom., 150.
(5) (1891) 11 A.W N, 120.

APPELLATE CIVIL.

Before Mr. Justice Sankaran Nair and Mr. Justice Ayling.

1913. April 17 and 1914. February 20 and March 6.

MUTHU RAMAKRISHNA NAICKEN (SECOND DEFENDANT), APPELLANT,

v.

MARIMUTHU GOUNDAN AND ANOTHER BY THEIR GUARDIANS *ad litem* ARJUNA GOUNDAN (PLAINTIFFS), RESPONDENTS.*

Hindu law—Acquisition of property by husband and wife—Joint-trade—Property joint—Wife's interest—Stridhanam—Power of disposition—Death of wife—No survivorship to husband—Devolution on her heirs—Suit in ejectment—Decree for joint possession, if, can be given.

Where certain properties were acquired with the profits earned by a husband and his wife (who were Hindus) in a trade which was carried on by both of them:

Held, that the properties were under the Hindu law the joint properties of the husband and the wife, and her interest therein was her stridhanam which on her death did not survive to her husband but devolved on the heirs to her stridhanam property.

Property acquired by a woman by her own exertions during coverture is her own property which she is entitled to hold independently of her husband and it devolves on her heirs on her death.

Though a suit be one in ejectment, a decree for joint possession may be passed in favour of the plaintiff.

APPEAL under article 15 of the Letters Patent against the judgment and order of MILLER, J., in Second Appeal No. 1619 of 1912, preferred against the decree of K. SRINIVASA RAO, the acting District Judge of Coimbatore, Appeal No. 37 of 1912, preferred against the decree of R. V. KRISHNAN, the District Munsif of Erode, in Original Suit No. 937 of 1910.

The Second Appeal herein came on for hearing under Order XLI, rule 11 of the Civil Procedure Code (Act V of 1908) before MILLER, J., who delivered the following judgment:—

SECOND APPEAL No. 1619 OF 1912.

MILLER, J. JUDGMENT.—There seems to me to be no reason to refuse acceptance to the view that, if the wife and husband earn together, the presumption is that the resulting property is that of

* Letters Patent Appeal No 98 of 1913 with Second Appeal No. 1619 of 1912.

the husband and that no part of it is the wife's stridhanam. On this ground I dismiss the Second Appeal.

The second defendant preferred an appeal under the Letters Patent against the above judgment of MILLER, J.

The other facts of the case appear from the judgment of SANKARAN NAIR, J.

S. Srinivasa Ayyangar and *S. Duraiswami Ayyar* for the appellant.

The respondents did not appear.

SANKARAN NAIR, J.—The plaintiffs sue as the legal representatives of one Mottaya Goundan to recover possession of the plaint lands from the first defendant, who held them as his lessee. The lease is admitted but the main contention is that the lands belonged to Mottaya Goundan's wife, Ayyammal, from whose alleged heir, the second defendant has purchased them and is now in possession. It is found by both the Courts that the properties were acquired with the profits earned by Mottaya Goundan and his wife, Ayyammal, in a trade which was carried on by both of them. Both the husband and wife were "equally working together." It is also stated that among the Padayachi community, to which Ayyammal and Mottaya Goundan belonged, the wife worked along with the husband "for the purpose of the maintenance of the family and for the preservation and development of the family properties." The District Munsif decided, however, that, according to the strict theory of the Hindu smrithis, even the separate property of a woman earned by her by mechanical arts is subject to her husband's control, and that, therefore, the money with which the plaint lands were acquired was not Ayyammal's peculium. He held that, though the properties were acquired in the name of Ayyammal, that is due to the fact that Mottaya Goundan wanted to shield his properties from the claims of his brothers and possibly also to the fact that Ayyammal was more intelligent than her husband. He further held that, assuming that Ayyammal and Mottaya Goundan must be deemed to have jointly acquired the plaint lands, on the death of Ayyammal, it became the sole property of Mottaya Goundan and, as the plaintiffs are admittedly entitled to claim as the representatives of Mottaya Goundan, he passed a decree directing the defendants to surrender them to the plaintiffs. In appeal the Subordinate Judge confirmed the District Munsif's decision.

MUTHU RAMA-KRISHNA NAICKEN v. MARIMUTHU GOUNDAN. —— SANKARAN NAIR, J.

His decision was confirmed by Mr. Justice MILLER. This is an appeal from his judgment.

In the lower Courts the main question that was argued appears to have been that the properties belonged solely to Ayyammal. In Second Appeal before us the main contention was that, on the facts proved, it cannot be held that the property belonged only to the husband.

If properties are acquired jointly by two persons, both of them males, the two would be joint owners. The question then is whether the fact that the properties in suit were acquired jointly by husband and wife makes any difference. If it was open to the wife to acquire property for herself by her own exertions during coverture, it would seem to follow that, if she acquired the property along with her husband, then they must be deemed to be joint owners. According to the Mitakshara, which is the leading authority in this Presidency, property however acquired by a woman is her stridhanam and on her death her heirs take it. This view is no doubt, directly opposed to the view maintained by the Dayabhaga and certain other authorities according to which, that alone is stridhanam which the wife has power "to give, sell or use independently of her husband's control." See Mayne's Hindu Law (7th edition), paragraph 610. Gifts to a woman in her capacity of bride or wife or given by her husband or by her relations or by the husband's relations are admittedly her exclusive property with the doubtful exception of gifts of immoveable property by the husband in certain circumstances. It is now also settled law in Bengal and Madras that the property inherited by a woman is not her exclusive property. Her right with reference to the property otherwise acquired, according to the Mitakshara, "by inheritance, purchase, partition, seizure or finding" has been the subject of much discussion. It has now been settled that she may acquire property by gift from strangers during coverture and that it would devolve on her heirs. See *Ramasami Padeiyatchi* v. *Virasami Padeiyatchi*(1). It has also been held that property may be given to a husband and wife jointly and that property may also be purchased by them jointly. Her husband's interest in such property would devolve on his heirs and her interest in the property

(1) (1867) 3 M.H.C.R., 272.

would devolve on her heirs. See *Madavarayya* v. *Tirtha Sami*(1) Property may also be devised to them jointly. See *Muthu-meenakshi Ammal* v. *Chandrasekhara Ayyar*(2). This is also the conclusion arrived at in *Salemma* v. *Lutchmana Reddy*(3). There an inam land was enfranchised in favour of a woman, and the question was whether it was her exclusive stridhanam property descendible to her heirs or not. The texts were reviewed and it was held that the Mitakshara should be followed, unless there is such a consensus of opinion among the commentators prevalent in Southern India as to suggest that the Mitakshara has been departed from, or in other words, that it is open to a female to acquire ownership in any of the modes in which it is open to males, and all such property, with the exception of that acquired by inheritance, is her stridhanam, devolving on her own heirs. The learned Judges accordingly held that a wife's earnings and gifts to her by strangers are her stridhanam property descendible to her heirs. This is a direct decision on the point and is in favour of the appellant. But as our learned colleague has apparently taken a different view, we propose to review the Hindu Law texts on this point, though neither the texts nor the cases above referred to, we are informed, were cited before the learned Judge.

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The question, as we have already stated, is whether a married woman's earnings are her exclusive property. Dr. Mayr adduces passages from the Vedas to show that in early times married women pursued independent occupations and acquired gains by them. See Mayne's Hindu Law, VII edition, paragraph 656. According to Manu (Chapter VIII, sloka 416), however, a wife is declared to have no property. The wealth which she acquires is said to be acquired for him to whom she belongs. Four of the commentators of Manu, and among them Medhatithi, take this to mean only that she is unable to dispose of her property independently of her husband. Another commentator, according to Mr Butler, the editor, "seems to indicate that he took it to refer to her incapacity to earn money by working for others." See Sacred Books of the East, volume XXV, page 326.

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(1) (1877) I.L.R., 1 Mad., 307. (2) (1904) I.L.R., 27 Mad., 458.
(3) (1898) I.L.R., 21 Mad., 100.

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The text that is generally referred to with reference to a woman's earnings is that of Katyayana which is thus translated by Colebrooke in his Digests, Volume II, page 589, sloka 470:— "But whatever wealth she may gain by arts, as *by painting or spinning*, or may receive on account of friendship from any but the kindred of her husband or parents, her lord alone has dominion over it: of her other property she may dispose without first obtaining his assent. The commentator Jagannatha states that 'Arts' in this text is expressed in the plural number with the sense of 'and the rest'." We have already pointed out that this text has not been followed in this Presidency as regards gifts from others than her husband's or her own kindred. In the Dayabhaga this text is understood to imply that "though the wealth be hers, it does not constitute woman's property, because she has not independent power over it." The Dayakrama Sangraha (Stokes' Hindu Law Books, page 490) is to the same effect. Chapter II, section II, sloka 29, states: "Notwithstanding the woman has ownership in both descriptions of property she has not independent power in regard to it" as the husband's permission for its disposal is necessary. In the Viramitrodaya we find the same proposition laid down in Chapter V, part I, slokas 2 and 7. The ownership of the woman in the properties is acknowledged; it is only her power of alienation that is declared subject to the husband's control. It is said "the denial is not of their being woman's property, but of its consequences, such as distribution, etc." Devala also mentions a woman's gains as part of her separate property over which she has exclusive control and which her husband cannot use except in times of distress. Mr. Mayne thinks that the word is apparently used by Devala in the sense of gifts—Mayne's Hindu Law, VII edition, paragraph 663. All the texts, therefore, recognize the wife's ownership in the property acquired by her own labour. They only restrict her right of alienation and make it subject to the wishes of her husband. Mr. Mayne considers the question in paragraph 663 and his conclusion is that these texts with reference to the husband's control do not seem to convey anything more than a moral precept, while the texts asserting her absolute power are "express and unqualified." It is unnecessary to express any opinion as to the husband's right to control any alienation by his wife, as that question does not arise in this

case. But we think that Mr. Mayne is right in his view that the property acquired by a woman by her own exertions during coverture is her own property which she is entitled to hold independently of her husband and that it devolves on her heirs. The Mitakshara is clear in favour of this conclusion and the other texts also recognise her ownership, though they convey an injunction that she is not to alienate the property without her husband's consent. This is due to the general incapacity of women to deal with property. These texts do not over-ride the express provision of the Mitakshara which declares her self-acquisition to be her own stridhanam; and we are confirmed in this view by the decisions cited.

We think, therefore, that the property in suit was the joint property of Ayyammal and her husband. If it formed joint property, there is no reason for holding that, on the death of Ayyammal, her interest survived to her husband. In *Madavarayya* v. *Tirtha Sami*(1) which we have already cited, the theory of survivorship was not recognised and it was held that the woman's own heirs were entitled to her undivided interest. Ayyammal's daughters, therefore, are the persons entitled to her property. They became co-owners with their father Mottaya Gourdan on Ayyammal's death. There is no finding that their right has been lost by adverse possession. Mottaya's possession connot be deemed adverse to his daughters who were co-owners with him.

On this finding the plaintiffs, who claim under Mottayya, are only co-owners, with his (Mottayya's) daughters. The first defendant admittedly got into possession as lessee under Mottayya; the plaintiffs are co-owners, and no objection was taken in the lower Courts that they alone cannot maintain the suit; but the first defendant set up the title of the second defendant who is found by the District Munsif to have no title, as he purchased the property from Velayuda Goundan, who is not the heir of Ayyammal. Though the suit is one in ejectment, a decree for joint possession may be passed. In the circumstances we set aside the decrees of the lower Courts, direct the District Munsif to restore the suit to his file, make the daughters or other representatives of Ayyammal parties to the

(1) (1877) I.L.R., 1 Mad., 307.

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suit, and pass a decree in accordance with law. The costs hitherto incurred will abide the result.

AYLING, J.—I agree.

K.R.

APPELLATE CIVIL.

Before Mr. Justice Ayling.

1914. March 17.

S. CHIDAMBARAM PILLAI (PLAINTIFF), PETITIONER,

v.

MUTHAMMAL AND ANOTHER (DEFENDANTS NOS. 1 AND 3), RESPONDENTS.*

Estates Land Act (Madras Act I of 1908), sec. 111, et seq.—Sale of holding under—Suit for declaration of its invalidity—Cognisable in a Civil Court.

A suit for a declaration that the sale of a holding under section 111, *et seq.*, of the Madras Estates Land Act was void in consequence of the landholder's failure to apply for sale within forty-five days as prescribed by section 115 of the Act, is maintainable in a Civil Court.

Gouse Mohideen Sahib v. *Muthialu Chettiar* (1914) M.W.N., 55, followed.

Dorasamy Pillai v. *Muthusamy Mooppan* (1904) I.L.R., 27 Mad., 94 and *Zemindar of Ettayapuram* v. *Sankarappa Reddiar* (1904) I.L.R., 27 Mad., 483, referred to

Section 189 of the Act commented on.

PETITION under section 115 of Act V of 1908 praying the High Court to revise the order of D. G. WALLER, the Acting District Judge of Tinnevelly, in Civil Miscellaneous Appeal No. 2 of 1913, preferred against the order of N. SUNDARAM AYYAR, the District Munsif of Ambasamudram, in Original Suit No. 5 of 1911.

The plaintiff sued in the Court of the District Munsif of Ambasamudram for a declaration that the sale of his holding was invalid and liable to be set aside on the ground that the application for sale was made more than 45 days after the posting of intimation of service as required by section 113 of the Estates Land Act. The District Munsif held that even if such a suit lay under the Act, it was exclusively triable by the Revenue Court and that he had no jurisdiction to try the same and returned

* Civil Revision Petition No. 154 of 1914.

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the plaint for presentation to the proper Court. The plaintiffs appealed against the above order and the lower Appellate Court agreeing with the view of the Court of First Instance dismissed the appeal. Plaintiff preferred this Appeal.

S. Ramaswami Ayyar for the petitioner.

The Honourable Mr. *L. A. Govindaraghava Ayyar* and *L. S. Viraraghava Ayyar* for the respondents.

AYLING, J.

JUDGMENT.—Petitioner sued for a declaration that a sale of his holding held under section 111 *et seq.* of the Madras Estates Land Act was legally void and liable to be set aside in consequence of the landholder's failure to apply to the Collector for sale within the period of forty-five days prescribed by section 115.

The Munsif held that he had no jurisdiction to try the suit and dismissed it. The District Judge on appeal took the same view.

It seems clear that a suit of this nature is maintainable in a Civil Court, in the absence of any statutory bar—*vide Doraisamy Pillai* v. *Muthusamy Mooppan*(1) and *Zamindar of Ettayapuram* v. *Sankarappa Reddiar*(2). Respondent relies on section 189 of the Estates Land Act. This makes it clear that a suit for damages sustained in consequence of the alleged illegality would lie in a Revenue and not in a Civil Court which is also specifically laid down in section 213 (3). But a suit for declaration like the present one is not one of those set forth in the schedule to the Act. It may seem anomalous to give the jurisdiction to award damages for the illegality to the Revenue Court which ordered the sale, and the jurisdiction of setting it aside to the Civil tribunal. But if the view taken by the lower Court is correct, then in spite of the mandatory directions of section 115, an order of a Collector for sale which was passed, without jurisdiction, must stand, and cannot be questioned; for, admittedly, no suit to set aside the sale will lie in a Revenue Court.

The only doubt that occurs to my mind arises out of the curious wording of section 189. The Civil Court is forbidden to take cognisance not of any suit or applications of the nature specified in the schedule but "if any dispute or matter in respect of which such suit or application might be brought or made.' Section 109 of the Bengal Tenancy Act may be referred to for

(1) (1904) I.L.R., 27 Mad., 94. (2) (1904) I.L.R., 27 Mad., 483.

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comparison. It is arguable that the words of section 189 bear a more extended meaning and exclude from the cognisance of a Civil Court not only the suits described in the schedule, but all suits arising out of a dispute or matter in respect of which such suits might be brought. I should be loth to place such an interpretation on the sections, which might have wide and possibly undesirable consequences without some authority or very strong grounds for holding that this was the meaning intended to be conveyed thereby. No authority has been quoted and indeed the point was not taken by respondent's vakil until after I had suggested it; and in a recent case of a similar nature *Gouse Moohideen Sahib* v. *Muthialu Chettiar*(1), the learned Judges appear to have felt no difficulty in the matter. I therefore, though not without some hesitation, prefer to follow the more restricted interpretation of the section which was (by implication) applied in that case. On this view I must hold that the jurisdiction of the Civil Court in the matter of the present suit was not ousted.

The decrees of the lower Court are set aside. The Munsif will restore the suit to his file and dispose of it according to law.

The costs will be costs in the cause.

S.V.

APPELLATE CRIMINAL.

Before Mr. Justice Wallis and Mr. Justice Sadasiva Ayyar.

1914. March 16 and 18.

Re NARAYANA NADAN (ACCUSED), PETITIONER.*

Criminal Procedure Code (Act V of 1898), sec. 195—Sanction for false complaint, appeal against—Police report based on a judgment of Court, sufficient legal basis for grant of sanction

Though a Court should not accord a sanction to prosecute, under section 195, Criminal Procedure Code (Act V of 1898), for bringing a false complaint, merely on the strength of a police report, yet if the report is based upon a judgment of the Court in a counter-case brought against the complainant, in connection with the same matter wherein his defence which was exactly the same as his complaint, was found to be false, such report is sufficient legal material for the Court to accord its sanction for false complaint.

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(1) (1914) M.W.N., 55.

* Criminal Miscellaneous Petition No. 428 of 1913.

Re NARAYANA NADAN.

Queen-Empress v. *Sheik Beari* (1887) I L R, 10 Mad., 232 (F.B.), referred to.

Section 195, Criminal Procedure Code, does not prescribe any rule as to upon what materials a Court should accord its sanction nor does it say that a fresh or preliminary enquiry should be held before granting sanction.

Per SADASIVA AYYAR, J.—The complainant's sworn statement, which was disbelieved by the Magistrate, was another legal material to form the basis for the grant of sanction against him

A sanction given by the lower Court ought not to be lightly revoked by a *Court of Appeal*

A third appeal to the High Court to revoke a sanction, though legally made in the form of a petition under section 195, Criminal Procedure Code, ought not to be encouraged in practice.

PETITION praying that the High Court will be pleased to set aside the order of D. G. WALLER, the Acting Sessions Judge of Tinnevelly, in Criminal Miscellaneous Case No. 61 of 1913, presented against the order of J. C. MOLONY, the District Magistrate of Tinnevelly, in Miscellaneous Petition No. 605 of 1913, presented against the order of C. RAMASWAMI, the Second-class Magistrate of Srivaikuntam, in Miscellaneous Case No. 4 of 1913.

The facts appear from the judgment of WALLIS, J.

A. Swaminatha Ayyar for the petitioner.

C. Sidney Smith for the Public Prosecutor for the Crown

WALLIS, J.

WALLIS, J.—The petitioner has been convicted of stabbing a certain person about sunset on 28th September 1912 in the course of a dispute about cattle. On that day, his father-in-law sent a telegram to the police at Tuticorin to say that the petitioner's house had been dacoited by some person unnamed. On 28th October 1912, nearly a month later, the petitioner put in a complaint in which he charged the man he has since been convicted of stabbing and others of having committed the dacoity while he was away at a distant village, and named nine witnesses. The Sub-Magistrate examined the complainant and doubting the truth of the complaint which was put in very late and appeared to be intended as a counter-charge to the charge of stabbing which was then pending against the complainant, referred it to the police for investigation and report on 28th October 1912. The police apparently did nothing until the petitioner had been tried and convicted in the stabbing charge on 13th December 1912. At the trial in the latter charge as

In my opinion the decision of the lower Courts was right. Section 195 (b) of the Code of Criminal Procedure which relates to sanction for certain offences "committed in or in relation to any proceeding in any Court" does not say by what consideration the Court is to be guided nor does it prescribe as indispensable that the Court should hold a fresh enquiry and take evidence for the complainant before granting sanction, a proceeding which would be quite unnecessary in cases where the Court has acquired a knowledge of the facts in the course of the proceeding in or in relation to which the offence is alleged to have been committed. All that is decided by the Full Bench in *Queen-Empress* v. *Sheik Beari*(1) is that the Court should not grant sanction to prosecute for preferring a false complaint merely on the ground that the complaint had been referred by the police as false and dismissed under section 203 of the Code of Criminal Procedure. There are no doubt certain *dicta* in the judgments of the learned Judges which have been regarded in some subsequent cases as meaning that the order should be made on judicial evidence or legal evidence, but those *dicta* do not mean, as has been contended before us, that such evidence must have been given on the application for sanction, or even on the hearing of the complaint itself. This is clear from the order of the Full Bench with reference to the first of the three cases referred to it. There they upheld a sanction given for the prosecution of a complainant who had preferred a charge of house-breaking and theft against a constable and others which was referred as false by the police with a suggestion that the complainant should be prosecuted. Before disposing of the application for sanction, the Magistrate tried and acquitted the constable and others on a charge of assault preferred by the same complainant, her son and brother. It was held by the Full Bench that the sanction so granted merely on the strength of the police report and of the result of the investigation in the other case was not illegal. In the present case the evidence in the other case was taken by the Court before the police referred the complaint now in question as false, and the result of those proceedings was one of the chief grounds on which they referred the case as false. No doubt the Magistrate who granted the

(1) (1887) I.L.R., 10 Mad., 232 (F.B.).

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sanction was not the same as the Magistrate who tried the counter-case against the present complainant, but the Court was the same, and the judgment of the Court in that case was on record: and the result of that case was in my opinion a matter which might properly be taken into consideration in granting sanction in this case. I may add that I agree with the observations of my learned brother which I have had the advantage of reading, would dismiss the petition.

SADASIVA AYYAR, J.

SADASIVA AYYAR, J.—Though this is called a Criminal Miscellaneous Petition, it is practically a third appeal from the order of the Second-class Magistrate of Srivaikuntam, sanctioning the prosecution of the petitioner for an offence under section 211, Indian Penal Code. The petitioner put in a complaint on the 20th October 1912 accusing ten persons of having committed dacoity in his house on the 28th September 1912. The complaint was a very deliberate one as his father-in-law had on the 28th September itself sent a telegram to the Assistant Superintendent of Police charging about fifty persons with having committed dacoity, and this complaint of 20th October 1912 was practically a detailed expansion of that telegram. Then he was examined by the Second-class Magistrate on the 20th October 1912 as a complainant and he deposed that the facts stated in his complaint were quite true. The Magistrate felt doubt as to the truth of the accusation on two grounds: (a) on account of the long delay in preferring the complaint and (b) as the complaint was put in as a counter-case to the Calendar Case No. 483 of 1912 against the petitioner. In that Calendar Case No. 483 of 1912 his defence was based upon almost the same allegations as formed the basis of his complaint. That defence was found false in that Calendar Case No. 483 of 1912 after an elaborate enquiry and after the examination of the witnesses whom he produced as defence witnesses in that case. His complaint of the 20th October 1912 was forwarded by the Magistrate to the police for investigation and the police reported the case to be false. The Magistrate's similar view (that the complaint was probably false) which had been arrived at by him on looking into the complaint and on examining the complainant was thus confirmed by the police report and he dismissed the complaint on the 11th January 1913. On the 10th March 1913, notice was sent to the petitioner to show cause why he should not be prosecuted

for having brought a false complaint of dacoity. He appeared on the 28th March 1913 to show cause and he was heard. The Magistrate considered that the petitioner's allegation that without a proper enquiry he (the Magistrate) had dismissed his complaint was not accurate and that it was only after proper enquiry he dismissed the complaint as false and he therefore granted the sanction on the 16th April 1913.

As I said before, this Criminal Miscellaneous Petition before us is a sort of third appeal from the Second-class Magistrate's order, a petition to the District Magistrate to revoke the sanction and a petition to the Sessions Judge to revoke the District Magistrate's order refusing to revoke the sanction having been unsuccessful.

While I admit that under the law, as now settled, the petitioner has a right to come up on a sort of third appeal to the High Court, I am strongly of opinion that such petitions by way of third appeal should, as a matter of practice, be rejected, unless the records show not merely a mere technical illegality or irregularity, but that a palpably innocent man is sought to be prosecuted out of private grudge by his enemies. Here the police have obtained the sanction to prosecute the petitioner. The facts stated in his complaint have been enquired into in the counter-case brought against the petitioner and have been found to be false; the petitioner's complaint was after his examination as complainant, strongly suspected to be false; it was found by the police also to be false when it was referred to them for investigation, and the improbabilities in his case were set out by the Magistrate in his order dismissing the case as false. Even supposing that the three lower Courts did not strictly act according to the instructions given for the guidance of the lower Courts in some decisions of the High Courts, I do not think that this is a fit case in which the High Court should interfere on a petition. When the Criminal Procedure Code says in section 195, clause 6, that a sanction given may be revoked by the appellate authority, I do not think it was intended that the higher authority was bound to revoke the sanction whenever irregularity or even illegality is shown in the proceedings of the lower authority giving sanction.

Even if I am wrong in this above view, I am not satisfied that in this case any illegality has been committed in the

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granting of the sanction though the petitioner's learned vakil, Mr. A. Swaminatha Ayyar, argued the case of his client with much persistency and ability and raised several nice points of law. One of his arguments was that because section 476 of the Criminal Procedure Code refers to a preliminary inquiry before any steps are taken under it, there ought to be also a preliminary inquiry before sanction is granted under the analogous section 195 of the Criminal Procedure Code. Even as regards section 476 of the Criminal Procedure Code, the words of the section are, "after making any preliminary inquiry *that may be necessary*." This shows that a preliminary inquiry is not essential in all cases even when the Court takes action under section 476.

In *Abdul Ghafur* v. *Raza Husain*(1), it was held that no such preliminary inquiry was necessary. *A fortiori* of course, under section 195 in which there is no reference at all to "preliminary inquiry" is such an enquiry unnecessary. In fact, it has been held in *In the matter of Govindu*(2), that even want of notice to the accused does not invalidate the grant of sanction under section 195 of the Code of Criminal Procedure.

The next contention was that under the Full Bench ruling in *Queen-Empress* v. *Sheik Beari*(3) the sanctioning of the prosecution of a man for an offence is a judicial act and that that act must be performed after forming a judgment upon legal evidence. In that case it was held, as I understand the points on which all the learned Judges were agreed, that the Magistrate should not substitute the judgment of the police for his own judgment and cannot accord sanction merely upon the police report. This case in *Queen-Empress* v. *Sheik Beari*(3) was considered by SPENCER, J., in *Audimulam* v. *Krishnien*(4). I adopt his reasoning so far as this point is concerned. I think that it is impossible for us to discriminate and say how far the Magistrate's order was based upon the patent unreliability of the statement made by the complainant when he was examined by the Magistrate (which statement is legal and material evidence) and how far it was based upon the police report or upon the fact that the facts mentioned in the complaint were found to be false in the

(1) (1912) I.L.R., 34 All., 267. (2) (1903) I.L.R., 26 Mad., 592.
(3) (1887) I.L.R., 10 Mad., 232 at p. 239 (F.B.).
(4) (1912) 23 M.L.J., 419 at pp. 427, 428 and 430.

counter-case. In the present case the records show, I think, that the Magistrate did not substitute the judgment of the police for his own judgment, and that one of the material facts which induced him to grant the sanction was that, in *his own judgment*, after he had examined the petitioner as complainant, he thought that the case was false. Even if there was any irregularity in his referring to the police report and to the fact that the petitioner's case was found false in the counter-case, that irregularity has not, in my opinion, occasioned any failure of justice and under section 537, Criminal Procedure Code, even if we were deciding an appeal, we cannot interfere with his order on that ground. I might, however, be permitted to say that in my opinion section 195 of the Criminal Procedure Code does not state that the authority giving sanction should act only upon legal evidence. So far as the Madras cases go, while they say that if the authority giving sanction is a judicial authority it should not grant sanction unless there is some legal evidence in support of the falsity of the complaint those cases ought not to be treated as ennunciating the much wider proposition that if other probabilities based on evidence which would not be admissible at the trial of the petitioner are also referred to by the authority giving sanction, the grant of sanction becomes wholly illegal and ought to be revoked. I am not sure that for the purposes of coming to a conclusion whether the complaint was *primâ facie* false, the finding in the connected case will not be evidence under section 11, clause 2, of the Evidence Act, though it may not be evidence in the case instituted on that sanction. I do not think that we should be astute to impose more restrictions on the discretion of the sanctioning authority in the grant of sanctions than are contemplated by the legislature. The legislature itself in section 195, Criminal Procedure Code, has given no indications whatever as to the materials on which the Court can be justified in awarding sanction and has imposed no such restrictions as are contended for. In *Queen-Empress* v. *Sheik Beari*(1), the learned Judges refer without disapproval to the sanctioning Magistrate in one of the cases having taken into consideration the fact that the complainant was unsuccessful in a connected case. I think

(1) (1887) I.L.R., 10 Mad., 232 at p. 233 (F.B.).

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that we ought not to interfere with the discretion of the subordinate Courts in the matter of the grant of sanction unless there is some *primâ facie* strong ground for holding that there is no reasonable probability of having a conviction on the sanction or that it is otherwise inexpedient to award the sanction on the facts of the particular case or that the party against whom sanction was granted was probably innocent. In the result I would dismiss this petition.

N.R.

APPELLATE CIVIL.

Before Mr. Justice Tyabji and Mr. Justice Spencer.

1914. March 23 and 24.

KUNHAMBI AND SIX OTHERS (DEFENDANTS NOS. 15 TO 21), APPELLANTS,

v.

KALANTHAR AND THIRTY-SIX OTHERS (PLAINTIFF'S LEGAL REPRESENTATIVES AND DEFENDANTS NOS. 1 TO 14, 22, EIGHTH DEFENDANT'S LEGAL REPRESENTATIVES), RESPONDENTS.*

Mappillas of North Malabar—Law applicable—Question of fact—Custom, requisites of a valid—Judicial notice—Reasonableness or legality—Question of law—Custom derogating from the Muhammadan Law—Madras Civil Courts Act (III of 1873), sec. 16

The law applicable to the parties to a suit is the law which the parties as a matter of fact by their customs and usages have adopted, not the law which the Courts by a consideration of the historical circumstances relating to the parties or of their religious books or otherwise consider to be the law that they ought to have adopted. If that law being sufficiently certain and not opposed to public policy is of such a nature that the Courts can give effect to it, then the principles underlying section 16 of the Madras Civil Courts Act require that they should give effect to it.

Jammya v. *Diwan* (1901) I.L.R., 23 All., 10, *Muhammad Ismail Khan* v. *Lala Sheomukh Rai* (1902) 17 C.W.N., 97 and *Hirbae* v. *Sonabae* (1847) Perr. O.C., 1105, referred to.

The question whether the particular parties are governed by the Marumakkattayam or the Muhammadan Law, is one of fact.

George v. *Davies* (1911) 2 K.B., 445, *Assan* v. *Pathumma* (1899) I.L.R., 22 Mad., 494 and *Kunhimbi Umma* v. *Kandy Moithin* (1904) I.L.R., 27 Mad., 77, referred to.

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* Second Appeal No. 1493 of 1911.

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A custom to hold good in law must be not unreasonable and must apply to matters which the written law has left undetermined, and the majority at least of any given class of persons must look upon it as binding and it must be established by a series of well-known, concordant, and, on the whole, continuous instances.

The question whether an alleged rule of conduct can be enforced at all or whether it is uncertain or opposed to public policy or unreasonable is one of law and may be considered irrespective of the question whether the custom actually exists.

Moult v. *Halliday* (1898) 1 Q B., 125, followed

Section 16 of the Madras Civil Courts Act, discussed.

SECOND APPEAL against the decree of T. A. RAMAKRISHNA AYYAR, the Subordinate Judge of North Malabar, in Appeal No. 189 of 1910, preferred against the decree of M. R. SANKARA AYYAR, the District Munsif of Kuttuparamba, in Original Suit No. 565 of 1908.

The facts appear from the judgment of TYABJI, J.

T. R. Ramachandra Ayyar for the appellants.

T. K. Govinda Ayyar for respondents Nos. 1 to 8.

The others were not represented.

TYABJI, J.—The question on which the parties to this appeal are at issue is whether they are governed by the Muhammadan law or the Marumakkattayam law. They are Mappillas of North Malabar. Both the lower Courts have decided that the Muhammadan law is applicable. The learned District Munsif proceeded on the basis that "a custom varying Muhammadan law to be recognised as valid must satisfy the essentials of peaceableness and consistency." "These elements," he added, "appear to be wanting in the case." In appeal the Subordinate Judge came to the same conclusion, on the ground apparently that the general presumption is that the parties follow the law of their religion. He stated, however, that no authority was quoted for the proposition that Mappillas in North Malabar follow the Marumakkattayam law. In conclusion he said: "I do not think, for the reasons pointed out by the District Munsif, that the form of evidence which the law demands to prove a custom is present in this case."

It is argued before us that the findings of the lower Courts proceed on such an erroneous view as to the nature of the question to be decided and in such disregard of the presumptions applicable that we ought to interfere in Second Appeal.

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TYABJI, J.

Neither of the lower Courts has alluded to the Madras Civil Courts Act, section 16 of which lays down: "Where, in any suit, or proceeding, it is necessary for any Court under this Act to decide any question regarding succession, inheritance, marriage, or caste, or any religious usage or institution, (a) the Muhammadan law in cases where the parties are Muhammadans, and the Hindu law in cases where the parties are Hindus, or, (b) any custom (if such there be) having the force of law and governing the parties or property concerned, shall form the rule of decision." The Act expressly mentions customs and usages as capable of being enforced by Civil Courts; and in this respect it differs from such Acts as the Civil Courts Act for Bengal, the United Provinces and Assam, Act XII of 1887, section 37 of which does not refer to customs and usages. The Courts bound by the latter Act had through a series of decisions been holding that inasmuch as the Muhammadan law was by the Legislature required to be enforced by the Courts and inasmuch as that Act did not refer to custom, it was not permissible for the parties to adduce any evidence of custom varying the strict Muhammadan law. The rule as I have just stated was followed by the Allahabad High Court in *Jammya* v. *Diwan*(1) and in a later case which was taken in appeal to the Privy Council. In the latter case the position taken up by the Allahabad High Court is very distinctly laid down. It appears from the decision of the Privy Council *Muhammad Ismail Khan* v. *Lala Sheomukh Rai*(2), that the following two issues among others were raised: (1) "can the answering defendants plead that the family in the matter of inheritance is subject to any custom in supersession of the Muhammadan law?" and (2) "if so, does any custom prevail in the family depriving female issue of right of inheritance in presence of their male issue?" All the three Courts in India in that case decided that no evidence of the alleged custom was admissible. Their Lordships of the Privy Council, however, reversed these decisions. Their judgment consisted of the following sentence: "Their Lordships have considered this case, and they think that the suit should be remanded to the High Court to enable the parties to file evidence with respect to issue No. 3 as to the family custom."

(1) (1901) I.L.R., 23 All., 20. (2) (1913) 17 C.W.N., 97.

As the Privy Council have not given reasons for differing from the series of decisions pronounced by the Allahabad and the Calcutta High Courts, it is only possible to fall back on previous decisions in order to discover the principle underlying the rule of law enacted specifically in the Madras Civil Courts Act, and held by the Privy Council to be applicable notwithstanding that it finds no explicit mention in the Act with which they were dealing. That principle was considered with very great learning in a celebrated judgment by Sir, ERSKINE PERRY, C.J., of the Supreme Court of Bombay in *Hirbae* v. *Sonabae* (*Kojahs and Memons' case*)(1). The CHIEF JUSTICE considers this point at page 116 *et seq.* He lays down in effect that such legislative enactments as we have to deal with and as govern the rights of the parties in the present case proceed on the basis that the Courts have to give their decisions in accordance with the law as delivered to them for administration by their Sovereign and that the law so delivered to them consists of that law which the parties as a matter of fact by their customs and usages have adopted, not the law which the Court either by a consideration of the historical circumstances relating to the parties, or of their religious books or otherwise should consider to be the law that they ought to have adopted. If that law, being sufficiently certain and not opposed to public policy, is of such a nature that the Courts can give effect to it, then the enactments require that they should give effect to it. In dealing with the rules that are included in the body of law to which any class of persons is subject, he points out various considerations rendering customs peculiarly important. "In every well-ordered community" he says, "it is essential to its peace that clear and certain rules should exist as to the various relations of domestic life, and in every early history it will be found, that as to most of these, such as marriage, succession, adoptions, as well as to the various occupations, agricultural, pastoral or mercantile, which may happen to prevail in such society, the exigencies of man have framed rules long before written laws existed. A considerable body of law thus arises in every state, and the legislator, when he is required to enter upon his task, rarely seeks to interfere

(1) (1847) Perr. O.C. 110; s.c., 2 Morley's Digest, 431 at p. 435 et

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at pages 504, 505 and 506. The question there also was whether the rights of the particular parties in regard to the property which formed the subject of litigation had to be governed by the Marumakkattayam law or by the Muhammadan law. The decision according to SUBRAHMANIA AYYAR, J., depended on three facts: (1) that the father and the paternal ancestors of one Pokker had all along been following the Muhammadan law; this fact was, it is stated, established beyond doubt by the evidence, (2) that Pokker's mother was governed by the Marumakkattayam law, (3) that the Mappillas of North Malabar were originally and generally bound by the Muhammadan law but that later they had adopted certain rules of conduct taken from the Marumakkattayam law. This third fact was also like the two other facts established by evidence. The evidence was furnished by Logan's Manual of Malabar, volume I, page 273, to which the Judge was entitled to refer in accordance with sections 49, 87 and 32 (4) of the Evidence Act. Taking these three facts, SUBRAHMANIA AYYAR, J., by a process of reasoning in which he also included considerations of principle and of equity and justice came to the conclusion that in regard to the particular parties the conclusion of the lower Courts was correct, namely, that the Muhammadan law should be taken to have been the law of the parties. In a later case *Kunhimbi Umma* v. *Kandy Moithin*(1), SUBRAHMANIA AYYAR, J., had again to consider a similar question, and he there held that the parties before him were governed not by the Muhammadan law but by the Marumakkattayam law, and he stated: "The question will, to a great extent, depend upon the circumstances of each case and the presumption would often be in favour of the Marumakkattayam rule of devolution, since we know that, in fact, that rule is followed in very many instances by such families." Here, therefore, he based his decision on a fourth fact quite distinct from the three facts which were before him in the earlier case and on which in his opinion the decision of the earlier case depended. This fourth fact was the knowledge of the fact that a great number of "such families" follow the Marumakkattayam law.

(1) (1904) I.L.R., 27 Mad., 77.

I have referred to the mode in which each of the first three facts were brought to the cognisance of the Court. With reference to the fourth fact the point is so often misunderstood that I must explain myself more fully. When the fact of the existence of a custom amongst a particular class of people has been repeatedly proved in the Courts, the Courts have the power to take judicial notice of it. *George* v. *Davies*(1) strikingly illustrates the rule. The question then arose in the following circumstances: There was a reported decision, *Moult* v. *Halliday*(2), in which HAWKINS and CHANNELL, JJ., had felt unable to take judicial notice of the existence of a particular usage. Thirteen years later, in 1911, the County Court Judge took judicial notice of the existence of that same custom, and BRAY and Lord COLERIDGE, JJ., held that this could be done notwithstanding that thirteen years earlier the Court had held that then the custom could not be judicially noticed—*George* v. *Davies*(1).

The two English cases to which I have referred bring out with great lucidity the two component elements of the question: one an element of fact, and the other of law; and the decisions also show when and to what extent Courts have power to take judicial notice of previous decisions.

Thus in the former case, *Moult* v. *Halliday*(2), HAWKINS, J., said: "I am very sorry to say that our decision in this case cannot settle the law on the question which the parties wished to have decided. The question which came before the County Court Judge for decision was whether or not the alleged custom had been proved, and that is a question of fact, and not a question of law. There is nothing here to show that this alleged custom has been recognised, so as to dispense with the necessity for proving its existence. In this particular case I wish we had power to consider the evidence, and determine whether the alleged custom had really been established, but the law is that the County Court Judge is the sole Judge on questions of fact, and therefore on this ground only we must dismiss the appeal. There was evidence before the County Court Judge which justified him in arriving at the conclusion that the alleged custom had not been proved."

(1) (1911) 2 K.B., 445. (2) (1898) 1 Q.B., 125 at pp. 127 and 128.

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With reference to the legal aspect of the point he said: "Having heard the question as to the reasonableness of the alleged custom fully discussed in the course of the argument, I think we ought to give our opinion upon it, and I have no hesitation in saying that, in my opinion, not only would the alleged custom not be so unreasonable that it could not prevail, even if proved, but it would be so reasonable that, if it were established by evidence, it ought to be acted upon."

And CHANNELL, J., said: "I am entirely of the same opinion. I agree with everything that has been said in the judgment which has just been delivered, and I should not have considered it necessary to add anything, were it not that the case raises a question of some interest as matter of law. It depends on what is the nature of that thing which is called a custom. A custom is what is so well known and understood that in transacting business it is unnecessary to mention it, because it is so well known that it must be taken to be incorporated in every contract, unless something to the contrary is said. For instance, there is the custom of a month's notice or a month's wages, which is so well known that every person who is hired as a domestic servant is taken to be engaged on those terms, unless there is an express stipulation to the contrary. The question as to the existence of a custom is a question of fact, and it is necessary to prove the custom in each case, until eventually it becomes so well understood that the Courts take judicial notice of it. . . . In the present case the custom certainly has not got to the stage of being judicially noticed, but the Court must in each case have evidence of the custom, and must form an opinion on that evidence. Here the County Court Judge has formed an opinion, and we cannot review his finding. I think the alleged custom, if it were proved, would be reasonable, and certainly it would not be acted upon. There can be very few cases, where a custom has been sufficiently proved, in which a Court could hold that it was unreasonable for that it must be convenient is shown by the fact that it has been established and followed."

In the later case BRAY, J., said: "At the trial the plaintiff relied upon a custom that either party in the case of a contract for the engagement of a domestic servant may terminate the contract of service at the end of the first month by giving notice to that effect at or before the expiration of the first

fortnight of the service. The County Court Judge was asked to take judicial notice of that custom and to act upon it. The Judge, who has been a County Court Judge for many years and who must have had great experience of these cases, which almost necessarily, owing to the smallness of the sums claimed, are brought in the County Court, said that he had in previous cases taken judicial notice of the custom, and would take judicial notice of it in this case. I cannot say that the Judge was wrong in so doing. A time must come when a County Court Judge having had the question of the existence of this custom before him in other cases, is entitled to say that he will take judicial notice of it, and will not require it to be proved by evidence in each case. In *Moult* v. *Halliday*(1), evidence was called in support of the custom, but the County Court Judge came to the conclusion, upon the evidence that the custom was not proved, and he gave judgment for the defendant. Upon appeal it was contended that the Judge was bound to take judicial notice of the custom. This Court held that the question whether the custom was proved was a question of fact, upon which the County Court Judge's decision was final, and upon that ground alone they dismissed the appeal That case was decided over thirteen years ago, and, as I have said, when this custom is continually being put forward and proved by evidence, a time must come when a Judge may say that he no longer requires it to be proved, but that he will take judicial notice of it I cannot say that the Judge was wrong in taking judicial notice of the custom, and therefore that point fails."

In the same way there was nothing to prevent SUBRAHMANIA AYYAR, J., from taking judicial notice of the fact to which he alludes in *Kunhimbi Umma v. Kandy Moithin*(2), that a great number of Mappilla families had adopted the Marumakkattayam law. Nor do I see any more inconsistency between the legal points of view from which *Kunhimbi Umma* v. *Kandy Moithin*(2) and *Assan* v. *Pathumma*(3) were respectively decided than between *Moult* v. *Halliday*(1) and *George* v. *Davies*(4) In each case the question was one of fact. The considerations on which the decision in the first case [*Kunhimbi Umma* v. *Kandy Moithin*(2)]

(1) (1898) 1 Q B 125
(2) (1904) I.L.R., 27 Mad., 77.
(3) (1899) I.L.R., 22 Mad., 494.
(4) (1911) 2 K.B., 445

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proceeded were different from those on which the second case was decided. Being the decisions of so distinguished a Judge as Sir SUBRAHMANIA AYYAR they must no doubt be taken to be of assistance and guidance as to the way in which the consideration of such a question must be approached. But they cannot be distorted into authorities for holding that because he found on the evidence in the one case that the parties were governed by the Marumakkattayam law therefore in any subsequent case there is a presumption or likelihood that the parties should be governed by the same law. The question would be whether there is the same basis for coming to the same conclusion. SUBRAHMANIA AYYAR, J. himself laid down the true basis of presumption to be twofold: either some policy of law or some general conformity with fact—see *Subramanian Chetty* v. *Arunachelam Chetty*(1).

I, therefore, come to the conclusion that where the question is whether the particular parties are governed by the Marumakkattayam law or the Muhammadan law the real issue to be decided is one of fact, namely, whether the particular parties have adopted the one system of law or the other and whether they have been governing their conduct in accordance with the one system or the other. For that purpose various considerations may have to be weighed on one side or the other—four of which have been alluded to by Sir SUBRAHMANIA AYYAR. One consideration is no doubt that if the parties belong to the Mussalman religion the rules of succession being a portion of that religion, it may be inferred that there would be a tendency to follow the rules of Islam as regards inheritance.—*Mahomed Sidick* v. *Haji Ahmed*(2). Another consideration pointing the

families as a matter of fact observe the Marumakkattayam law. There may be also some considerations as regards the way in which property has been held or the way in which the parties have conducted themselves in the past: if, for instance, the parties themselves or their ancestors have in previous litigation set up that they are governed by one system or the other. The

(1) (1905) I.L.R., 28 Mad., 1 at p. 4.
(2) (1885) I.L.R., 10 Bom., 1 at pp. 9-10.

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mode of proving the existence of custom in any particular case is thus alluded to by Thibaut *System des Pandekten Rechts*, volume 1, page 15 in a passage cited by Sir ERSKINE PERRY in *Hirbæ* v. *Sonabæ*(1): "A custom, therefore, to hold good in law, requires, besides the above negative conditions (viz., that the custom is not unreasonable and applies to matters which the written law has left undetermined), the following positive condition, namely, that the majority at least of any given class of persons look upon the rule as binding, and it must be established by a series of well-known, concordant, and, on the whole, continuous instances. How many examples are necessary to prove a custom cannot be laid down beforehand, neither is the number to be left to the arbitrary discretion of the Judge,—but the point in each case is, whether the common consent of the class in question is clearly demonstrated by the number of instances proved." These considerations are not exclusive of each other. Due attention must be given to each of them and to any others that may be relevant under the Indian Evidence Act to the question of fact involved.

It is true that neither of the Courts below has considered the question in the manner in which in my opinion it should in strictness be considered; and it is also true that some remarks seem to me, with great deference to both the lower Courts, meaningless in reference to the real question to be decided. But as I have pointed out there is no basis for taking judicial notice of any circumstance which in itself is decisive of the question of fact or which has so strong a bearing on the question of fact as to raise a presumption that the question of fact must *primâ facie* be decided in any particular way, and I am unable to hold that the finding arrived at by both the Courts is a finding based on such an erroneous mode of approaching it and in such disregard of the evidence as would entitle us to interfere with it in Second Appeal.

It seems to me that the evidence has as a matter of fact been considered and that the decision, notwithstanding some remarks, is based on the evidence I would therefore dismiss this appeal with costs.

SPENCER, J.—I concur.

SPENCER, J.

S.V.

(1) (1847) Perry's O.C., 110 at p. 118.

APPELLATE CIVIL.

Before Mr. Justice Tyabji and Mr. Justice Spencer.

1914. March 9, 10, 12, 13, 16 and 30.

C. PRASANNA VENKATACHELLA REDDIAR (SECOND DEFENDANT), APPELLANT,

v.

THE COLLECTOR OF TRICHINOPOLY AND ANOTHER (PLAINTIFF AND FIRST DEFENDANT), RESPONDENTS.*

Civil Procedure Code (Act V of 1908), ss. 92 and 93, suit under—Alienee from trustee, declaration against—Appeal by alienee—Death of trustee pending appeal—Abatement—Right to sue, meaning of—Alienee for consideration but not in good faith or without notice—Limitation Act (IX of 1908), sec. 10, effect of.

Where in a suit brought by the Collector of a district under section 92 of the Code against a trustee and an alienee from him, a declaration was granted to the effect that the alienation in favour of the latter was not binding on the trust, and the alienee appealed, making the Collector and the trustee parties to the appeal, but pending appeal, the trustee died and his legal representative was not brought on the record.

Held, that the appeal did not abate as the trustee was not a necessary party to it.

Held also, that the cause of action against the alienee (who was an alienee for consideration) arose on the date of the alienation and as the suit was brought more than six years after that date, it was barred by limitation under article 20 of the Limitation Act. Time will run in favour of an alienee for consideration, though he may not be an alienee in good faith. Trust property in the hands of alienees for consideration and in good faith and without notice cannot be followed at all.

Per TYABJI, J.—The phrase "right to sue" with reference to appeals means "right to obtain relief."

APPEAL against the decree of V. K. DESIKA ACHARI, the Subordinate Judge of Trichinopoly, in Original Suit No. 2 of 1910.

The facts of the case appear from the judgment of TYABJI, J.

T. Subrahmanya Ayyar and *T. M. Krishnaswami Ayyar* for the appellant.

The *Government Pleader* for the respondent.

The second respondent was not represented.

TYABJI, J.

TYABJI, J.—The Collector of Trichinopoly is the plaintiff. The suit is instituted under sections 92 and 93 of the Civil Procedure Code.

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* Appeal No. 203 of 1911.

The first defendant (now deceased) was the alleged trustee and manager of the charities referred to in the plaint. The second defendant was alleged to be a transferee from the first defendant of a portion of the lands appertaining to the charitable trust.

The prayers against the first defendant were for removal of the first defendant from the trusteeship and for accounts. There was a prayer (*b*) "to declare the sale to the second defendant of the lands belonging to the charity to be invalid" This is the only relief claimed against the second defendant. There were other prayers for the appointment of a new trustee and for vesting the trust property in the trustee as appointed. The plaintiff obtained all the reliefs asked against both the defendants in the lower Court.

There were appeals against this decree by each of the defendants. But the first defendant is now dead and her representatives not having been brought on the record, her appeal has abated, and has been dismissed by us. The present appeal is by the second defendant.

It was contended before us on behalf of the plaintiff that the second defendant's appeal must also abate, inasmuch as the first defendant who was originally a respondent to this appeal is now dead and her legal representatives have not been brought on the record as required by Order XXII.

In my opinion the appeal does not abate.

The mere fact that one of the respondents is dead and that his representative is not brought on the record will not make the appeal abate if the right survives to the appellant. In *Gopal* v. *Ramachandra*(1), it was succinctly stated that when the sections of the Civil Procedure Code which are now replaced by Order XXII have to be applied to appeals, the words "the right to sue" must be construed as meaning "the right to prosecute by law, to obtain relief by means of legal procedure." This is not expressly stated in Order XXII, rule 11, which may be styled the interpretation clause of the order. But several rules in the order become meaningless in their application to appeals unless these words are added; and the addition of these words would follow from giving to the expression "a right to sue" a meaning cognate to that

(1) (1902) I.L.R., 26 Bom., 597 at pp. 602, 603 and 607.

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which the rule expressly gives to the word "suit". *Gopal* v. *Ramachandra*(1) was followed in *Saramen Chetty* v. *Sundaraja Naick*(2).

The relief that the second defendant claims in appeal is first that as he was not a necessary party to the suit, his name should be struck off from the record, and secondly that if there was any cause of action against him it was barred by limitation that in either case the suit should be dismissed as against him. If the second defendant is entitled to claim this relief, he is entitled to do so in his sole right. The only person against whom this relief is claimed is the plaintiff. On the death of the first defendant, the second defendant's right to claim this was not affected. A test for deciding whether the right survives was suggested by the Government Pleader, viz., whether the appellant can succeed, and the decree can be reversed, without bringing the legal representative of the deceased party on the record. This test is satisfied in the present appeal The question on which adjudication is sought by the second defendant as appellant before us will not affect the deceased party. See *Srinivasachari* v. *Gnanaprakasa Mudaliar*(3). An ingenious argument was put forward on this point that the lower Court's decree entitled the second defendant to sue the first defendant for damages for breach of covenant for title . . . if there was any such covenant that the first defendant was consequently interested in the appeal of the second defendant. The argument does not seem to require any detailed refutation. I hold, therefore, that the appeal does not abate.

On the merits several questions of law were argued before us. It is necessary to deal only with the question of limitation. I am of opinion that the claim, if any, against the second defendant was barred.

I express no opinion on the point whether the plaintiff had any cause of action against the second defendant; but will assume that in the circumstances of this case, though the suit was brought by the Collector under sections 92 and 93 of the Civil Procedure Code such a declaration as is here sought by prayer (b) can be asked and obtained against a person who claims to be a transferee from the trustee.

It was suggested in the first instance that the Collector's right to obtain this relief (assuming it exists) is not barred as

(1) (1902) I.L.R., 26 Bom., 597.
(2) (1902) I.L.R., 26 Mad., 499.
(3) (1906) I.L.R., 30 Mad., 67, 68 and 69.

section 10 of the Limitation Act prevents the right to follow the trust property in the second defendant's hands from being barred by any length of time. The second defendant has been found to be an assignee for valuable consideration, and that finding has not been attacked before us. But it was argued that it has not been found that the second defendant is a transferee in good faith, and that the mere fact of his being a transferee for consideration will not make the plea of limitation available to him, unless he is also a transferee in good faith. This contention cannot be upheld. Trust property in the hands of a transferee in good faith for consideration without the notice of the trust cannot be followed by the beneficiary at all · see Trusts Act, section 64. The right to follow arises only where the transferee has not acted in good faith : (1) If such a transferee has paid no consideration he is not an assignee for valuable consideration within the terms of the Limitation Act, section 10, and in his case a suit for the purpose of following trust property is not barred by any length of time. But (2) where the transferee is an assignee for valuable consideration, (*a*) if he has acted in good faith without having notice of the trust he acquires immediate title to the property under section 64 of the Trusts Act, or (*b*) if he has not acted in good faith, but has paid valuable consideration he acquires good title after the lapse of the period necessary for extinguishing (under section 28 of the Limitation Act) the right of the beneficiary to follow the trust property in his hands. This is in accordance with principle. When there is valuable consideration for the transfer, the original trust property is replaced by the consideration. There is no such institution when there is no consideration, no question is raised here as to the adequacy of the consideration.

If limitation can be pleaded then the article applicable to the suit is article 120. This was conceded. It was argued, however, by the learned Government Pleader that time did not begin to run from the date of the execution of the sale of the 26th of January 1899 which is alleged to have been made in breach of trust, and a declaration of the invalidity of which is sought in prayer (*b*) of the plaint, but that it began to run only from the time when the Collector was informed of the facts entitling him to take action under section 92 of the Civil Procedure Code. It was strenuously pressed upon us that a public officer has no duty

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cast upon him to go round and examine public trusts and that suits which he is entitled to institute must be allowed to be barred though he may have no knowledge of his right to sue. The article must, however, be construed as it is, and I find myself unable to see how the meaning suggested by learned Government Pleader can be read into the words "when the right to sue accrues." The article must be construed as it is notwithstanding that article 134 prescribes a period of twelve years from the date of the purchase from the trustee when possession is sought for. If the Collector can sue under section 92 of the Civil Procedure Code for a declaration against an alleged transferee in breach of trust (on which point I express no opinion), then the suit must, it seems to me, be brought within six years of the sale. Time began to run therefore on 26th January 1899, and the suit was brought more than six years thereafter. It was, in my opinion, barred by limitation.

The appeal will be allowed and the suit dismissed against the second defendant. The costs of both parties to the appeal in both Courts will be payable out of the trust funds, but the appellant will recover his whole costs first and the first respondent will recover his costs only out of the balance. We are informed that some costs incurred in the lower Court have been recovered by the Collector from the appellant. These will have to be refunded to the appellant and under section 82 of the Civil Procedure Code we specify four months from this date for this being done.

SPENCER, J.

SPENCER, J.—I agree that the appellant can obtain the relief that he seeks in this appeal without making the legal representatives of the second respondent parties.

In *Durga Charan Sarkar* v. *Jotindra Mohan Tagore*(1), the test employed for ascertaining whether a particular defendant was necessary party to the suit was to see (1) whether there was a right to some relief against him in respect of the matter involved in the suit, (2) whether his presence was necessary to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the suit. The question involved in an appeal do not necessarily include all the questions involved in the suit to which it is related; if we read

(1) (1899) I.L.R., 27 Calc., 493 at p. 497.

"appeal" wherever the word "suit" occurs in the above passage and consider what are the reliefs asked for by the appellant in the present appeal it will appear that he can obtain all that he wants without the presence of the first defendant or her legal representatives.

There has been considerable divergence of opinion in the reported decisions of Courts in India as to the scope of section 539 (corresponding to section 92 of the Code of 1908) before the present Code became law. Now the question as to the powers of a Court proceeding under section 539 to remove trustee held to be within the competence of the Court by *Subbayya* v. *Krishna*(1), *Huseni Begam* v *The Collector of Moradabad*(2), *Girdhari Lal* v. *Ram Lal*(3), *Sajedur Raja Chowdhuri* v. *Gour Mohun Deo Baishnav*(4), and held to be without the competence of the Court by *Narasimha* v. *Ayyan*(5), *Rangasami Naikan* v. *Varadappa Naikan*(6), *Budree Das Mukim* v. *Chooni Lal Johurry*(7), *Budh Singh Dudhuria* v. *Niradbaran Roy*(8), has been settled by the legislature introducing clause (*a*) in section 92 (1). It is still a debatable question whether alienees or trespassers on trust property can be joined as parties to a suit under this section. It was held in *Ghazaffer Husain Khan* v. *Yawar Husain*(9), that alienees could be impleaded for the purpose of determining what properties are affected, by the trust and in *Sajedur Raja Chowdhuri* v. *Gour Mohun Deo Baishnav*(4), that they could be made parties for the purpose of recovering from them properties improperly alienated but in *Augustine* v. *Medlycott*(10), *Srinivasa Ayyangar* v. *Strinivasa Swami*(11), *Kazi Hassan* v. *Sagun Balkrishna*(12), *Huseni Begam* v. *The Collector of Moradabad*(2), *Arunachella Chetti* v. *Muthu Chettiar*(13), *Budree Das Mukim* v. *Chooni Lal Johurry*(7), *Budh Singh Dudhuria* v. *Niradbaran Roy*(8), it was decided that the section was not applicable to suits against strangers to the trust Now assuming without accepting that the Government Pleader is correct in his

(1) (1891) I.L.R., 14 Mad., 186.
(2) (1897) I.L.R., 20 All., 48.
(3) (1899) I.L.R., 21 All., 200.
(4) (1897) I.L.R., 24 Calc., 418.
(5) (1889) I.L.R., 12 Mad., 157.
(6) (1894) I.L.R., 17 Mad., 462.
(7) (1906) I.L.R., 33 Calc., 789.
(8) (1905) 2 C.L.J., 431.
(9) (1903) I.L.R., 25 All., 112.
(10) (1892) I.L.R., 15 Mad., 241.
(11) (1893) I.L.R., 16 Mad., 31.
(12) (1900) I.L.R., 24 Bom., 170.
(13) (1880) 23 M.L.J., 347.

VAIKUNTA-RAMA PILLAI v. AUTHIMOOLAM CHETTIAR.

Quære.—Whether subsequent creditors are included under section 53 of the Transfer of Property Act.

Per SADASIVA AYYAR, J.—A person does not actually become a subsequent or prior creditor by reason of the estoppel of the debtor.

An estoppel cannot overrule a plain provision of law. The statutory provision that a minor is incompetent to incur a contractual debt cannot be overruled by an estoppel.

SECOND Appeal against the decree of F. D. P. OLDFIELD, the District Judge of Tinnevelly, in Appeal No. 418 of 1910, preferred against the decree of K. S. RAMASWAMI SASTRI, the District Munsif of Tinnevelly, in Original Suit No. 596 of 1906.

The material facts appear from the judgment of the High Court.

C. V. Anantakrishna Ayyar for the appellant.

T. R. Ramachandra Ayyar and *M. V. Duraiswami Ayyangar* for the respondent.

WALLIS, J.

WALLIS, J.—This is a suit by the plaintiff on a mortgage executed by the first defendant during minority in favour of the third defendant who transferred it to the fourth defendant who again transferred it to the plaintiff. The transfer by the third to the fourth defendant was attested by the first defendant after he had attained majority. Before the date of the attestation but after he attained majority the first defendant executed a settlement transferring all his property to his mother and wife on behalf of his minor son stipulating only for maintenance for himself. The District Judge has found that the settlement was intended to be operative, but that it was executed by the first defendant with intent to defeat and delay his creditors, and there is no ground for questioning these findings. But he has also found that the plaintiff was a person defrauded, defeated or delayed by the settlement, so as to be entitled to set it aside under section 53 of the Transfer of Property Act. From the decision an appeal has been preferred by the son, the second defendant. It has been contended before us that the first defendant at the date of the settlement was a debtor of the third defendant for the money advanced to him on mortgage during minority as he was bound to refund it.

Where a minor has obtained money by misrepresenting his age, that amounts to fraud and he may be made to refund it, but I think it is now settled that, in the absence of fraud, a refund cannot be ordered. This would appear to have been the rule

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in England even before the Infants' Relief Act of 1874 which makes contracts entered into by minors void by statute as the Contract Act does in India. In England there is an express decision on the point by the Court of Appeal in *Levene* v. *Brougham*(1), and the earlier decision of the Court of Appeal in *Ex parte Jones*(2), to which Sir GEORGE JESSELL was a party, is to the same effect. All the cases have been reviewed recently by LUSH, J., in *Stocks* v. *Wilson*(3), where it is shown on an examination of all the authorities that the ground, on which equity interferes to make a person of full age return money or property which he obtained during minority, is fraud. In that case as in the earlier case of *Ex parte The Unity Joint-Stock Mutual Banking Association*(4), fraud was found and a return ordered. As regards Indian cases it seems sufficient to refer to the well-known decision in *Mohiri Bibee* v. *Dharmodas Ghose*(5), in which their Lordships held that minors' contracts are void and not voidable and that section 65 of the Indian Contract Act has no application to them and in which they cited with approval the observations of ROMER, L J, in *Thurston* v. *Nottingham Permanent Benefit Building Society*(6): "a Court of Equity cannot say that it is equitable to compel a person to pay any moneys in respect of a transaction which, as against that person, the Legislature has declared to be void." That is to say in the absence of fraud, an infant is not estopped from pleading minority in answer to a suit for the return of the money advanced to him during minority. This has also been expressly decided by the Allahabad High Court in *Kanhai Lal* v. *Babu Ram*(7). The finding in the present case is that there was no fraud or misrepresentation by the minor as to his age when he borrowed on a mortgage from the third defendant. Consequently he could not then have been ordered to refund, and therefore the third defendant was not one of his creditors at the date of the settlement. Both the lower Courts, however, have held that this does not debar the plaintiff from setting aside the settlement. The District Munsif relies on the fact that the first defendant always treated the third defendant as a creditor,

(1) (1909) 25 Times L.R., 265.
(2) (1881) 18 Ch D., 109.
(3) (1913) 2 K B., 235.
(4) (1858) 3 G & J., 63.
(5) (1903) I.L.R., 30 Calc., 539.
(6) (1912) 1 Ch., 1 at p. 13.
(7) (1911) 8 All. L.J., 1058.

VAIKUNTA-RAMA PILLAI v. AUTHIMOOLAM CHETTIAR.

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WALLIS, J.—This is a suit by the plaintiff on a mortgage executed by the first defendant during minority in favour of the third defendant who transferred it to the fourth defendant who again transferred it to the plaintiff. The transfer by the third to the fourth defendant was attested by the first defendant after he had attained majority. Before the date of the attestation but after he attained majority the first defendant executed a settlement transferring all his property to his mother and wife on behalf of his minor son stipulating only for maintenance for himself. The District Judge has found that the settlement was intended to be operative, but that it was executed by the first defendant with intent to defeat and delay his creditors, and there is no ground for questioning these findings. But he has also found that the plaintiff was a person defrauded, defeated or delayed by the settlement, so as to be entitled to set it aside under section 53 of the Transfer of Property Act. From the decision an appeal has been preferred by the son, the second defendant. It has been contended before us that the first defendant at the date of the settlement was a debtor of the third defendant for the money advanced to him on mortgage during minority as he was bound to refund it.

Where a minor has obtained money by misrepresenting his age, that amounts to fraud and he may be made to refund it, but I think it is now settled that, in the absence of fraud, a refund cannot be ordered. This would appear to have been the rule

in England even before the Infants' Relief Act of 1874 which makes contracts entered into by minors void by statute as the Contract Act does in India. In England there is an express decision on the point by the Court of Appeal in *Levene* v. *Brougham*(1), and the earlier decision of the Court of Appeal in *Ex parte Jones*(2), to which Sir GEORGE JESSELL was a party, is to the same effect. All the cases have been reviewed recently by LUSH, J., in *Stocks* v. *Wilson*(3), where it is shown on an examination of all the authorities that the ground, on which equity interferes to make a person of full age return money or property which he obtained during minority, is fraud. In that case as in the earlier case of *Ex parte The Unity Joint-Stock Mutual Banking Association*(4), fraud was found and a return ordered. As regards Indian cases it seems sufficient to refer to the well-known decision in *Mohiri Bibee* v. *Dharmodas Ghose*(5), in which their Lordships held that minors' contracts are void and not voidable and that section 65 of the Indian Contract Act has no application to them and in which they cited with approval the observations of ROMER, L J, in *Thurston* v. *Nottingham Permanent Benefit Building Society*(6): "a Court of Equity cannot say that it is equitable to compel a person to pay any moneys in respect of a transaction which, as against that person, the Legislature has declared to be void." That is to say *in the absence of fraud*, an *infant is not estopped* from pleading minority in answer to a suit for the return of the money advanced to him during minority. This has also been expressly decided by the Allahabad High Court in *Kanhai Lal* v. *Babu Ram*(7). The finding in the present case is that there was no fraud or misrepresentation by the minor as to his age when he borrowed on a mortgage from the third defendant. Consequently he could not then have been ordered to refund, and therefore the third defendant was not one of his creditors at the date of the settlement. Both the *lower Courts*, however, have held that this does not debar the plaintiff from setting aside the settlement. The District Munsif relies on the fact that the first defendant always treated the third defendant as a creditor,

(1) (1909) 25 Times L.R., 265.
(2) (1881) 18 Ch.D., 109.
(3) (1913) 2 K B, 235.
(4) (1858) 3 G. & J., 63.
(5) (1903) I.L.R., 30 Calc., 539.
(6) (1902) 1 Ch, 1 at p. 13.
(7) (1911) 8 All. L.J., 1053.

APPELLATE CIVIL.

Before Mr. Justice Wallis and Mr. Justice Sadasiva Ayyar.

1914. April 8, 9 and 17.

PASUMARTI PAYIDANNA (THIRD DEFENDANT), APPELLANT,

v.

GADI LAKSHMINARASAMMA AND FOUR OTHERS (PLAINTIFF AND DEFENDANTS NOS. 1, 2, 4 AND 5), RESPONDENTS.*

Civil Procedure Code (Act V of 1908), ss. 47 and 50, O. XXI, r. 90—Transfer of decree to another Court—Judgment-debtor, death of—Application to bring in legal representatives—Jurisdiction of such Court—Minor legal representative—Guardian ad litem, *not appointed—Sale in execution—Decree-holder and auction-purchaser, fraud of—Sale, validity of—Application under Order XXI, rule 90—Conversion into a suit—Suit for setting aside, if necessary—Limitation Act (IX of 1908), arts. 12, 95 and 166—Suit for other reliefs on the ground of fraud, if maintainable.*

The first defendant obtained decrees in two suits, viz., Original Suits Nos. 555 and 559 of 1903 on the file of the District Munsif's Court of Vizianagram against one *S*, the husband of the plaintiff and the second defendant. *S* died subsequent to the passing of the decrees, which were transferred to the District Munsif's Court of Rajam for execution. The first defendant filed an application in the latter Court for bringing on the record the plaintiff and the second defendant as the legal representatives of the deceased judgment-debtor and for execution of the decrees. The Court passed an order as prayed for. The plaintiff (the junior widow of *S*) was a minor at the time of the application and sale, but she was placed on the record as though she were a major without a guardian *ad litem* to act for her, though both the first defendant (the decree-holder) and the third defendant (the auction-purchaser) knew at the time that she was a minor. The second defendant (the co-widow) had then ceased to have any interest in her husband's estate. The decree-holder applied for sale in Original Suit No. 555 of 1903 of properties which were attached in both the aforesaid decrees. The third defendant, who bid for the properties for Rs. 601, caused the sale to be stopped in Original Suit No. 555 of 1903; the first defendant in collusion with the third defendant brought them to sale in Original Suit No 559 of 1903, the reserve price was reduced to Rs. 200 and the third defendant purchased the property for Rs. 301; the executing Court was not informed of the sale in Original Suit No. 555 of 1903 and of the third defendant's bid for Rs. 601 therein. The sale was held on 19th October 1906 and was confirmed on 23rd January 1907. The plaintiff (who attained majority in July 1907) filed an application on the 16th March 1909 in Original Suit No. 559 of 1903 under section 47 of the Code of Civil Procedure for setting aside the sale and for a declaration that the sale was invalid and for other reliefs. The petition was converted into a suit under

* Second Appeal No. 1124 of 1912.

the provisions of section 47 of the Civil Procedure Code. The defendants contended that the sale was valid, that in any event the sale had to be set aside, and that both the application under section 47 of the Civil Procedure Code and the suit were barred by limitation under articles 162 and 12 of the Limitation Act respectively.

Held, that the plaintiff, who had no guardian *ad litem* appointed for her in the execution proceedings was not a party to the suit in which the sale was made, and was entitled to bring a suit for a declaration that the sale was not binding without regard to the provisions of section 47 of the Civil Procedure Code.

That the plaintiff not having been a party to the suit and not having been sufficiently represented by any one who was a party, the sale was not binding on the plaintiff and did not require to be set aside.

That the suit which was instituted within three years of the plaintiff's attainment of majority was not barred by limitation.

Per SADASIVA AYYAR, J.—When a judgment-debtor has to set aside a sale of his property for fraud of the decree-holder or of both himself and the auction purchaser, he can only apply under Order XXI, rule 90 of the Civil Procedure Code, subject to the limitation prescribed in article 166 of the Limitation Act; but he may be entitled to bring a suit for other appropriate reliefs on the ground of fraud against the decree-holder and the auction-purchaser, such as for damages or for injunction, subject to the limitation prescribed in article 95 of the Limitation Act.

SECOND APPEAL against the decree of V. V. S. AVADHANI, the acting Temporary Subordinate Judge of Vizagapatam, in Appeal No. 205 of 1911, preferred against the decree of C. R. VENKATESWARA AYYAR, the District Munsif of Rajam, in Original Suit No. 407 of 1909.

The facts of the case appear from the judgment of WALLIS, J.

K. Srinivasa Ayyangar and *V. Ramesam* for the appellant.

The Honourable Mr. *B. N. Sarma* for the first respondent.

WALLIS, J.—This is a Second Appeal from the decrees of the lower Courts declaring that the sale in execution of the decree in Original Suit No. 559 of 1903 on the file of the District Munsif of Vizianagram was not binding on the plaintiff. The present plaint was presented as a petition in that suit, but was registered as a plaint in a separate suit under the new provision in section 47, Civil Procedure Code

WALLIS, J.

The facts may be briefly stated. The present first defendant had obtained decrees against plaintiff's husband in two suits Nos. 555 and 559 of 1903, and after his death, his two widows, the plaintiff and the second defendant were brought on record as his legal representatives by the Court of the District Munsif of Rajam to which the decrees had been transferred for

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execution. One of the grounds taken by the plaintiff is that the Court to which the decrees had been transferred for execution was not the proper Court to bring on legal representatives of a deceased party, as decided by the Full Bench in *Swaminatha Ayyar* v. *Vaidyanatha Sastri*(1), and that the order was a nullity. It is, however, unnecessary to consider this point, as the sale has been held not to be binding on another ground. The main objection to the sale is that, as found by the lower Courts, at the time when the plaintiff and the second defendant, the co-widow, were brought on the record and at the date of the sale on 19th October 1906 the plaintiff was a minor only attaining her majority in July 1907, while the other widow, the second defendant, had ceased to have any interest in the estate of her deceased husband. The plaintiff was admittedly impleaded as a major though, according to the finding, the first defendant, decree-holder and the third defendant, the auction-purchaser, both knew she was a minor. The attached properties which were subject to mortgages were first put up for sale by the first defendant in execution of his decree in Original Suit No. 555 of 1903 on the 15th October 1906. The properties were put up at Rs. 600 and the sale list (Exhibit H) shows that there were no bidders on the 15th, 16th and 17th and that on the 18th the present third defendant bid Rs. 601. This sale was stopped at the instance, it is said, of the third defendant because certain other decree-holders had applied for rateable distribution in the suit, a matter which was no business of his; and on the following day, the 19th, the first defendant applied orally to the District Munsif in the other suit, No. 559 of 1903, and, on the plea that there were no bidders, got the reserve price reduced to Rs. 200, without telling the District Munsif of the sale in Original Suit No. 555 of 1903 and the bid of Rs. 601 by the third defendant. The properties were then put up to sale in Original Suit No. 559 of 1903 and knocked down to the third defendant for Rs. 301.

The Subordinate Judge has found, in my opinion rightly, that this was a fraud upon the plaintiff. The properties should have been sold in execution of the decree in Original Suit No. 555 of 1903 in which they were first put up for sale, when the

(1) (1905) I.L.R., 28 Mad., 466.

first defendant, as decree-holder in Original Suit No. 559, could if so minded, have applied for rateable distribution of the sale-proceeds; and the conduct of the first defendant and the third defendant in proceeding with the sale in the second suit and getting the reserve price reduced by suppressing from the Court what had happened at the first sale amounted to a fraud upon the plaintiff. This fraud is not without some bearing on the main issue in the case, because, in view of what happened in the absence of any proper representation of the judgment-debtor, it cannot be said that the plaintiff was not prejudiced by the omission to bring her properly on the record.

The respondent relies on two decisions of the Privy Council in *Khiarajmal* v. *Daim*(1) and *Rashidunnisa* v. *Muhammad Ismail Khan*(2) to show that the sales are wholly void against the plaintiff because she was not properly represented, while the appellant relies on the decision of the Privy Council in *Malkarjun* v. *Narhari*(3) and on certain observations in *Kadir Mohideen Marakkayar* v. *Muthukrishna Ayyar*(4). In my opinion the decision in *Malkarjun* v. *Narhari*(3) has no bearing on the present case. In that case a party, who was brought on as legal representative, objected that he was not the legal representative, but the Court decided that he was, and their Lordships held that, in view of this decision which was within the jurisdiction of the Court, the sale could not be treated as a nullity even against the real representatives of the deceased who afterwards came forward Their Lordships also held that, if the suit could be regarded as one to set aside the sale, it was barred by article 12 of the Limitation Act.

On the other hand in *Khiarajmal* v. *Daim*(1) one Amirbaksh, a minor, the legal representative of one Naurez, was sued by his guardian, one Alahnauraz, who was not his guardian in fact, and had not been appointed as his guardian *ad litem*, and the Court held that . . . Court sales in execution of the decrees obtained in these suits were not binding on the estate of the deceased Naurez or the minor, but were without jurisdiction and null and void. In the course of the judgment, their Lordships no doubt say that the absence from the record of one of the legal

(1) (1905) I.L.R., 32 Calc., 296 at p. 314 (P.C.).
(2) (1909) I.L.R., 31 All., 572.
(3) (1901) I.L.R., 25 Bom., 337.
(4) (1903) I.L.R., 26 Mad., 230.

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representatives of a deceased judgment-debtor is not always sufficient reason for disturbing judicial sales which otherwise have been properly conducted. "The Indian Courts", their Lordships say, "have properly exercised a wide discretion in allowing the estate of a deceased debtor to be represented by one member of the family, and in refusing to disturb judicial sales on the mere ground that some members of the family, who were minors, were *not made parties to the proceedings, if it appears that there* was a debt justly due from the deceased, and no prejudice is shown to the absent minors." *But these observations* do not cover such a case as the present in which, according to the findings, the *other widow who was brought on the record* had ceased to have any interest in her husband's estate, and the sale itself was a fraudulent one. An endeavour has been made to distinguish that case from the present on the ground that the decrees themselves were nullities owing to the minor defendant not having been properly represented, whereas in the present case the decrees were duly obtained against the deceased judgment-debtor. The still more recent decision of their Lordships in *Rashidunnisa* v. *Muhammad Ismail Khan*(1) shows that there is no substance in this distinction. In that case, as in the present, the suit was brought to declare the nullity as against the plaintiff of certain sales in execution of decrees *against a* deceased person in which the minor plaintiff had been brought on as the legal representative of the deceased *judgment-debtor*. In two instances he had been represented by a woman who, as such, was not *qualified to act as guardian ad litem*, and in the third by another person whose interests were adverse. Their Lordships held that the plaintiff had never been a party to any of these suits in the proper sense of the term. They further held that a minor brought on in this defective manner was not a party to the suit within the meaning of section 244, now section 47, Civil Procedure Code, and did not come within the operation of that section.

It follows from this decision that the minor here, who had no guardian *ad litem* at all, was not a party *to the suit in* which the sale was made, and that she was entitled to bring the present *suit to declare it not binding* without regard to the

(1) (1909) I.L.R., 31 All., 572; s.c., 36 I.A., 168.

provisions of section 47, Civil Procedure Code. It follows also from the two decisions last mentioned that the plaintiff, not having been a party to that suit, and not having been sufficiently represented by any one who was a party seeing that the other widow had ceased to have any interest in the estate, the sale was not binding on her, and does not require to be set aside. What has been already said disposes of the question of limitation as the new article 166 and article 12 are alike inapplicable, and the suit which was instituted within three years of the plaintiff's attainment of majority is not barred. The appeal is dismissed with Costs.

SADASIVA AYYAR, J.—The third defendant is the appellant. The plaintiff is the principal respondent. The material facts might be shortly stated thus:—

The plaintiff is the second widow of the judgment-debtor in Original Suit No. 559 of 1903. The decree in that suit was transferred from the Vizianagram District Munsif's Court to the Rajam District Munsif's Court for execution. The Rajam District Munsif's Court on the application of the decree-holder (the present first defendant) allowed execution against the plaintiff (junior widow) and the second defendant (senior widow). Under section 234 of the old Code (section 50, clause 1 of the present Code) it was to the Court which passed the decree to which the application by the decree-holder to execute the decree against the widows of the judgment-debtor ought to have been made and it is that Court which ought to have passed the order allowing execution. However, the Rajam District Munsif's Court somehow passed the order.

Another defect in that order was that, while the two widows jointly represented the estate of the deceased judgment-debtor (each of them representing half the said interest) the decree-holder admitting this fact and knowing that the plaintiff (junior widow) was a minor, represented to the Rajam District Munsif's Court that she was a major, brought her on record as a major and conducted execution proceedings against her and brought to sale the plaint properties including her moiety of the interest thereon as if she was a major. The third defendant purchased the two moieties of the two widows in the Court-auction sale, he also knowing that she (the plaintiff) was a minor. The purchaser (third defendant) and the decree-h-

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(the first defendant) were also guilty of some other fraudulent acts (as found by the lower Appellate Court) in connection with this Court-auction sale.

The sale took place on 19th October 1906 and it was confirmed on the 23rd January 1907. The present suit was brought on the 13th March 1909 praying for the following reliefs:—(a) that the Court-auction sale of 19th October 1906 may be set aside, (b) that it may be declared invalid, (c) that such further or other reliefs might be granted, and (d) that costs might be awarded.

The lower Courts have granted the reliefs prayed for by the plaintiff. I ought to have mentioned that the plaintiff asked for the above reliefs, not by a plaint in a regular suit but by an application put in under section 47 of the Civil Procedure Code, which application was converted into a suit by the District Munsif's Court of Rajam.

So far as the merits are concerned, I need only say that on the findings of the lower Appellate Court, the plaintiff was entitled to a decree as the Court-auction sale was brought about by the fraud of the decree-holder and the Court-auction-purchaser (a fraud having two branches, one directed against the plaintiff, the junior widow of the judgment-debtor, and the other directed against the executing Court which was wilfully kept in ignorance of the fact of the plaintiff's minority and of the offer of the Court-auction-purchaser in another suit (the decree in which was simultaneously executed) of three times the purchase-money for which it was ultimately knocked down. The plaintiff also relied on the contention that the District Munsif's Court of Rajam had no jurisdiction to allow execution against her as the legal representative of her husband as that Court was not the Court which passed the decree. Having regard, however, to the decision of BENSON and MILLER, JJ., in *Thamboo Pillai* v. *Sriramulu Naidu*(1) to the effect that an order of the executing Court allowing execution against the legal representatives of the judgment-debtor is not void, in other words, that the defect of jurisdiction in the executing Court is not such a defect *in the larger sense* as makes its order wholly ineffectual, I do not think that the plaintiff is entitled to succeed on that technical ground alone.

(1) (1907) 17 M.L.J., 300.

Another ground on which the plaintiff (respondent) asks us to uphold the decision of the lower Court is that as the plaintiff was not represented by a guardian in the execution-proceedings she was no party at all to the proceedings and the sale thereunder, that it is only a person who was a party to the execution proceedings that is obliged to set them aside and that a person in the position of a stranger to the proceedings need only obtain a declaration that the proceedings have not affected her rights. Though the plaintiff also prayed in her plaint for setting aside the sale, that prayer may be treated as a surplusage and the suit may be treated as a mere suit for a declaration of the invalidity of the sale as against the plaintiff's rights in her husband's properties.

In answer to this contention of the plaintiff, the appellant urged that according to the decision of the Privy Council in *Malkarjun* v. *Narhari*(1) the legal representative of a deceased judgment-debtor ought to have the execution sale set aside by proper proceedings even though he was not made a party to the execution proceedings and even though a wrong party had been joined as such legal representative; that on similar reasoning, a minor who was brought in as legal representative, but for whom a guardian was not appointed must also have the sale set aside by proper proceedings and should not be allowed to treat it as invalid as against her without a positive cancellation of the sale and that this rule of law applies *a fortiori* in a case like the present where a co-widow, one of the legal representatives, was a major and was on the record. The rejoinder of plaintiff to this contention of appellant is that though in the absence of fraud or collusion, where a Court and a decree-holder treat a person who is not the legal representative of the deceased judgment-debtor as such legal representative or treat one of several legal representatives as the sole legal representative and conduct execution proceedings, such execution proceedings ought first to be set aside by the true legal representative or by those legal representatives who had not been added as such by proper proceedings, that that rule does not apply to a case where the decree-holder and the Court did purport to bring in the proper legal representative (or one of the proper legal representatives) who was a

(1) (1901) I.L.R., 25 Bom., 337 (P.C.).

minor as representing respectively the whole or a portion of the estate of the deceased judgment-debtor but had not put him or her properly on the record by appointing a guardian to act for him or her in the execution proceedings and that this non-applicability of the rule laid down in *Malkarjun* v. *Narhari*(1), becomes more pronounced as, in this case, it was through the decree-holder's fraud and not through his mere ignorance that the minor legal representative was not represented by a guardian. I think that this contention of the plaintiff in rejoinder ought to be accepted. In the Privy Council case in *Rashidunnisa* v. *Muhammad Ismail Khan*(2), not only the decrees obtained against a minor without a proper guardian having been appointed for her but even Court auction sales held of the interests belonging to a minor legal representative (among the several legal representatives of a deceased judgment-debtor) were treated and declared invalid in the suit brought by the said legal representative. Mr. V. Ramesam who partly argued the appellant's case with acuteness and persistence contended that *Rashidunnisa* v. *Muhammad Ismail Khan*(2), did not decide that even such a minor legal representative need not have the sale set aside by proper legal proceedings and need only sue for declaration of the invalidity of the Court auction sales as against her interests. I have carefully read through that judgment. In the Court of First Instance in that case, the suit seems to have been brought (see the report at page 572) for a declaration that the decrees and sales were invalid and also for the relief that they should be set aside so far as the plaintiff was concerned. Thus, as in the present case, there seem to have been prayers for a declaration of invalidity and also for setting aside. (It is not, of course, surprising that plaintiffs in such cases are not clear in their own minds as to whether there is a necessity for a positive cancellation through Court of such sales and decrees or whether mere declaration will do when learned gentlemen of the bar are able to put forward plausible arguments for both views.) In the present case, the plaintiff has been careful to add also a prayer for "further and proper reliefs which the Court may deem fit." In that Privy Council case in *Rashidunnisa* v. *Muhammad Ismail Khan*(2), the Subordinate Judge seems to have

(1) (1901) I.L.R., 25 Bom., 337 (P.C.).
(2) (1909) I.L.R., 31 All., 572; s.c., 36 I.A., 168.

given both the reliefs (see page 575) which reliefs are however spoken of by the reporter as "the relief she" (the plaintiff) "claimed." Their Lordships of the Privy Council do not make any definite pronouncement on the question whether the sales were void as against the plaintiff and need not therefore be set aside and whether therefore a mere declaration of the invalidity will do, or whether they were *only voidable* by the plaintiff as regards her interests and whether therefore she should ask in the suit for a relief as to their cancellation. At page 583, their Lordships simply restore the decree of the Subordinate Judge.

While in *Mallarjun* v. *Narhari*(1), the estate of the deceased judgment-debtor could be treated (owing to the wrong order of the Court which had jurisdiction to pass that order) as sufficiently represented in execution proceedings by the wrong legal representative and hence that the right legal representative should have the sale set aside by taking proper proceedings and could not treat such a sale as completely void, a legal representative who was a minor not represented by a guardian and who could therefore not act at all in the proceedings for the protection of the interests of the estate should be treated *as no party at all to the proceedings,* that the interest in the estate represented by her should also be treated as not put in a position to be legally dealt with by the proceedings in the executing Court and that such a minor legal representative need not bring a suit to have the execution proceedings set aside and might properly content herself with a prayer for a declaration of the invalidity of the execution proceedings as against her and as against the interests she possessed in the deceased judgment-debtor's estate.

I have to deal finally with the contention that the plaintiff's only remedy was by an application under Order XXI, rule 90 (old section 311) of the Civil Procedure Code to have the execution sale set aside and that that application is barred by limitation as not having been brought within the 30 days allowed for that purpose by article 166 of the Limitation Act. As I have remarked before, in this case an application was put in by the plaintiff under section 47 of the Civil Procedure Code and this suit arose out of the transformation of that application into a plaint.

(1) (1901), I.L.R., 25 Bom., 337 (P.C.).

the arrest of the second petitioner. The first petitioner forcibly dragged him away. The Second-class Magistrate of Tiruppattur convicted both the petitioners of offences under sections 225 and 224, Indian Penal Code. The lower Appellate Court confirmed the conviction. The petitioners preferred this revision petition to the High Court.

T. Ranga Achariyar and *R. Kuppuswami Ayyar* for the petitioners.

C. Sidney Smith for the *Public Prosecutor* for the Crown.

TYABJI, J.

ORDER.—The question to be decided is whether the first and second accused were rightly convicted under sections 225 and 224 of the Penal Code for resistance or obstruction to lawful apprehension respectively.

The second accused was the person who was being apprehended. The case against him, it is common ground, depends upon the evidence of the first witness for the prosecution. It has been read out to me and I am of opinion that it discloses no case against the second accused of his having intentionally offered any resistance or illegal obstruction to the lawful apprehension of himself.

I am not prepared to say however that there is no evidence of his having escaped or attempted to escape from custody in which he was detained assuming that he was lawfully detained. He was in custody at the time when the first accused and others came to rescue him. Though the direct evidence is that the others "took him away," from that fact the inference that the second accused escaped with the assistance of those who "took him away" is not very violent or unreasonable.

The result is that I am not prepared to interfere on the finding of fact that the second accused escaped from lawful custody assuming that the custody was lawful.

The next question is whether the second accused was in lawful custody. He had been let out on his own bond to appear in the Court.

The Magistrate refers to the subsequent proceedings in his cross examination in the following terms:—

"I issued the warrant (Exhibit A) on the written requisition of the Sub-Inspector if I remember right. When I issued the warrant I did not ascertain whether the second accused had executed a bond for his appearance whenever required before

VENKATRAMA v. KRISHNA.

PETITION under sections 435 and 439 of the Criminal Procedure Code (Act V of 1898), praying the High Court to revise the order of C. G. AUSTIN, the First-class Sub-Divisional Magistrate of Kumbakonam, in Criminal Appeal No. 311 of 1913, preferred against the order of P. V. S. NARAYANA RAO, President, Bench of Magistrates, Kumbakonam, in Summary Trial No. 1944 of 1913.

The facts necessary for the report are set out in the ORDER below.

K. S. Jayarama Ayyar for the petitioners.

The *Public Prosecutor* for the Crown.

The complainant neither appeared in person nor by pleader.

SPENCER, J.

SPENCER, J.—The question raised at the hearing of the Revision Petition is whether the order of the Sub-Divisional Magistrate setting aside the award of compensation to the accused by the Kumbakonam Bench of Magistrates was bad for want of notice to the accused.

It was argued in the first place that Chapter XXXI of the Criminal Procedure Code does not apply to appeals against orders under section 250 and therefore that section 422 which directs that notice of appeals should merely be given to the officer appointed by Government to receive notices of appeals does not govern the case; in the second place, that in the absence of any provision for notice the maxim '*Audi alteram partem*' should govern the proceedings.

The first argument will not, in my opinion, hold good, for the reason that section 250 does not declare what the powers of an Appellate Court are in disposing of appeals under clause 3 of the section and it is necessary to invoke the aid of section 423 for this purpose. Section 439 illustrates the difference in this respect between section 250 and section 195 which has been held to be a self-contained section.

On the second point I agree with the observation of Sir SUBRAHMANIA AYYAR, J., in *Emperor* v. *Palaniappavelan*(1), that the accused should have notice of the appeal in order that they may have an opportunity of supporting the order passed in their favour.

(1) (1906) I.L.R., 29 Mad., 167.

It seems to be an anomaly which might be cured when the Criminal Procedure Code is amended that no provision should be made for notice to the person most interested in the order being upheld in the case of an appeal being preferred against an order of compensation passed by a Second or Third-class Magistrate, but that if such an order is passed by a First-class Magistrate and the matter is taken to the High Court for revision of his order, section 439 (2), strictly construed, will make it imperative that notice should go to the accused.

A bench of two learned Judges of this Court have held that notice to the accused is not imperative in the case of appeals under section 250 [*Ambakkagari Nagi Reddy* v. *Basappa of Medimakulapalli*(1)], and this is probably what was meant by another Bench in *Guruswami Naiken* v. *Tirumurthi Chetty*(2), when they declared that the accused has no right of audience in such an appeal.

In the former case the Court declined to interfere in revision on the ground that there was no illegality, and I consider that I am bound by that decision, although I am aware that in respect of orders passed under other sections of the Code which do not contain a direction for notice to be given, Courts have sometimes interfered in revision with orders that are merely improper but not illegal for want of notice, following the general rule that an order should not be made to a person's prejudice without giving him an opportunity of being heard, e.g., *Alagirisami Naidu* v. *Balakrishnasami Mudaliar*(3), *Imperatrix* v. *Sadashiv*(4), *In the matter of the petition of Umrao Singh* v. *Fakir Chand*(5) and *In the matter of Teacotta Shekdar*(6).

Here the Sub-Divisional Magistrate's order, besides being improper for want of notice to the accused, requires to be set aside for another reason. He says he finds it difficult to conclude that the complainant's story must necessarily have been false. The Bench held that it was vexatious. No doubt an accusation may be false as well as frivolous and vexatious [*Beni Madhab Karim* v. *Kumud Kumar Biswas*(7)] but it is necessary to find

(1) (1910) I.L.R., 33 Mad., [illegible].
(2) (1915) 27 M.L.J., [illegible].
(3) (1903) I.L.R., 26 Mad., 41.
(4) ([illegible]) I.L.R., [illegible] Bom., [illegible].
(5) (1881) I.L.R., 3 All., 742.
(6) (1882) I.L.R., 8 Calc., [illegible].
(7) ([illegible]) I.L.R., 30 Calc., [illegible].

VENKATRAMA v. KRISHNA.

PETITION under sections 435 and 439 of the Criminal Procedure Code (Act V of 1898), praying the High Court to revise the order of C. G. AUSTIN, the First-class Sub-Divisional Magistrate of Kumbakonam, in Criminal Appeal No. 311 of 1913, preferred against the order of P. V. S. NARAYANA RAO, President, Bench of Magistrates, Kumbakonam, in Summary Trial No. 1944 of 1913.

The facts necessary for the report are set out in the ORDER below.

K. S. Jayarama Ayyar for the petitioners.

The *Public Prosecutor* for the Crown.

The complainant neither appeared in person nor by pleader.

SPENCER, J.

SPENCER, J.—The question raised at the hearing of the Revision Petition is whether the order of the Sub-Divisional Magistrate setting aside the award of compensation to the accused by the Kumbakonam Bench of Magistrates was bad for want of notice to the accused.

It was argued in the first place that Chapter XXXI of the Criminal Procedure Code does not apply to appeals against orders under section 250 and therefore that section 422 which directs that notice of appeals should merely be given to the officer appointed by Government to receive notices of appeals does not govern the case; in the second place, that in the absence of any provision for notice the maxim '*Audi alteram partem*' should govern the proceedings.

The first argument will not, in my opinion, hold good, for the reason that section 250 does not declare what the powers of [illegible] Appellate Court are in disposing of appeals under cl[illegible] the section and it is necessary to invoke the aid of [illegible] for this purpose. Section 439 illustrates the diff[illegible] respect between section 250 and section 195 w[illegible] held to be a self-contained section.

On the second point I agree with th[illegible] SUBRAHMANIA AYYAR, J., in *Emperor* v. *P*[illegible] the accused should have notice of the appeal in order that they may have an opportunity of supporting the order passed in their favour.

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(1) (1906) I.L.R., 29 Mad., 1[illegible]

It seems to be an anomaly which might be cured when the Criminal Procedure Code is amended that no provision should be made for notice to the person most interested in the order being upheld in the case of an appeal being preferred against an order of compensation passed by a Second or Third-class Magistrate, but that if such an order is passed by a First-class Magistrate and the matter is taken to the High Court for revision of his order, section 439 (2), strictly construed, will make it imperative that notice should go to the accused.

A bench of two learned Judges of this Court have held that notice to the accused is not imperative in the case of appeals under section 250 [*Ambakkagari Nagi Reddy* v. *Basappa of Medimakulapalli*(1)], and this is probably what was meant by another Bench in *Guruswami Naiken* v. *Tirumurthi Chetty*(2), when they declared that the accused has no right of audience in such an appeal.

In the former case the Court declined to interfere in revision on the ground that there was no illegality, and I consider that I am bound by that decision, although I am aware that in respect of orders passed under other sections of the Code which do not contain a direction for notice to be given, Courts have sometimes interfered in revision with orders that are merely improper but not illegal for want of notice, following the general rule that an order should not be made to a person's prejudice without giving him an opportunity of being heard, e.g., *Alagirisami Naidu* v. *Balakrishnasami Mudaliar*(3), *Imperatrix* v. *Sadashiv*(4), *In the matter of the petition of Umrao Singh* v. *Fakir Chand*(5) and *In the matter of Teacotta Sheldar*(6).

Here the Sub-Divisional Magistrate's order, besides being improper for want of notice to the accused, requires to be set aside for another reason He says he finds it difficult to conclude that the complainant's story must necessarily have been false. The Bench held that it was vexatious. No doubt an accusation ... lso ... is frivolous and vexatious [*Beni Madhab* ... *In the matter of Byrataiu Naidu*], ... ving compensation is to recompense by way ... to find ... ty who has been vexatiously dragged before a ... Clause (5) of section 250 supports this view.

854. 137. 310. 1907

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(1) (1903) I.L.R., 26 Mad., 127.

VENKATARAMA v. KRISHNA.

SANKARAN NAIR AYYAR, J.

If this is correct, it would be improper to deprive a man of what has been awarded to him without giving him an opportunity of supporting the decision in his favour.

The decision in *Ambakkagari Nagi Reddy* v. *Basappa* of *Medimakulapalli*(1) does not disapprove of the *dictum* of SIR S. SUBRAHMANIA AYYAR, J., in the earlier case. In *Gurusami Naicken* v. *Tirumurthi Chetty*(2) the only question was whether the Public Prosecutor should have had notice. I do not take these decisions to lay down as a rule of law that the accused to whom compensation has been awarded is not entitled to notice before the order in his favour is set aside. It may be that the legislature should provide specifically for notice. But as the law at present stands, I am unable to agree with the contention of the learned Public Prosecutor that the accused is not entitled to be heard in the Appellate Court. The First-class Magistrate should give notice to the accused before disposing of the appeal.

O.M.N.

KUNTHAL-AMMAL v. SURYA-PRAKASAKOYA MUDALIAR.

Held, that the sum of Rs. 4,000 was not disposed of even under the above esiduary clause of the will, that the plaintiff was entitled to it as on an .estacy and that the executor was liable to account for the same from the te of the testator's death on the footing of a wilful default.

The residuary clause in the form in which it appears in English wills is actically unknown to the ordinary testator in Madras and the rules of con- ruction which have been laid down by English Courts are not applicable.

The facts are given in the judgment.

A. Duraiswami Ayyar for the plaintiff.

D. Chamier for the first defendant.

P. Sambandham for the second defendant.

N. Chandrasekhara Ayyar for the third defendant

C P. Ramaswami Ayyar for Venkatasubba Mudaliyar, licant.

BAKEWELL, J.

JUDGMENT.—One Dakshinamurthi Mudaliar was entitled to cer- ı moneys in this Court under decree in Suit No. 45 of 1889. an order in that suit, dated the 27th March 1893, certain neys amounting to Rs. 4,056–12–3 were directed to be trans- red by the Registrar to the Accountant-General for investment. ese moneys represented certain jewels which were found to be inheritance of Dakshinamurthi Mudaliar and not to
If an order nder the will of his father. At the date of the
iterfered in amurthi Mudaliar was a minor, but having attained
ot illegal fo applied, in February 1904, for payment out of
rder should urt; and it appears from Exhibits H and H-1, the
im an oppo nds issued by the Accountant-General, that his
Balakrishnas confined to the moneys specified in that certifi-
he matter of some mistake on the part of the legal advisors of
n the matter that suit, the moneys in the hands of the Registrar
Here the ere not transferred to the Accountant-General
improper for the order of the 27th March 1893 and were lost
side for anot he application was made by the plaintiff for pay-
hat the com m. This is clearly stated by the present first
The Bench he affidavit filed by him in that suit on the 8th of
may be false xhibit C). In paragraph 8 he states "It appears
Karim v. K sum of Rs. 4,056-12-3 which appears to have
e hands of the Registrar of this Honourable Court
(1) (1910 n to exist and was consequently overlooked and
(3) (190 ome to know that the said sum of Rs 4,056-12-3
standing to the credit of this suit." The amount was

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KUNTHAL-AMMAL v. SURYA-PRAKASAROYA MUDALIAR.

BAKEWELL, J.

accordingly paid out of Court to the first defendant who claimed it as the executor of the will of Dakshinamurthi Mudaliar.

This will is dated the 5th December 1905 and the testator died in the same month. The first defendant was appointed executor of the will and has been administering the estate of the deceased, and this suit is brought by the widow of the deceased, on behalf of herself and the other legatees under the will, for an account of the administration of the estate, and for its administration under the orders of the Court. The question has arisen as to whether this sum of Rs. 4,000 and odd passed to the residuary legatee under the will. The will follows the form, which is very well known in this Court, of first stating the property which the testator intends to dispose of and then dividing it up amongst the various beneficiaries. Clause No. 2 of the will reads as follows:—"The house No. 25 in Nattu Pillayar Covil Street and ready money were received (by me) under an order of the High Court according to my adoptive father's will. Of the amount left after deducting the sum spent therefrom, not only is a certain portion lodged in fixed deposit in Arbuthnot's House in my name and in the name of my senior elder brother P. N. K. Suryaprakasaroya Mudaliar but the remaining sum is in shape of secured and unsecured debts and ready money." The testator then proceeds to give various specific and pecuniary legacies, and in clause 13 he says: "The sum which may be left after deducting the abovementioned legacies and such other expenses shall be utilised in my name without defect for pooja once, that is, daily, and repairs and other charities for the temple of Sri Vaideswarar in Poonamallee." Having regard to the fact that the existence of this sum of Rs. 4,000 and odd was unknown to the testator at the time, and to the statement made by him that he is dealing with a particular house and the moneys which had been already received by him from the High Court, I think that the words in clause 13 refer to the residue of the moneys in his hands which have not been already disposed of by him under the will, and that the sum of Rs. 4,000 and odd is not disposed of by him. I may point out that the residuary clause in the form in which it appears in English wills is practically unknown to the ordinary testator in Madras and that the rules of construction which have been laid down by English Courts are not applicable.

KUNTHAL-AMMAL v. SURYA-PRAKASAROYA MUDALIAR.

BAKEWELL, J.

The defendant has also pleaded a release by the plaintiff of all claims against him, but it is clear from the evidence that this document was executed by the plaintiff when she was a minor. It is also perfectly clear that it was executed under a mutual mistake and for that reason also it is not binding on the plaintiff.

The plaintiff has called for and put in a book purporting to be an account of the first defendant of his administration of the estate. It is not in his affidavit of documents and I think it is obviously a fraudulent concoction. Certain entries which appear in it have been proved, by the evidence called by the plaintiff, to be untrue.

There will, therefore, be a decree declaring that the sum of Rs. 4,056-12-3 did not pass under the will of the deceased but will go to the plaintiff as on an intestacy, that the estate must be administered by the Court and that the first defendant must account from the date of the death of the deceased on the footing of wilful default. The first defendant will pay the costs of the suit up to date. The first defendant is ordered to pay this sum of Rs. 4,056-12-3 into Court within ten days

Messrs. *Branson and Branson*, Attorneys for the first defendant.

N.R.

ORIGINAL CIVIL.

Before Mr. Justice Bakewell.

1915. October 7.

MOHIDEEN BEE *et al* (PLAINTIFFS),

v.

SYED MEER SAHEB *et al* (DEFENDANTS) *

Muhammadan law—Joint business by two brothers—Death of one of them—Subsequent businesses by survivor and sons of the deceased—Properties purchased out of profits of joint business—Moneys collected by survivor—Suit by heirs of the deceased for their share—Nature of suit—Limitation Act (IX of 1908), arts. 106, 123 and 127—Joint family property, if exists in Muhammadan law—Exclusion, proof of, if necessary.

Two Muhammadan brothers carried on a joint business, and one of them died nineteen years before suit leaving three sons and three daughters. Some properties were purchased out of the profits of the joint business, in the name of the surviving brother, the latter subsequently carried on several other

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* Civil Suit No. 23 of 1915.

MOHIDEEN BEE v. SYED MEER SAHEB.

businesses together with two of the sons of the deceased brother and with a stranger who died more than three years before suit. The heirs of the deceased brother brought the present suit against the surviving brother and others to recover their share of the properties acquired out of the profits derived from the several businesses and their share of the moneys collected in the same.

Held, that the suit was one for an account and a share of the profits of a dissolved partnership and was barred under article 106 of the Limitation Act (*IX of 1908*).

Under the Muhammadan law there is no such thing as joint family property.

If the members of a Muhammadan family succeed to property on the death of a relation, each of them takes a share of each item of the property, and a suit by such a member for a share is governed by article 123 and not article 127 of the Limitation Act

Abdul Kader v. *Aishamma* (1893) I.L.R., 16 Mad., 61, distinguished.

The facts of the case appear from the judgment.

S. Guruswami Chetti and *A. Hameed Hasan* for the plaintiff.

C. P. Ramaswami Ayyar and *C. Padmanabha Ayyangar* for the first defendant.

C. Krishnama Achariyar for defendants Nos. 2 and 3.

BAKEWELL, J. JUDGMENT.—The plaintiffs in this case are the heirs of one Syed Oomer Sahib who died about nineteen years ago leaving three sons and three daughters all of whom attained their majority considerably more than three years before this suit. Syed Oomer had a brother Syed Meer who survived him and is the first defendant in the case. The plaint itself is very difficult to understand as it appears to intermingle Muhammadan and Hindu law in a very confused manner; but paragraph 7 sets out that Syed Oomer carried on business jointly with his brother the first defendant and that the properties set out in Schedule A "were purchased out of the moneys acquired in the said joint business and the sale-deeds thereof were clandestinely secured by the first defendant in his own name." Clearly the allegation is that the two brothers carried on a partnership business which was dissolved by the death of Syed Oomer and that the properties set out in Schedule A are part of the assets. It is perfectly clear that the proper suit against the first defendant on those allegations would be a suit for an account of the partnership as from the date of the death of Oomer, and the property that would be divisible would be the assets which remained after the realization of the partnership property and the payment of the partnership debts. Such a suit would have become barred more than fifteen years ago, under article 106 of the Limitation Act. Paragraph 8 sets out that after the death of Syed Oomer his two sons, second and

third plaintiffs, one Khader Saheb and the first defendant carried on various businesses and the immoveable properties set out in Schedule B to the plaint were purchased out of the earnings of the joint business. Here again the alleged *partnership* was dissolved on the death of Khader Saheb who admittedly died four years ago, and a suit on account of these transactions is likewise barred. Paragraph 14 sets out that the first defendant with the assistance of the funds of the family carried on a business in partnership with one Patel Hussain. This is apparently part of one of the firms mentioned in paragraph 7 or 8. In that case this claim is also barred. It was admitted that this business was carried on in the years 1903-04 and a suit for an account is therefore barred. Paragraph 15 alleges that some fuel depot business was carried on under the management of Syed Khader Saheb. Any suit with regard to this should have been brought within three years from the dissolution of partnership and the claim to this item is likewise barred. Paragraph 16 alleges that the first defendant received the sale-proceeds of a house which was sold by the first plaintiff and another person (now deceased). The moneys were received by him so long ago as 1895 and any claim against him is barred under article 62 of the Limitation Act. Paragraph 17 alleges that about 1897 the first defendant realised some moneys which had been invested on a mortgage. This claim is barred for the same reason.

I think that the suit is due to some confusion in the minds of the plaintiffs as to the applicability of the Hindu law of joint family property to Muhammadans. There is no allegation in the plaint that the parties agreed to retain the property which they inherited from Syed Oomer on his death undivided and to hold it as tenants-in-common such as appears in the case of *Abdul Kader* v. *Aishamma*(1). It has been argued that article 127 of the Limitation Act will apply, under which the plaintiff has twelve years from his exclusion from joint family property. I think it is perfectly clear that in Muhammadan law there is no such thing as joint family property. If the members of a Muhammadan family succeed to property on the death of a relation each of them takes a share of each item of the property; and the article of the Limitation Act which would apply to a suit for a share would be article 123 which deals with a suit for a

(1) (1893) I.L.R., 16 Mad., 61.

MOHIDEEN BEE v. SYED MEER SAHEB. — BAKEWELL, J. distributive share of the property of an intestate. In the case where one of the heirs, has retained part of the inheritance in his possession, the suit must be brought within twelve years at the latest, after the debts of the intestate have been paid and the inheritance has become divisible among the heirs. In my opinion the suit is barred and must be dismissed with costs.

K R

ORIGINAL CIVIL.

Before Mr. Justice Bakewell.

JAMES RUSSEL McLAREN AND OTHERS (PLAINTIFFS),

v.

V. VEERIAH NAIDU AND OTHERS (DEFENDANTS).*

1915 November 9. *Limitation Act (IX of 1908), art. 183—Revivor of decree of Original Side of the High Court—Revival of decree on notice to one only of two judgment-debtors, not operating as revival against the other.*

A revivor of a decree of the Original Side of the High Court made on an application for execution against one only of two judgment-debtors in the case does not keep the decree alive so as to enable the decree-holder to execute it against the other judgment-debtor after twelve years from the date of the decree.

The facts of the case sufficiently appear from the judgment.

Messrs. *Venkatasubba Rao* and *Radhakrishnayya* for the plaintiffs.

K. Ramachandra Ayyar for the first defendant.

BAKEWELL, J. JUDGMENT.—By a decree of this suit, dated 20th of February 1900, the two defendants in the suit were ordered to pay to the plaintiffs the sum of Rs 10,938-11-0 and interest thereon and costs On the 24th February 1903, one of the plaintiffs in the suit presented an application for execution of this decree which prayed that notice under section 248 of the Code of Civil Procedure might issue to the first defendant to appear and show cause why execution of the decree should not issue and for attachment of a decree in another suit awarding costs to the first defendant. Notice was issued accordingly to the first defendant and on 3rd March 1903 an order was made granting leave to execute as prayed.

On the 25th February 1914 the transferee from the same plaint presented this application for execution of the decree, which states that the last order in execution is that of 3rd March

* Civil Suit No. 203 of 1899.

McLAREN v. VEERIAH NAIDU

BAKEWELL, J.

1903 and prays that the name of the transferee may be brought on record and leave to execute the decree against the second defendant be granted to him, and that notice *may* issue to the defendants. The second defendant appears upon notice issued on this application and objects that the application is barred by limitation by virtue of article 183 of the Limitation Act, 1908. This article prescribes a period of twelve years for an application to enforce a decree of a High Court in the exercise of its ordinary original civil jurisdiction, and provides that, when the decree has been revived, the twelve years shall be completed from the date of such revivor.

The English law is stated by Blackstone in the following passage :— "Writs of execution must be sued out within a year and a day after the judgment is entered ; otherwise the Court concludes *prima facie* that the judgment is satisfied and extinct ; yet, however, it will grant a writ of *scire facias* in pursuance of statute Westen 2-13, Edw.1, c. 45, for the defendant to show cause why the judgment should not be revived and execution had against him ; to which the defendant may plead such matter as he has to allege in order to show why process of execution should not be issued or the plaintiff may still bring an action of debt founded on this dominant judgment, which was the only method of revival allowed by the common law" (Commentaries, 15th Edition, Vol. 3, page 421). The writ recited the judgment and any change in the parties, and commanded the Sheriff to make known to the defendant or other person named in the writ that he should appear before the Court on a specified date to show cause why the plaintiff should not have execution of the judgment (Freeman on Execution, Vol. 1, pages 323 and 324). The form of notice under Order XXI, rule 22 of the Code, which corresponds with section 248 of the Code of 1882, contains substantially the same particulars (Appendix E, form No. 7), and it has been held that the procedure under this section has taken the place of the former procedure by writ of *scire facias* in the Supreme Court, and that an order for execution after notice effects a revivor of a decree within the meaning of article 180 [see *Desoo Venkatesa Perumal Chetty* v. *Srinivasa Ranga Rao*(1).] Where there had been a change of parties subsequent to judgment, as in the case of the death of the judgment-creditor,

(1) (1910) I.L.R., 33 Mad. 187.

McLaren v. Veeriah Naidu.

Bakewell, J.

a writ of *scire facias* was necessary even within a year of the judgment, and it was held that a judgment in *scire facias* conferred a new right upon the executors [*Farran* v. *Beresford*(1) and *Farrell* v. *Gleeson*(2)]. Whether the judgment in *scire facias* conferred a new right when there had been no change of parties seems doubtful *Farran* v. *Beresford*(1) but the writ should conform to the original judgment and should, therefore, be joint when the judgment is joint, and the latter should be revived against all the original defendants (Freeman on Execution, volume 1, page 313). The procedure upon the writ therefore followed that in the action of debt against joint-debtors in which all should be joined and judgment against one extinguished the claim against another joint-debtor [*King* v. *Hoare*(3)].

From the passage from Blackstone cited above it appears that a judgment-creditor had concurrent remedies by the writ of *scire facias* and the action of debt, and it is improbable that the judgments would have different effects.

The order of revivor in the present case was made without notice to one defendant and he had therefore no opportunity of appearing and objecting thereto, and it had no effect as against him or his property, except that, if it were carried out his co-debtor might obtain a right of contribution as against him. It seems to me that an *ex parte* order of this kind should not be held to affect the position of the second defendant in the absence of any direct authority.

In other Courts, where the prescribed period of limitation is very much less than in this Court, an application for execution made against one of several joint-debtors takes effect against them all (article 182); but there is no such provision for cases in which notice of the application is required. The fact that the legislature has expressly provided for one case of joint-debtors and has omitted to make the same provision for another case appears to me to show an intention to place the two cases on a different footing.

For these reasons I hold that the previous order in execution against the first defendant did not revive the decree as against the second defendant, and I dismiss this application with taxed costs.

N.R.

(1) (1843) 10 Cl. & F., 319 at p. 334; s.c., 8 E.R., 764.
(2) (1844) 11 Cl. & F., 702; s.c., 8 E.R., 1269. (3) (1844) 13 M. & W., 494.

APPELLATE CIVIL.

Before Sir Charles Arnold White, Kt., Chief Justice, and Mr. Justice Seshagiri Ayyar.

1914. April 6, 7, 8, 9 and 22.

SREE SREE SREE MADANA MOHANA ANANGA BHEEMA DEO KESARI GAJAPATI, LATE A MINOR BY SREE SREE KUNDANA DEVI PUTTA MAHADEVI, NOW A MAJOR (PLAINTIFF), APPELLANT,

v.

SREE SREE SREE PURUSHOTHAMA ANANGA BHEEMA DEO (FIRST DEFENDANT), RESPONDENT.*

Hindu Law—Adoption—Authority to adopt, construction of—Extrinsic evidence, admissibility of—Successive adoptions—Limits for the exercise of the power to adopt—First adopted son, death of—His widow alive—Second adoption by widow of previous owner, validity of—Impartible zamindari, how far joint family property—Vesting of property in a co-parcener, meaning of—Divesting of property by adoption—Rule as to adoption to last male holder—Applicability of rule to ordinary co-parcenary and to impartible zamindari.

A, the holder of an impartible zamindari, died in 1869 without issue, leaving a widow *K*. Prior to his death, he executed a document authorising her to adopt a son to him. On his death his brother *R* succeeded to the estate. Subsequently in 1870, *K* adopted *B* who recovered the zamindari from *R* by suit and died in 1906 without issue leaving a widow *R M*. On the death of *B*, the son of *R* succeeded to the zamindari but died fifteen days after his accession; the first and second defendants were his sons. In 1907, *K* purporting to act under the power given by her husband adopted the plaintiff as a son to her husband, while *R.M.*, the widow of *B*, was alive. The plaintiff sued to recover the zamindari from the defendants. The latter pleaded that the power to adopt given to *K* by *A* (her husband), did not authorise her to make a second adoption, that the existence of *R M* was a bar to the exercise of the power even if it was not exhausted by the first adoption and that the adoption, not having been made to the last male holder, was invalid.

Held, that the power to adopt given by *A* to *K* was wide enough to enable her to make a second adoption; but that the power was not exercisable by reason of the fact that *R.M.* (*B*'s widow) was alive when the second adoption was made by *K*.

Per WHITE, C.J.—The rule that an adoption should be made to the last male owner is applicable to a joint Hindu family living under the Mitakshara Law.

Sivagnanam Servaigar v. Ramaswamy Chettiar (1912) 22 M.L.J., 55, referred to.

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* Appeal No. 65 of 1911.

McLAREN v. VEERIAH NAIDU.

BAKEWELL, J.

a writ of *scire facias* was necessary even within a year of the judgment, and it was held that a judgment in *scire facias* conferred a new right upon the executors [*Farran* v. *Beresford*(1) and *Farrell* v. *Gleeson*(2)]. Whether the judgment in *scire facias* conferred a new right when there had been no change of parties seems doubtful *Farran* v. *Beresford*(1) but the writ should conform to the original judgment and should, therefore, be joint when the judgment is joint, and the latter should be revived against all the original defendants (Freeman on Execution, volume 1, page 313). The procedure upon the writ therefore followed that in the action of debt against joint-debtors in which all should be joined and judgment against one extinguished the claim against another joint-debtor [*King* v. *Hoare*(3)].

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N.R.

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APPELLATE CIVIL.

Before Sir Charles Arnold White, Kt., Chief Justice, and Mr. Justice Seshagiri Ayyar.

1914. April 6, 7, 8, 9 and 22.

SREE SREE SREE MADANA MOHANA ANANGA BHEEMA DEO KESARI GAJAPATI, LATE A MINOR BY SREE SREE KUNDANA DEVI PUTTA MAHADEVI, NOW A MAJOR (PLAINTIFF), APPELLANT,

v.

SREE SREE SREE PURUSHOTHAMA ANANGA BHEEMA DEO (FIRST DEFENDANT), RESPONDENT.*

Hindu Law—Adoption—Authority to adopt, construction of—Extrinsic evidence, admissibility of—Successive adoptions—Limits for the exercise of the power to adopt—First adopted son, death of—His widow alive—Second adoption by widow of previous owner, validity of—Impartible zamindari, how far joint family property—Vesting of property in a co-parcener, meaning of—Divesting of property by adoption—Rule as to adoption to last male holder—Applicability of rule to ordinary co-parcenary and to impartible zamindari.

A, the holder of an impartible zamindari, died in 1868 without issue, leaving a widow *K*. Prior to his death, he executed a document authorising her to adopt a son to him. On his death his brother *R* succeeded to the estate. Subsequently in 1870, *K* adopted *B*, who recovered the zamindari from *R* by suit and died in 1906 without issue leaving a widow *R.M.* On the death of *B*, the son of *R* succeeded to the zamindari but died fifteen days after his accession; the first and second defendants were his sons. In 1907, *K* purporting to act under the power given by her husband adopted the plaintiff as a son to her husband, while *R.M.*, the widow of *B*, was alive. The plaintiff sued to recover the zamindari from the defendants. The latter pleaded that the power to adopt given to *K* by *A* (her husband), did not authorise her to make a second adoption, that the existence of *R.M.* was a bar to the exercise of the power even if it was not exhausted by the first adoption and that the adoption, not having been made to the last male holder, was invalid.

Held, that the power to adopt given by *A* to *K* was wide enough to enable her to make a second adoption, but that the power was not exercisable by reason of the fact that *R.M.* (*B*'s widow) was alive when the second adoption was made by *K*.

Per WHITE, C.J.—The rule that an adoption should be made to the last male owner is applicable to a joint Hindu family living under the Mitakshara Law.

Sivagnanam Servaigar v. Ramasawmy Chettiar (1912) 22 M.L.J., 55, referred

* Appeal No. 65 of 1911.

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Per SESHAGIRI AYYAR, J.—The canon of construction regarding powers to adopt is not different from that of ordinary testamentary dispositions. The intention of the testator has to be gathered from the language employed by him and from the circumstances existing at the time of the grant of the power.

The authority given by a Hindu to his wife should be regarded as being general in its nature unless conditions have been imposed or limitations placed upon it by him.

Where the exercise of a power to make a second adoption will not result in creating a new line of succession but will only transfer the estate from one intermediate owner to another with the prospect of the latter being eventually divested, the limit of the power to adopt should be held to have been reached.

An estate taken by survivorship by a member of a joint Hindu family is a conditional estate subject to defeasance on the coming into existence by adoption or otherwise, of a new member into the co-parcenary. The rule of law that, in order that an estate once vested may be divested, the adoption should be made to the last male holder, is not applicable to co-parcenary property; and an impartible zamindari is joint family property subject to an exception.

APPEAL against the decree of T. SADASIVA AYYAR, the District Judge of Ganjam, in Original Suit No. 12 of 1908.

The plaintiff claimed to recover the suit properties as the adopted son of Adikonda Deo, who was the Zamindar of Chinnakimedi, an impartible estate. Adikonda died without issue in 1868, leaving a widow Kundana Devi. A few days before his death Adikonda executed a written authority by which he authorised his wife Kundana Devi to adopt a son. The material portion of the document was as follows:—"As I know that my end, consequent upon the expiration of the terms fixed by fate, is approaching (I do hereby declare) that in case you, who are at present pregnant, be delivered of a male issue, the said child alone shall inherit my taluk, as well as all my property, both moveable and immoveable. Becoming the owner of moveable and immoveable properties, till he arrives at proper age you will look after him, or if a daughter be the result of your present pregnancy, you, adopting a son, who may be in your opinion worthy of the throne and making him owner of the taluk, etc., shall, pending the attainment of the said boy's majority, take care of him. This agreement is executed with my free will."

On the death of Adikonda in 1868, his brother Raghunatha succeeded to the zamindari; in 1870 Kundana Devi, in pursuance of the authority of her husband, adopted Brojo Kishoro as a son to him. Brojo Kishoro recovered the zamindari from Raghunatha by a suit which went up on

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As pointed out by their Lordships of the Privy Council in *Suryanarayana* v. *Venkataramana*(1) "the main factor for consideration in these cases is the intention of the husband." I think the only safe rule is to try and ascertain the intention of the donor of the power from the terms in which the authority is given—viewed—in the light of such extrinsic evidence as would be admissible if the question for consideration were the construction of a will. In the present case for instance in my opinion evidence that the husband who gave the authority was at enmity with his brother and was anxious to exclude him from the succession would be admissible extrinsic evidence as evidence of an attendant circumstance. Evidence that the first adopted son lived for thirty-six years, and that events happened between the giving of the authority and the second adoption, which if the testator could have foreseen them, might have made it likely he would restrict the authority to one adoption, seems to me to be extrinsic evidence which is not admissible.

As regards the *argumentum ab inconvenienti* on which the learned Judge lays considerable stress I think considerations of convenience have more relevance in connection with the second and third questions than with the question of construction. No doubt there are passages in some of the judgments in the cases to which the learned District Judge refers which lend support to his view that for the purposes of ascertaining the intention of the donor of the power subsequent events might be looked to. The learned Judge cites a passage from the judgment in *Mussumat Bhoobun Moyee Debia* v. *Ram Kishore Acharj Chowdhry*(2): "It could hardly have been intended that after the lapse of several successive heirs, a son should be adopted to the great-grandfather of the last taker." This was an observation with reference to the particular case before their Lordships. I do not think their Lordships intended to lay down any general canon of construction.

With all respect to the learned District Judge I think the authority in the present case, read by the light of the judgment of the Privy Council in *Suryanarayana* v. *Venkataramana*(1) is sufficiently wide to include a second adoption.

(1) (1906) I.L.R., 29 Mad., 382 (P.C.). (2) (1865) 10 M.I.A., 279.

As regards the second question it is common ground that the adoption was not made to the last male holder, and that, when it was made, the zamindari had vested in Vaishnava Deo and his son successively. The contention on behalf of the appellant was that the rule suggested by Mr. Mayne in paragraph 191 of his book are not applicable to joint Hindu families living under the Mitakshara law.

As regards this question, whilst I do not desire expressly to dissent from the view which my learned brother takes, I am not satisfied that the view which I took though the point did not then actually arise for decision in *Sivagnanam Servaigar* v. *Ramasawmy Chettiar*(1) was wrong. I do not think it necessary to discuss this question further since I agree with my learned brother's conclusion with reference to the third question, viz., that in the present case the power is not exercisable by reason of the fact that Brojo Kishoro's widow was alive when the adoption in question was made by Adikonda's widow.

I would dismiss this appeal with costs.

SESHAGIRI AYYAR, J.—Adikonda Deo, Zamindar of Chinnakimedi, died on the 23rd November 1868. Prior to his death, on the 20th November 1868, he gave authority to his wife Kundana Devi (Exhibit B) to adopt a son to him. She was then pregnant and subsequently gave birth to a daughter. She adopted Brojikrishna Dev on the 20th November 1870. Between the death of Adikonda and the adoption, the zamindari vested in Raghunatha Dev, the undivided younger brother of Adikonda. The authority to adopt having been disputed, a suit was instituted (Original Suit No. 1 of 1871) on behalf of the adopted son to recover possession of the zamindari. The matter went up to the Privy Council. It was decided that the authority to adopt was genuine and that the adopted son divested Raghunatha Dev [*Sri Raghunadha* v. *Sri Brozo Kishoro*(2)]. Brojo Kishoro died on the 3rd September 1906, leaving his widow Ratna Mala surviving him. Vaishnava Dev, the son of Raghunatha Dev, succeeded to the zamindari on the death of Brojo Kishoro. He died on the 18th November 1906, fifteen days after his accession. The defendants Nos. 1 and 2 are his sons. Kundana Devi, the widow of Adikonda, purporting to act on the authority given to her by her husband,

(1) (1912) 23 M.L.J., 55. (2) (1876) 3 I.A., 154.

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adopted the plaintiff on the 1st December 1907. This suit is on behalf of the second adopted son to recover the zamindari from the defendants. The defendants plead that the power given by Adikonda did not enable his widow to make a second adoption, that the existence of Ratna Mala, the widow of Brojo Kishoro, is bar to the exercise of the power, even if it was not exhausted by the first adoption, and that the adoption not having been made to the last male holder, it is invalid. The learned District Judge of Ganjam in a very elaborate judgment held that the plaintiff's claim was unsustainable, and dismissed the suit. Hence this appeal.

The first question for determination is whether under Exhibit B, Kundana Devi can make a second adoption. The genuineness of the document is not in question It does not specify any particular individual as to the boy to be adopted and it imposes no other restrictions. It was rightly conceded by Mr. S. Srinivasa Ayyangar, the learned vakil for the respondent, that the use of the words a "son", was not intended to be restrictive of the number: similar words were held to authorise successive adoptions. *Vide* *Rani Dharam Kunwar* v. *Balwant Singh*(1). It was argued, however, that Adikonda could never have contemplated the death of the first adopted son and the necessity for a second adoption, and therefore the document should not be construed as conferring such a power. The canon of construction regarding powers to adopt is not different from that of ordinary testamentary dispositions. The intention of the testator has to be gathered from the language employed by him and from the circumstances existing at the time of the grant of the power. If Adikonda was capable of looking far ahead, I am prepared to hold that he contemplated that his brother Ragunatha Devi and his descendants should not succeed to the zamindari under any circumstance. In the earlier litigation it is pointed out by Sir JAMES COLVILLE delivering the judgment of the Judicial Committee in *Sri Raghunadha* v. *Sri Brozo Kishoro*(2), that the brothers "were long on bad terms with each other . . . the strife was embittered by subsequent quarrels between the brothers and by the desperate attempt of Ragunada as late as 1852 to oust his brother by proving him to be illegitimate." The judgment goes on to say "that

(1) (1912) 39 I.A., 142. (2) (1876) 3 I.A., 154 at p. 177.

Adikonda would desire to retain by all means in his power the zamindari in his own line." If, therefore, it is permissible to speculate upon what Adikonda would have desired in case his adopted son died, the probabilities are that he intended his widow to make a second adoption, if the law permitted her to do so. See *Bhagwat Pershad* v. *Murari Lall* (1). It is clear that Adikonda was anxious that he should have a son "worthy of his throne"; and the fact that the authority was given at a time when his wife was pregnant accentuates the position that his intention was that his line should be continued by an adopted son in case his wife gave birth to a female child. The case is covered by the decision of the Judicial Committee in *Suryanarayana* v. *Venkataramana*(2). The learned vakil for the respondent contended that the authority given to the widow in that case was more general and comprehensive in its terms than is contained in Exhibit B. But the principle enunciated in that decision applies with equal force to this case. Their Lordships of the Judicial Committee have indicated that the authority given by a Hindu husband to his wife should be regarded as being general in its nature, unless conditions have been imposed or limitations placed upon it by him. At page 387, their Lordships say that they are unable to attach much weight to the opinion of Sir WILLIAM MACNAGHTEN to the effect that a second adoption is invalid. This disapproval is based on the fact that Sir WILLIAM MACNAGHTEN ignored the opinion of the pandit and did not quote any precedents for his conclusion. The *vyavastha* of the pandit which is cited with approval expressly says that as "the deed put in does not restrict the adoption to one son only" another may be adopted. The view of the learned Judges who decided *Suryanarayana* v. *Venkataramana* (2), which was confirmed in *Suryanarayana* v. *Venkataramana*(3), is in entire accordance with the *dictum* of the pandit. *Bhagwat Pershad* v. *Murari Lall*(1) and *Rani Dharam Kunwar* v. *Balwant Singh*(4) also proceed on the same ground. I am therefore of opinion that Exhibit B did confer a power to make a second adoption. The learned District Judge's conclusion to the contrary is largely

(1) (1910) 15 C.W.N., 524.
(2) (1903) I.L.R., 26 Mad., 681.
(3) (1906) I.L.R., 29 Mad., 382 (P.C.).
(4) (1912) 39 I.A., 142.

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based upon two considerations: (1) that no question of spiritual benefit could have been in the contemplation of Adikonda, as it was customary in Uriya zamindari families to appoint a Brahman priest to conduct the funeral ceremonies of the deceased and to perform his annual *sradhas*; and (2) that as the adopted son lived to the age of 36 years, the spiritual cravings of the deceased must have been fully satisfied. It is true that a priest known by the appellation of the *puo-Brahman* is generally appointed by these zamindars to perform their obsequies and *sradhas*. He also takes the *gotram* of the deceased. It is impossible to argue from this that this hired priest exhausts all the spiritual benefits which a son is expected to confer upon a Hindu father. The performance of these two ceremonies is not the only object of having a son: I have no desire to discuss at any length the religious precepts relating to this question. Extracts from the Smritis and from the Mahabarata bearing on this subject are collected in Sarcar's Vyvastha Darpana, Chapter IX. These however do not exhaust the materials but they are fairly representative of the shastric injunctions on the subject. A Hindu father desires a son in order that he may discharge his obligations to his ancestors, to his creditors and to Gods. A *puo-Brahman* can discharge only a small portion of the first function. The debt to God which the Smritis and the Vedas speak of as being incumbent upon the son to discharge, consists not only in the worship of the family deities, but also in the performance of good and pious acts—building and endowing temples, going on pilgrimage, feeding the poor, relieving the needy and the distressed, the digging of tanks, etc. The appointed priest is not expected to perform any of these duties, nor can he pay the debts of the deceased. The idea that the *puo-Brahman* can be a substitute for a son is altogether foreign to Hindu notions. The second objection must now be taken to have been set at rest by their Lordships of the Judicial Committee endorsing the considered opinion of Mr. Justice ROMESH CHUNDER MITTER in *Ram Soondur Singh* v. *Surbanee Dossee*(1). It is enough to say that that view is fully supported by the statement of Sage Yagnavalkya, an authority paramount in this Presidency, who says, "the

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(1) (1874) 22 W.R., 121.

attainment of worlds, immortality and Heaven depend on a son, grandson and great-grandson." That a son who lived for 36 years must be taken to have satisfied this desire to have three generations of descendants can find no support in Hindu theology. I have therefore come to the conclusion that the authority conferred by Exhibit B should not be construed as restrictive of the powers of Kundunni Devi to make a second adoption.

The next question is whether the fact that the plaintiff was adopted to Adikonda who was not the last male holder and after the zamindari had vested in Vaishnava Dev and his son successively invalidates the adoption. The only limitation placed by the text writers on the power to adopt is that "the man should be destitute of a son". The word "son" has been construed in the Dattaka Mimamsa (section 1, paragraph 13) following a text of Manu, to include a grandson and a great grandson. Of course there is the obvious limitation of the death of the donee of the power. She cannot delegate. These are the only qualifications which the ancient law-givers have recognised. But the Courts have from considerations of expediency imposed further restrictions on the exercise of the power to adopt. They are attributable to a desire that property should not be divested frequently and capriciously; and are the outgrowth of ideas tending to the preservation of peace and the quieting of title. Such being, according to my opinion, the principle of judicial pronouncements relating to the divesting of property, I consider that it will not advance justice to crystallise them into inflexible and rigid rules, and then to endeavour to engraft exceptions on them. I shall presently examine the decisions bearing on this question. Before doing so it is necessary to state that the term "vesting of property" as applied to a Mitakshara joint family is liable to be misunderstood. All that is connoted by the phrase is that in the absence of preferential heirs, the presumptive heir is entitled to possession of the estate without prejudice to the rights of others which may accrue at some future time. He takes the surviving interest conditionally: see *Krishna* v. *Sami*(1) and per RUSSEL, J., in

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(1) (1886) I.L.R., 9 Mad., 64.

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Bachoo v. *Mankorebai*(1). He gets no absolute property in it. Under the Hindu law property cannot be in abeyance, but must vest in some one; but the intermediate holder is not to be regarded as the absolute owner of the property. If this view of the position of the person who takes possession pending further development is kept in mind, there will not be much difficulty in reconciling the various rulings upon the point.

Mr. S. Srinivasa Ayyangar contends that the rules suggested by Mr. Mayne in paragraph 191 are not applicable to families living in coparcenary under the Mitakshara system of law. I think the contention is well founded. The paragraph in question has a marginal note "Bengal Decisions," and the rules themselves are obviously inapplicable to joint property. The reference to Madras decisions is explainable on the ground that they relate to separate property obtained by inheritance. The authorities bearing on the question may be considered under two heads: those relating to separate property and to inheritance proper, and those dealing with coparcenary property and to survivorship. *Mussumat Bhoobun Moyee Debia* v. *Ram Kishore Acharj Chowdhry*(2) and *Sri Raghunadha* v. *Sri Brozo Kishoro*(3) represent the two classes. It will be convenient, before proceeding further, to deal with the argument of Mr. S. Srinivasa Ayyangar that the distinction between survivorship and inheritance is arbitrary and that the decided cases lead to the conclusion that joint Hindu family property is really taken by inheritance. He has drawn our attention to stray observations in some of the judgments of the various High Courts; *Krishna* v. *Sami*(4), *Surendra Nandan* alias *Gyanendra Nandan Das* v. *Sailaja Kant Das Mahapatra*(5) and *Bachoo* v. *Mankorebai*(1). It has often been pointed out that sentences should not be detached from the main context and quoted as precedents. I do not think the quotations themselves bear the interpretation placed upon them by the learned vakil. He made a further point that whether survivorship is the rule of law in joint Hindu families or not, it is not so in the case of impartible zamindaris. The

(1) (1905) I.L.R., 29 Bom., 51 at p. 58. (2) (1865) 10 M.I.A., 279.
(3) (1870) 3 I.A., 154 at p. 174.
(4) (1886) I.L.R., 9 Mad., 64 at pp. 67 and 77.
(5) (1891) I.L.R., 18 Calc., 385 at pp. 373, 395 and 397.

course of decisions in this Presidency has established that the heir to a zamindari is to be found by regarding the estate as coparcenary family property; see *Rajah of Kalahasti* v. *Achigadu*(1), *Zamindar of Karvetnagar* v. *Trustee of Tirumalai, Tirupati, etc., Devastanams*(2), *Maharaja of Bobbili* v. *Zemindar of Chundi*(3) and *Thirumal Rao Saheb* v. *Rangadani Rao Saheb*(4). It is true as pointed out by Mr. S. Srinivasa Ayyangar that in section 2, sub-clauses 2 and 3 of the Madras Impartible Estates Act (II of 1904), the successor is spoken of as the heir: it does not follow therefrom that he takes by inheritance. Section 4 of the Act introduces practically the same restrictions upon the power of the proprietor of the estate to make alienations as fetter the acts of the managing member of a joint Hindu family. The law has thus practically been brought into conformity with the state of affairs which existed before the decision of the Judicial Committee of the Privy Council in the *Mahauli* alienation case—*Sartaj Kuari* v. *Deo Raj Kuari*(5). It is true that the zamindari in the hands of the successor has been considered to be assets for the purpose of enabling the decree-holder to proceed against it for the realisation of the amount due to him; to this extent, there is divergence from the normal rule applicable to a joint Hindu family. On the other hand, every incident which attaches to survivorship exists either by virtue of legislation or by judicial pronouncements in an impartible estate. I, therefore, see no reason to hold that the zamindari of Chinnakimedi is not governed by the rule of survivorship relating to joint family property.

Turning now to the two classes of cases mentioned by me, I shall first deal with those relating to co-parcenary property. The decision in *Sri Raghunadha* v. *Sri Brozo Kishoro*(6) does not directly bear upon the question; but it is authority for the position that even when the estate had vested in a male owner who was capable of transmitting it to his heirs in full proprietary right the adoptee was entitled to divest such person. The next case is the Guntoor case, *Rajah Vellanki Venkata*

(1) (1907) I.L.R., 30 Mad., 454.
(2) (1909) I.L.R., 32 Mad., 429.
(3) (1912) I.L.R., 35 Mad., 103.
(4) (1912) 23 M.L.J., 74.
(5) (1888) I.L.R., 10 All., 272.
(6) (1876) 3 I.A., 154.

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Krishna Row v. *Venkata Rama Lakshmi Narsayya*(1). In that case, the property vested in the first adopted son who died an infant and unmarried. The mother succeeded and made a second adoption. This was upheld by the Privy Council. The theory that the adoption should be to the last male holder fails in this case. *Suryanarayana* v. *Venkataramana*(2) illustrates the same position. The first adopted son lived for over ten years. It was held that the mother was competent to make a second adoption. Here again, the theory that the adoption should be to the last male holder falls to the ground. In *Bachoo Hurkisondas* v. *Mankorebai*(3), there were two brothers, one of them died while his wife was pregnant. The surviving brother gave power to his wife to adopt and died. The adoption was made after a son was born to the predeceased brother. Overruling the contention that *Mussumat Bhoobun Moyee Debia* v. *Ram Kishore Acharj Chowdhry*(4) applies, it was held that the adoption conferred title to the estate of his adoptive father. *Rani Dharam Kunwar* v. *Balwant Singh*(5) is the last of the Privy Council rulings on the question. In that case during the pregnancy of the wife, power to make successive adoptions was given—a male child was born but died soon. Two adoptions followed in quick succession: both the adoptees died: a third adoption was made, but was questioned by the adopting widow herself as being invalid: the decision itself was based upon the principle of estoppel as against the widow. But their Lordships take care to say that the adoption was otherwise valid and binding. In page 148, there is this observation. "Of course, the estoppel pleaded against the Rani must be taken as purely personal. It does not bind any one who claims by an independent title, but, in view of the decision now given, that the respondent was, in fact, duly adopted, further litigation on the point may be taken as happily out of the question."

These decisions of the Privy Council are consistent only with the principle that the theory that the adoption should be made to the last male holder does not apply to joint Hindu families living in co-parcenary. I shall very briefly deal with the

(1) (1876) 4 I.A., 1.
(2) (1903) I.L.R., 29 Mad., 382 (P.C.)
(3) (1907) 34 I.A., 107.
(4) (1865) 10 M.I.A., 279.
(5) (1912) 39 I.A., 142.

decisions of the High Courts. In *Venkappa Bapu* v. *Jivaji Krishna*(1), it was held that where the mother succeeded after the death of the son's widow, the adoption was valid. In *Surendra Nandan* alias *Gyanendra Nandan Das* v. *Sailaja Kant Das Mahapatra*(2) an adoption by a predeceased brother's widow was held good. The same principle was applied where property had vested in a member of the joint family to the exclusion of a disqualified member of that family. It was held that the son of this disqualified person succeeded to his share in the joint family property [*Krishna* v. *Sami*(3)] These decisions show that the *last male holder's* theory is inapplicable to joint Hindu families.

On the other hand, it is now settled law that where property had passed by inheritance and had vested in a full owner, subsequent adoptions would not divest his property. *Booban Moyee's* case, [*Mussumat Bhoobun Moyee Debia* v. *Ram Kishore Acharj Chowdhry*(4)] decides this explicitly and has been followed in *Pudma Coomari Debi* v. *Court of Wards*(5), *Bhubaneswari Debi* v. *Nilkomul Lahiri*(6), *Thayammal* v. *Venkatarama*(7) and in *Rathna Mudaliar* v. *Raghunadha Bhatter*(8). The head-note in the last case is incorrect. The case was one of inheritance and not of survivorship. These are all cases really of collateral succession. Where property is taken by inheritance there is no equity by which it can be divested in favour of a person who had no claim on the inheritance. To this class of cases, the rules enunciated by Mr. Mayne will apply; and I feel no doubt that it was never the intention of that learned writer to formulate a set of rules applicable to joint and separate properties alike. Mr. S. Srinivasa Ayyangar pressed upon our attention the case decided by the learned CHIEF JUSTICE and Mr. JUSTICE PHILLIPS [*Sivagnanam Servaigar* v. *Ramasawmy Chettiar*(9)]. In that case the question was whether an adopted son can question the alienation made by a person in whom the property had vested prior to the adoption. It was held that the intermediate holder was not in the position of a trespasser.

(1) (1901) I.L.R., 25 Bom., 306.
(2) (1891) I.L.R., 18 Calc., 385.
(3) (1886) I.L.R., 9 Mad., 64.
(4) (1865) 10 M.I.A., 279.
(5) (1881) 8 I.A., 229.
(6) (1885) 12 I.A., 137.
(7) (1887) I.L.R., 10 Mad., 205 (P.C.); s.c., 10 I.A., 67.
(8) (1898) 8 M.L.J., 173.
(9) (1912) 22 M.L.J., 85.

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The learned CHIEF JUSTICE points out at page 93 that the language of the judgment in *Mussumat Bhoobun Moyee Debia* v. *Ram Kishore Acharj Choudhry*(1) is not appropriate to a case of survivorship. Without giving any decision on the point, His Lordship indicates that the weight of authority is in favour of applying that decision to joint Hindu families; no final conclusion was arrived at, because it was not necessary for the decisions of the case; and I do not think that case helps the respondent. The learned vakil for the respondent invited our attention to the rulings in *Chandra* v. *Gojarabai*(2), *Krishnarav Trimbak* v. *Shankarrav Vinayak*(3), *Manikyamala Bose* v. *Nanda Kumar Bose*(4) and *Aditi Suryaprakasa Rao* v. *Nidamarty Gangaraju*(5). It is not necessary to discuss the question considered in these rulings, especially in the Bombay cases, as to whether a co-parcenary comes to an end when there are no male members in the family, and that the property then passes to the widow of the surviving member of the joint Hindu family by inheritance. The learned Judges seem to regard the joint family as a quasi-corporation which loses this character by the death of the last male member. Whether this position is correct or not, these cases do not afford any assistance in deciding the question before us.

I have examined the authorities at some length, and my conclusion is that the estate taken by survivorship by a member of the joint Hindu family is a conditional estate subject to defeasance on the coming into existence by adoption or otherwise of a new member into the co-parcenary, that the rule of law that in order that an estate once vested may be divested the adoption should be made to the last male holder is not applicable to co-parcenary property, and that an impartible zamindari is joint family property subject to an exception.

There remains yet another question and that is whether the existence of Ratna Mala, the widow of Brojo Kishore, is a bar to the adoption made by Kundana Devi. Mr. K. Srinivasa Ayyangar argues that the only limit to the power to adopt is that mentioned in the text of Dattaka Mimamsa already quoted; it is true that the legislature has fixed no period of limitation

(1) (1865) 10 M.I.A., 279. (2) (1890) I.L.R., 14 Bom., 463.
(3) (1893) I.L.R., 17 Bom., 164. (4) (1906) I.L.R., 33 Calc., 1306.
(5) (1910) I.L.R., 33 Mad., 228.

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and as pointed out in *Mutasaddi Lal* v. *Kundan Lal*(1) there is no limit of time within which an adoption should be made. First adoptions made long after the granting of the authority have been upheld on this ground. See also Mayne, paragraph 154, and the cases cited at the footnote. Our attention has been drawn by the learned vakil for the respondent to *Ramkrishna* v. *Shamrao*(2), where Justice CHANDAVARKAR in delivering the opinion of the Full Bench says: "Where a Hindu dies leaving a widow and a son, and that son dies leaving a natural born or adopted son or leaving no son but his own widow to continue the line by means of adoption, the power of the former widow is extinguished and can never afterwards be revived." It is not easy to trace the origin of this rule; it is stated in some of the decided cases that the law does not favour an unlimited user of the power to adopt. Although the power to adopt must receive a liberal interpretation, it is not, in my opinion, inconsistent with this principle that some limitation should be placed on the donee of the power. Law does not favour constant interruptions with possession; and it is desirable that some rule of equity should be enforced against permitting successive adoptions. In the present case, Brojo Kishore was 36 years of age when he died. He had no male issue at the time of his death. He made no adoption himself. As his widow Ratna Mala is not a party to this litigation, we are not in a position to say whether he has authorised her to make an adoption; nor can we assert that this lady is not in a position to make an adoption. If she adopts, the plaintiff, as admitted by the learned vakil for the appellant, can have no claim to the estate. Where the exercise of a power to make a second adoption will not result in creating a new line of succession, but will only transfer the estate from one intermediate owner to another with the prospect of the latter being eventually divested, the Courts might well say that the limit of the power to adopt has been reached. Mr. Justice CHANDAVARKAR has taken this view and I find he is supported by authorities; West and Buhler, 984 and 985, *Payapa* v. *Appanna*(3); *Thayammal* v. *Venkatarama*(4) and *Amulya Charan Setl* v. *Kali Das Sen*(5). It

(1) (1906) I.L.R., 28 All., 377. (2) (1902) I.L.R., 26 Bom., 526.
(3) (1899) I.L.R., 23 Bom., 327.
(4) (1887) I.L.R., 10 Mad., 205 (P.C.), s.c., 14 I.A., 67.
(5) (1905) I.L.R., 32 Calc., 861.

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is true that in these latter cases, the property vested in the son's widow. In the present case the property does not vest either in the mother-in-law or in the daughter-in-law. I do not think this fact can affect the principle that where a person is in existence who is competent to adopt a boy in whom the full proprietary right will vest, that must be taken to be the limit of the exercise of the power by the donee to make successive adoptions. I have therefore come to the conclusion, though not without hesitation that the power of Kundana Devi to make a second adoption is not exercisable under the circumstances of this case. It is upon this ground alone that I hold that the appeal fails. I agree in dismissing it with costs.

K.R.

APPELLATE CIVIL.

Before Mr. Justice Wallis and Mr. Justice Oldfield.

1914 April 21, 22 and 29.

DEVAGUPTAPU KAMESWARAMMA (FOURTH DEFENDANT), APPELLANT,

v.

VADDADI VENKATA SUBBA ROW AND FOUR OTHERS (PLAINTIFF, DEFENDANTS NOS. 1 to 3 AND LEGAL REPRESENTATIVES OF FIRST DEFENDANT), RESPONDENTS.*

Hindu Law—Surety-debt of father—Son's liability for—Order in execution against father as surety—Subsequent partition between father and son—Attachment of property allotted to son's share—Non-liability of such property—Claim petition by son, dismissal of—Subsequent suit by son—Liability of surety, if enforceable in execution—Civil Procedure Code (Act XIV of 1882), ss. 253, 583 and 610—Civil Procedure Code (Act V of 1908), sec. 53, inapplicable, where father is living.

The second defendant obtained a decree for maintenance against the third defendant. Pending an appeal against the decree, the former recovered the amount in execution on the first defendant standing surety for the second defendant. The decree was reversed on appeal, the third defendant applied in execution proceedings for restitution against the first defendant as surety; an order was passed in execution for recovery of the amount against the first defendant and certain lands were attached. The plaintiff who was the son of the

* Second Appeal No. 1667 of 1912.

first defendant, filed a claim petition objecting to the attachment on the ground that under a partition between his father and himself made subsequent to the order against the first defendant but before the attachment, the properties in question had fallen to his (plaintiff's) share and consequently were not liable to attachment. The petition was dismissed. The plaintiff thereupon brought the present suit for a declaration that the suit properties were not liable to be attached under the order passed against the first defendant.

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Held, that, under sections 253 and 583 of the Civil Procedure Code (Act XIV of 1882), an order can be passed against a surety for recovering in execution proceedings the amount due from him

Held further, that a Hindu son is liable for the surety debt of his father, to the extent of the joint family property which came to his hands at partition.

Ramachandra Padayachi v. *Kondayya Chetti* (1901) I.L.R., 24 Mad., 555, followed.

But a decree for such a debt obtained against the father before partition is not executable after partition against the son and the joint family property allotted to him

Krishnasami Konan v *Ramasami Ayyar* (1899) I.L.R., 22 Mad., 519, followed.

Section 53 of the Code of Civil Procedure (Act V of 1908), which provides that property, in the hands of a son, which under the Hindu law is liable for the payment of a debt of his deceased father in respect of which a decree has been passed, shall be deemed to be assets in the hands of the legal representative, only applies to the case of a deceased father, the principle of the section cannot be extended to a case where the father is living

SECOND APPEAL against the decree of A. SAMBAMURTHI AYYAR, the Subordinate Judge of Rajahmundry, in Appeal No. 42 of 1912, preferred against the decree of V. RANGA RAO, the District Munsif of Peddapuram, in Original Suit No. 285 of 1908.

The material facts appear from the judgment of the High Court.

A. Krishnaswami Ayyar for the appellant.

The Honourable Mr. *B. N. Sarma* for the first respondent.

P. Narayanamurti for the fourth respondent.

WALLIS, J.

WALLIS, J.—In this case the present second defendant obtained a decree for maintenance against the third defendant and recovered in execution Rs. 637 which she was allowed to draw on giving security under section 253, Civil Procedure Code. The surety was the first defendant, the father of the plaintiff. The decree was reversed by the High Court, and the first defendant as surety was ordered to pay the third defendant the money which had been recovered from him by the second defendant under the decree. The order was made under section 253, Civil Procedure Code, which read with section 583, Civil Procedure

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WALLIS, J.

Code, was applicable to security for the performance of appellate decrees according to *Thirumalai* v. *Ramayyar*(1).

This decision has been questioned before us on the ground that it is inconsistent with the later decision in *Arunachallam* v. *Arunachallam*(2) decided by the same Judges. In that case the security had been given pending an appeal to the Privy Council, and it was necessary to invoke the aid of section 610, Civil Procedure Code, to render section 253 applicable to the case. The learned Judges apparently were of opinion that it might have been invoked but for the fact that in 1888 a special proviso had been introduced into section 610, that, in so far as the order awards costs to the respondents, it may be executed against a surety therefor to the extent to which he has rendered himself liable in the same manner in which it may be executed against the appellant. With great respect it appears to me that what we have to look to is the meaning of sections 253 and 610 as originally enacted in 1877. The fact that the legislature eleven years later in 1888 inserted a proviso in section 610 only shows the interpretation which the framers of the amendment were disposed to place upon the sections as they then stood. This interpretation is not authoritative, and in these circumstances the addition of the proviso is no reason for modifying the opinion which the Court would otherwise have arrived at on the construction of the original sections. Even where a proviso of this kind is introduced into a section at the time of enactment, it is often done *ex abundanti cauteld*, and it by no means follows that the operation of the section is affected thereby. In these circumstances I prefer to follow the earlier decision of the learned Judges in *Thirumalai* v. *Ramayyar*(1), which has been cited with approval in *Chettikulam Venkatachala Reddiar* v. *Chettikulam Kumara Venkitachala Reddiar*(3), more especially as this interpretation of the sections had been adopted in the express provisions of the present Code. I am therefore of opinion that the order was rightly made against the first defendant.

This order the third defendant executed against property which fell to the plaintiff at a partition between himself and his

(1) (1890) I.L.R., 13 Mad., 1. (2) (1892) I.L.R., 15 Mad., 203.
(3) (1905) I.L.R., 28 Mad., 377.

father, the first defendant, after the date of the order against the father. The plaintiff objected that the properties were not liable to attachment and on the rejection of his claim filed the present suit to establish his right. The defence in the lower Court was that the partition was collusive and inoperative, but the lower Courts rejected this contention and gave the plaintiff a decree.

In Second Appeal the point has been taken that, even supposing the partition to have been good, the present third defendant is none the less entitled to execute decree against the plaintiff, to the extent of the joint family property which has come to him, the order equivalent to a decree which he obtained against the plaintiff's father before the partition. The order under section 253 may, I think, be considered as equivalent to a decree against the father and it appears to be now settled in this Court that a suretyship liability such as this is one which a Hindu is under a pious obligation to discharge.

I think it is also clear that plaintiff as a Hindu son is liable for the debt to the extent of the joint family property which came to his hands at partition, *Ramachandra Padayachi* v. *Kondayya Chetti*(1) The only question then is, is a decree for such a debt obtained against the father before partition executable after partition against the son and the joint family property allotted to him. In *Krishnasami Konan* v. *Ramasami Ayyar*(2), where the father had contracted the debt before partition, and a suit had been brought and a decree passed against him after partition, it was held that the decree could not be executed against the properties which had fallen to the son on partition, because "the principle upon which the son cannot object to ancestral property being seized in execution for an unsecured personal debt of the father is, that the father, under the Hindu law, is entitled to sell on account of such debt the whole of the ancestral estate." This necessarily implies that at the time the property is attached it remains the undivided property of the father and the son. The same view has been taken under very similar circumstances by MILLER and KRISHNASWAMI AYYAR, JJ., in *Lakshmana Chettiar* v. *Govindarajulu*

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(1) (1901) I.L.R., 24 Mad., 555. (2) (1899) I.L.R., 22 Mad., 519.

KAMESWARAMMA v. VENKATA SUBBA ROW. — WALLIS, J.

Naidu(1), see also *Rathna Naidu* v. *Aiyanachariar*(2). It is sought to distinguish these cases on the ground that the order equivalent to a decree was made against the father in this case before the date of partition: but this circumstance does not appear to make any difference, as, at the date of execution the property now in question had ceased to be joint family property, and the cases referred to on the other side—*Jagabhai Lalubhai* v. *Bhubandas Jagjivandas*(3), *Deendyal Lal* v. *Jugdeep Narain Singh*(4), *Suraj Bunsi Koer* v. *Sheo Proshad Singh*(5), *Nanomi Babuasin* v. *Modhun Mohun*(6) and *Govind* v. *Sakharam*(7)—were all cases in which the property remained joint and so subject to alienation by the father in satisfaction of his debt. Lastly it has been attempted to base an argument on section 53 of the present Code which provides that for the purpose of sections 50 and 52, property in the hands of a son which under the Hindu law is liable for the payment of the debt of his deceased father in respect of which a decree has been passed shall be deemed to be property of the deceased father which has come to the hands of his son as his legal representative. This statutory fiction however only applies to the case of a deceased father, and we should not be justified in extending it to a case where the father is still living, or in inferring, as has been suggested, that, as the decree could under the section be executed against the property in question if the father was dead, it must *a fortiori* be executable against the same property where the father is alive. The answer is that the legislature has not made any such provision. In the result the Second Appeal fails and is dismissed with costs.

OLDFIELD, J.

OLDFIELD, J.—I concur.

K.R

(1) (1898) 8 M.L.T., 349.
(2) (1908) 18 M.L.J., 509.
(3) (1887) I.L.R., 11 Bom., 37.
(4) (1877) 4 I.A., 247.
(5) (1879) 6 I.A., 88.
(6) (1886) I.L.R., 13 Calc., 21 (P.C.).
(7) (1904) I.L.R., 28 Bom., 383.

APPELLATE CIVIL.

Before Mr. Justice Sadasiva Ayyar and Mr. Justice Tyabji.

THAYAMMAL (DEFENDANTS NOS. 3 AND 4), APPELLANTS,

1914. July 17.

v.

KUPPANNA KOUNDAN (PLAINTIFF), RESPONDENT.*

Hindu Law--Guardian of a minor's person and property—Natural guardians, who are—Rights of parents, elder brother and direct male and female ancestors—Paternal aunt, not a natural guardian—King's rights, paramount—Recourse to Court, necessary, if no natural guardian alive—Alienation by de facto guardian—Setting aside, if necessary—Suit for possession—Limitation Act (IX of 1908), art 44 or 144, applicability of.

Under the Hindu Law, nobody else than the father and the mother of a minor (with probable exceptions in favour of the elder brother and the direct male and female ancestors) is entitled as a matter of natural right to be and to act as a guardian of a minor's person and property; consequently a paternal aunt is not a natural guardian of a minor.

Where there is no natural guardian alive, recourse must be had to the Court, as representing the rights of the King which are paramount to even the rights of the parents, for the appointment of a guardian

Alienations without necessity, made by a *de facto* guardian, need not be set aside.

Article 44 of the Limitation Act (IX of 1908) does not apply to alienations by unauthorized guardians.

SECOND APPEAL against the decree of K. SRINIVASA RAO, the Subordinate Judge of Coimbatore, in Appeal No. 174 of 1911, preferred against the decree of S. NARAYANASWAMI AYYAR, the District Munsif of Udamalpet, in Original Suit No. 131 of 1910.

The plaintiff sued to recover possession of certain lands which originally belonged to him but had been alienated during his minority by his mother as his guardian and after her death by his paternal aunt acting as his guardian. The sale by the mother was made under Exhibit II, dated 27th June 1895, while the sale by the paternal aunt was made under Exhibit III, dated 26th May 1899. The plaintiff instituted the present suit in 1910. It was found by the Lower Courts that the plaintiff had attained majority more than three years prior to the suit. The lower Courts found that the alienations were not supported by necessity. The lower Appellate Court held that the suit in respect of the land

* Second Appeal No. 1437 of 1912.

THATAMMAL v. KUPPANNA KOUNDAN.

alienated by the mother as guardian was barred by limitation. As regards the lands sold by the paternal aunt acting as guardian of the plaintiff, the lower Appellate Court held, on appeal, that the paternal aunt was not a natural guardian and that the suit was not barred by limitation and decreed the claim in respect of the same in favour of the plaintiff. The lower Appellate Court observed that article 44 of the Limitation Act (IX of 1908) was not applicable to a suit to recover possession of lands sold without necessity by a person who was not a natural guardian or a guardian appointed by a Court, but that article 144 of the Limitation Act applied to the suit which was within twelve years of the alienation. The defendants appealed to the High Court.

T. Ramachandra Rao for the appellants.

T. M. Krishnaswami Ayyar for the respondents.

SADASIVA AYYAR, J.

SADASIVA AYYAR, J.—Following *Kristo Kissor Neoghy* v. *Kadermoye Dossee*(1) and *Musst. Bhikuo Koer* v. *Musst. Chamela Koer*(2), I hold that under Hindu Law, nobody else than the father and mother of a minor (with probable exceptions in favour of the elder brother and the direct male and female ancestors of the minor) is entitled as a matter of natural right to be and to act as guardian of a minor's person and properties. Recourse must be had to the Court (representing the rights of the King which are paramount to even the rights of the parents) where there is no natural guardian alive.

The paternal aunt was therefore not the natural guardian of the plaintiff when she made the unauthorized alienation.

Assuming that she was the *de facto* guardian, her alienation for no necessity need not be set aside. Article 44 of the Limitation Act does not apply to alienations by unauthorized guardians—see *Mata Din* v. *Ahmed Ali*(3). The judgment of the lower Appellate Court is right in the main but in the decretal portion, it decrees possession of the entire lands covered by Exhibit III forgetting that so far as the portions covered by Exhibit II are concerned, the claim had been held to be barred by limitation.

The lower Court's decree will be modified accordingly, that is, by providing that the plaintiff's suit shall be decreed only as regards the portion or fraction of the lands covered by

(1) (1878) 2 C.L.R., 553. (2) (1897) 2 C.W.N., 191.
(3) (1912) I.L.R., 34 All., 213.

Exhibit III which is not included in Exhibit II and it will be confirmed in other respects. The appellants will pay half of respondent's costs in this Court and bear their own. THAYAMMAL v. KUPPANNA KOUNDAN.

TYABJI, J.—No direct authority is cited to us showing that a paternal aunt is a natural guardian (as distinguished from a testamentary guardian or a guardian appointed by Court) of a minor under Hindu Law. TYABJI, J.

Mohanund Mondul v. Nafur Mondul(1) is however cited in which it is said that "it was not questioned and it could not very well be questioned" that a paternal grandmother of the minor who has acted as the manager of the minor's property "answered to the description of natural guardian in this case." It is argued for the appellants that this is a ruling that a paternal grandmother is a natural guardian and that therefore a paternal aunt may also be such and may therefore be clothed with the powers of a guardian without being appointed as such by competent authority. It may be that the remarks just preceding the statements I have cited may require reconsideration in view of what was said by their Lordships of the Privy Council in *Mir Sarwarjan* v. *Fakhruddin Mahomed Chowdhuri*(2). Apart from this, however, as my learned brother has said in his judgment, (which I have had the benefit of reading) a female in the direct line of ascent stands in Hindu Law on a totally different footing as regards rights of guardianships from a collateral like a paternal aunt.

The only other authorities cited for the appellant consists of passages from Macnaughton's Hindu Law and similar text books where it is said that paternal kinsmen have the right of guardianship. It is not quite clear whether female paternal kinsmen (not being in the direct line of ascent) are intended to be included amongst those relations who have the "natural" right of guardianship. Mayne's Hindu Law (8th edition), page 278, paragraph 211, on the other hand expressly refers to male kinsmen alone as having this right. And this view is supported by the decision in *Kristo Kissor Neoghy* v. *Kadermoye Dossee*(3) and by the view expressed by my learned brother in his judgment.

(1) (1899) I.L.R., 26 Calc., 820 at p. 825. (2) (1911) I.L.R., 39 Calc., 232.
(3) (1878) 2 C.L.R., 283.

THAYAMMAL v. KUPPANNA KOUNDAN.

TYABJI, J.

I therefore agree in the order proposed by my learned brother.

The memorandum of objections is allowed with costs as Exhibit III was not executed for purposes binding on the plaintiff and it is not proved that Rs. 50 (the money recovered by the plaintiff's aunt) was spent for the plaintiff's benefit.

K.R.

APPELLATE CIVIL.

Before Sir John Wallis, Kt., Officiating Chief Justice, and Mr. Justice Kumaraswami Sastriyar.

1914. July 17 and 20.

SRI MEERJA RAJA SRI POOSAPATI VIJIARAMA GAJAPATHI RAJI MAHARAJ MANYA SULTAN BAHADUR, MAHARAJA OF VIZIANAGARAM (PLAINTIFF), APPELLANT,

v.

THE COLLECTOR OF VIZAGAPATAM AND SEVENTY OTHERS (DEFENDANTS NOS. 1—3 AND 5—63), RESPONDENTS.*

(Madras) Assessment of Land Revenue Act [illegible] *meaning of—Permanent lessee, not an* [illegible] *tration and assessment—Proprietor or owner under* [illegible] *—Madras Hereditary Village Offices Act (III of 1895).*

Grantees, holding under perpetual grants subject to payment to the zamindar (the grantor) of a small rent under the name of *jodi*, *kattubadi* or *poruppu*, are not liable to have their lands separately registered and to have separate assessment imposed upon them, under the provisions of the Madras Act I of 1876.

A permanent lessee is not included in the term "owner" as used in section 2 of the Madras Assessment of Land Revenue Act (I of 1876).

A permanent lessee is not a proprietor or owner under Regulation XXV of 1802 or the Madras Hereditary Village Offices Act (III of 1895).

Venkateswara Yettiappah Naicker v. Alagoo Mootoo Servagaren (1861) 8 M.I.A., 327, *Hari Narayan Singh v. Sriram Chakravarti* (1910) 37 I.A., 136, *Durga Prasad Singh v. Braja Nath Bose* (1911) 39 I.A., 133 and *Kshetrabaro Bissoyi v. Sobhanapuram Harikristna Naidu* (1910) I.L.R., 33 Mad., 310, followed.

Robert Fischer v. The Secretary of State for India in Council (1899) I.L.R., 22 Mad., 270 (P.C.), distinguished.

Kamalammal v. Raju Naicker (1896) I.L.R., 19 Mad., 203, distinguished.

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* Appeal No. 224 of 1909.

APPEAL against the decree of D. RAGHAVENDRA RAO, the Subordinate Judge of Vizagapatam, in Original Suit No. 34 of 1906.

MAHARAJA OF VIZIANAGARAM v. THE COLLECTOR OF VIZAGAPATAM

The facts of the case appear from the judgment.

S. Srinivasa Ayyangar and *K. V. Krishnaswami Ayyar* for the appellant.

The *Government Pleader* for the first respondent.

The Honourable Mr. *B. N. Sarma* for thirty-sixth respondent.

V. Ramesam for respondents Nos 2 to 15, 20 to 45, 52 to 61 and 66 to 70.

S. Duraiswami Ayyar for the seventy-first respondent.

WALLIS, OFFG. C.J., AND KUMARASWAMI SASTRIYAR, J.

The judgment of the Court was delivered by WALLIS, OFFG. C.J.—We think the Subordinate Judge in this case was right. The first question relates to the nature of the interest at present enjoyed by the defendants. By a deed, dated the 1st June 1808, the predecessor of the present plaintiff granted a mokhasa patta to three individuals of three villages without reserving any rent. There is no doubt, and it has been so held in some cases in this Court, such tenures were formerly believed to be resumable on the death of the grantor. On the death of the grantor in this case when the estate came under the management of the Collector as manager in 1845 three villages were resumed. That is to say, the villages were attached or kept under zufit and the profits of the villages were enjoyed apparently by the zamindar for some years. Then in the year 1853, a petition was put in (Exhibit B) stating that the villages had been granted on service tenure to the ancestors of the petitioners and that the zamindar had been pleased to release them from attachment "to be enjoyed by us, nine sons of the aforesaid Vijia Gopalrazu (one of the grantees). I agreed to pay a kattubadi of Rs. 300 a year newly fixed." Then Exhibit C is an order of the zamindar giving effect to this arrangement and Exhibit D is a further order addressed to the office amin and it says "Inasmuch as the said village were not formerly charged with kattubadi and as Seetharama Razu, one of the sons of Vijiagopala Razu (that is to say, one of the original grantees) presented a sanad to us stating that the nine sons of late Kakarlapudi Vijiagopala Razu would pay the kattubadi of Rs. 300 every year from the current fasli year 1263 and enjoy the same as before, and act in obedience to the orders of the sircar, the said three villages

MAHARAJA OF VIZIA-NAGARAM v. THE COLLECTOR OF VIZAGAPATAM.

WALLIS, OFFG. C.J. AND KUMARASWAMI SASTRIYAR, J.

should be released from attachment and given to the nine persons of the family to be enjoyed by all the members of the said family." Now the three villages have been enjoyed for the past sixty years subject to the payment of this kattubadi without any question being raised about it, and we must take it, that the tenure on which they held is that they should hold the land subject to an annual payment of this kattubadi of Rs. 300 and that in effect there was a re-grant of the three villages in 1853. Those are the terms of the tenure with which we have to deal. Subsequently some years ago the zamindar sought to resume these villages and instituted a suit for that purpose, which was dismissed. He is now seeking to take advantage of Act I of 1876 for the purpose of getting these three villages separately registered in the names of the descendants of the grantees, and having a proportionate peshkash or Government revenue charged upon them, thus entirely altering the terms upon which they had been held for so many years by the grantees; which terms are: that they should enjoy the villages on a payment of Rs. 300 kattubadi annually, leaving the zamindar to pay the proportionate peshkash which, as the mere fact of the institution of this suit shows, is probably a considerably larger sum. Now there are, it is not denied, very numerous other villages in the Northern Circars and possibly elsewhere which are held on similar tenures and in which a similar operation might be attempted if the law allowed it. Therefore the question is one of considerable general importance, as to whether grantees holding on perpetual grants subject to the payment of a small rent under the name of *jodi, kattubadi* or *poruppu* are liable to have their lands separately registered under this Act and separate assessment imposed upon them. Now the history of the question is that Regulation XXV of 1802 provided that proprietors of land should be at liberty to transfer without the consent of Government and such transfers should be valid, but that "unless such sale, gift or transfer shall have been regularly registered at the office of the Collector, and unless the public assessment shall have been previously determined and fixed on such separated portions of land by the Collector, such sale, gift or transfer shall be of no legal force or effect, nor shall such transaction exempt a zamindar from the payment of any part of the public land tax assessed on the entire zamindari previously

to such transfer, but the whole zamindari shall continue to be answerable for the total land tax in the same manner as if no such transaction had occurred." Notwithstanding the generality of the language of the latter part of this section, it has been held by the Privy Council in the Ettiyapuram case *Venkateswara Yettiappah Naicker* v *Alagoo Moottoo Serragaren*(1), and elsewhere that this section does not affect the validity of transfers as between the parties but only saves the rights of Government. The Regulation also provided for the manner in which the proportionate assessment was to be fixed and in Regulation XXVI there was a provision as to the separate registration of portions of settled estates which had been alienated in a Court sale. So far as I know there was no specific legislative provision as to how separate registration was to be enforced in other cases, though no doubt the right to such separate registration was recognised in certain cases In that state of things Act I of 1876 was passed. It is described as "*An Act to make better provision for the separate assessment of alienated portions of permanently-settled estates.*" And it says: "Whereas it is desirable to make better provision for the separate assessment to land revenue of portions of permanently-settled estates alienated by sale or otherwise; It is hereby enacted as follows.—

MAHARAJA OF VIZIANAGARAM v. THE COLLECTOR OF VIZAGAPATAM.

WALLIS, OFFG. C.J. AND KUMARASWAMI SASTRIYAR, J.

(1) The alienor or alienee of any portion of a permanently settled estate, or the representative of any such alienor or alienee, may apply to the Collector of the district in which such portion is situate for its registration in the name of the alienee and for its separate assessment in respect of land revenue.

(2) The Collector shall thereupon hold an enquiry as to who is the present owner of the property in respect of which the application is made."

So that what the Collector has to do is to find out who is the present owner, and the intention of the legislature is that it should be on - when there has been a change of ownership that separate registration and assessment should take place. Now the question is whether there can be said to have been a change of ownership by virtue of this grant of these three villages to the grantees subject to a reserved payment of a kattubadi or favourable rent of Rs. 300. Assuming that the

(1) (1831) 8 M.I.A., 327

Bose(1), in which it was held that a permanent grant at a favourable rent—of the nature of the kattubadi reserved in this case—was not a transfer of ownership so as to deprive the grantor of his mining rights in the land which are incidental to his character of owner And in the first case *Hari Narayan Singh* v. *Sriram Chakravarti*(2), his right is distinctly based upon his possessing the character of owner. The Subordinate Judge has quoted various authorities to the same effect in his judgment: "Markby in his Elements of Law (5th edition) observes: 'However numerous and extensive may be the detached rights, however insignificant may be the residue, it is the holder of this residue of right whom we always consider as the owner.'" This is of course from the legal point of view. From the economic point of view a permanent lease on a condition of fixity of tenure may no doubt be spoken of as a condition of divided ownerships, but we are merely considering the accepted meaning of the word owner in the language of the law. The decision of the Privy Council in the Fischer's case [*Robert Fischer* v. *The Secretary of State for India in Council*(3)], does not affect the present case, because there what was contemplated from the first was an out-and-out gift of the village to Mr. Fischer to be separately registered and according to the construction put upon the various documents their Lordships came to the conclusion that the *peshkash* or *poruppu*, as it was called in different documents, was only intended to be a temporary payment to the zamindar pending the separate registration and assessment which was contemplated from the very first. With regard to the case in *Kamalammal* v. *Raju Naicker*(4) and the observations there cited, we may point out that that was a case of gift and obviously where there is a case of gift, that is a case of out-and-out alienation, and the donee becomes the owner. But those cases are quite different from the present case which is, in our opinion, merely that of a permanent lease at a favourable rent. We think that it would be giving an extension, which was never intended and which would be of very dangerous consequence, to the Act I of 1876, if we were to hold that the creation of a perpetual lease at a favourable rent rendered the lessee the

(1) (1911) 39 I.A., 133.
(2) (1910) 37 I.A., 136.
(3) (1899) I.L.R., 22 Mad., 270 (P.C).
(4) (1896) I.L.R., 19 Mad., 398.

MAHARAJA OF VIZIANAGARAM v. THE COLLECTOR OF VIZAGAPATAM.

WALLIS, OFFG. C.J., AND KUMARASWAMI SASTRIYAR, J.

owner so as to subject him to the liability of having the land included in the lease separately registered and separately assessed. I may also add that a decision to the same effect has already been given by this Court by Mr. Justice MILLER and Mr. Justice MUNRO in an unreported case—*Sanyasi Naidu v. Maharaja of Bobbili Samastanam*(1).

In the result the appeal fails and is dismissed with costs. No order as to costs of the Secretary of State.

K.R.

APPELLATE CIVIL.

Before Mr. Justice Sankaran Nair and Mr. Justice Spencer.

1914 August 3 and 7.

P ALWAR CHETTY (PLAINTIFF), APPELLANT,

v

P. CHIDAMBARA MUDALI AND SIX OTHERS (DEFENDANTS), RESPONDENTS.*

Administrator-General's Act (II of 1874), ss. 20, 52 and 54—Grant of Letters of Administration to the Administrator-General—Vesting of the estate in him—Sale by him of lands for his commission without sanction of Court, validity of.

A grant of Letters of Administration under section 20 of Administrator-General's Act to the Administrator-General in respect of the estate of a deceased Hindu vests the estate in the Administrator General and enables him to dispose of immoveable property without the consent of the Court

The administration cannot be treated as closed until every act necessary for its completion has been done Hence, a sale by the Administrator-General of some immoveable property of the deceased, for the purpose of realising the commission due to him under the Act, is a valid sale in the course of administration and it takes precedence over a prior sale effected by the heir of the deceased.

APPEAL from the judgment and decree of WHITE, C.J., in Civil Suit No. 144 of 1915.

The following facts are taken from the judgment of SPENCER, J.:—

"Upon the death of one Rajamanicka Mudali, the father "of the first defendant, the Administrator-General was directed "by an order of Mr. Justice BODDAM upon a petition presented to "him on the Original Side, to take out Letters of Administration

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(1) Appeal No. 141 of 1905.

* Original Side Appeal No. 61 of 1906.

"to the estate of the deceased. Accordingly, Letters of Administration, which are Exhibit Y, were granted to the Administrator-General on the 28th March 1899. The first defendant is said to have attained his majority on November 19, 1904 On the same day he mortgaged a house belonging to the estate of his deceased father in favour of the third defendant; and on the 26th April 1905 he sold the same house to the plaintiff for Rs. 2,500. Subsequently, in July 1905 the Administrator-General at the first defendant's request sold this house to the second defendant for Rs. 2,300 in order to recover the commission due to him for the administration of the estate, and a sale-deed was executed on the first August 1905 to that defendant."

The plaintiff, as purchaser of the house from the first defendant brought this suit to recover the same or in the alternative to recover the purchase money. He got a decree for Rs. 2,500 as against the first defendant, but his suit was dismissed as against the defendants Nos. 2 and 3 and the Administrator-General who was the fourth defendant in the case. The plaintiff preferred this appeal against all the four defendants.

C. K. Mahadeva Ayyar for the appellant.

C. Venkatasubbaramayya for the respondents Nos. 6 and 7.

V. Viswanadha Sastriyar for the third respondent.

W. Barton for the fourth respondent.

SPENCER, J.—This is an appeal from a judgment of the learned CHIEF JUSTICE sitting as a single Judge on the Original Side of the High Court. SPENCER, J.

Upon the death of one Rajamanicka Mudali, the father of the first defendant, the Administrator-General was directed by an order of Mr. Justice BODDAM upon a petition presented to him on the Original Side, to take out Letters of Administration to the estate of the deceased. Accordingly, Letters of Administration, which are Exhibit Y, were granted to the Administrator-General on the 28th March 1899. The first defendant is said to have attained his majority on November 19, 1904. On the same day he mortgaged a house belonging to the estate of his deceased father in favour of the third defendant; and on the 26th April 1905 he sold the same house to the plaintiff for Rs. 2,500. Subsequently, in July 1905 the Administrator-General at the first defendant's request sold this house to the

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second defendant for Rs. 2,300 in order to recover the commission due to him for the administration of the estate, and a sale-deed was executed on the 1st August 1905 to that defendant. The plaintiff brought this suit for a declaration that the sale by the *Administrator-General to the second defendant was invalid;* but this contention was found against him and the suit was dismissed. He now appeals.

The appellant's pleader, in his arguments, has raised the following questions: (1) Was the sale by the Administrator-General after the first defendant attained majority and without the orders of the Court a good and valid sale? (2) Did the property vest in the Administrator-General by virtue of the Letters of Administration? and (3) Did the property vest in any other members of the family?

The last point may be briefly disposed of by pointing out that if the property passed by survivorship to any person other than first defendant, the plaintiff who claims to derive title from the first defendant will be out of Court.

The answer to the first question must depend on the answer to be given to another question which is, what powers does the Administrator-General possess when dealing with the estates of Hindus administered by him under Act II of 1874? Section 17 of this Act empowers a Court to pass such an order as Exhibit X purports to be, directing the Administrator-General to apply for Letters of Administration of the effects of any person including Hindus who die leaving assets within the local limits of the ordinary original civil jurisdiction of the High Court in the Presidency towns. Section 18 provides that, in cases where danger is apprehended of such property being wasted before the legal successor can be ascertained, the Court may authorise the Administrator-General to collect and take possession of such property and hold it according to the orders and directions of the Court, and thereupon the Administrator-General shall be entitled to collect and take possession of such property and, if necessary, to maintain a suit for the recovery thereof. This section is not a section under which Letters of Administration are granted, because it expressly refers to the contingency of Letters being afterwards granted. The section under which Letters of Administration are granted is section 20, and this section contains no words to the effect that the Administrator-

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General must act "under the orders and directions of the Court." In the absence of any words to the contrary, it may be presumed that after receiving the Letters of Administration he would exercise his ordinary powers as Administrator-General. In *In the Goods of Hari Das Dutt*(1), it was held by HARINGTON, J., that an Administrator-General holding an estate under section 18 of the Administrator-General's Act pending the grant of Letters of Administration would not be in any better position than a private administrator. In *Lalchand Ramdayal* v. *Gumtibai*(2), there is an observation at page 153, that an Administrator-General who has obtained a fiat for Letters of Administration would have no higher authority over, or estate in, the deceased's property than any ordinary administrator would have over, or in the property of a deceased Hindu whatever that authority or estate might be. The Act itself does not define the powers of the Administrator-General. But under the Charter of 1800 this High Court was invested with power to grant Letters of Administration in such manner and form as was at that time in use, or might hereafter be in use, in the Diocese of London and to do all other things whatsoever needful and necessary on that behalf. (See Morley's Digest, volume II, page 619).

This leads us to the second question whether the estate vested in the Administrator-General by virtue of the grant of the Letters of Administration. The learned CHIEF JUSTICE has held that it did, notwithstanding the fact that no vesting section is to be found in the Administrator-General's Act. Section 179 of the Indian Succession Act and section 4 of the Probate and Administration Act expressly provide that the executor or administrator of a deceased person is his legal representative for all purposes and all the property of the deceased person vests in him as such. Before these sections can be applied, it must be considered whether the Administrator-General's Act is a self-contained Act, or whether it must be read subject to the provisions of either of these two Acts so far as they can be applied to the circumstances of the particular case. By section 2 of the Hindu Wills Act XXI of 1870, section 179 of the Indian Succession Act was applied to the wills of Hindus in the town

(1) (1906) 11 C.W.N., 183. (2) (1871) 8 Bom. H.C.R., 140 (O.C.J.)

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of Bombay and Madras and was again repealed by section 154 of the Probate and Administration Act. The result of this is that, so far as the wills of Hindus are concerned, section 179 which vests the estate of a deceased Hindu in his administrator does not apply, although certain other sections of the Indian Succession Act do apply to wills of Hindus; but the present case, being a case of intestacy, will not be governed by the Hindu Wills Act (XXI of 1870).

Again if the Administrator-General's Act has to be read subject to the provisions of the Probate and Administration Act, section 4 which vests the property in the administrator will apply; and also section 90, which restricts the power of an administrator to dispose of property by way of sale or mortgage without the previous permission of the Court, must be applied. In the Succession Act there is no restriction such as is contained in section 90 of the Probate and Administration Act, and therefore if the cases of Hindus dying intestate ought to be governed by the Succession Act, there can be no doubt that the estate of the deceased is vested in the administrator and that he has full powers to dispose of it in such manner as may appear to him proper. With reference to the Charter which gives powers similar to those in use in the Diocese of London, it may be observed that the office of Administrator-General in this country corresponds to that of the Public Trustee in England, and the powers of a Public Trustee when dealing with small estates of a capital value not exceeding £1,000, include such powers as arise from the fact that after he declares in writing signed and sealed by him, that he takes over the administration of the estate, the estate excepting copyhold and stock vests in him as if it were transferred to him by a vesting order under the Trustee Act. The learned CHIEF JUSTICE has observed in this connection that according to the practice of the English Court of Probate the Administrator would have power to deal with everything that is covered by the grant without obtaining the special sanction of the Court. Although the Administrator-General's Act does not, in express words, state that all the properties over which the Administrator-General has obtained Letters of Administration vest in him, section 33 contemplates the fact that estates may be vested in the Administrator-General by virtue of Letters of Administration. In the absence of any words of limitation in this Act, I feel no

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doubt that the learned CHIEF JUSTICE was right in holding that the estate of Rajamanicka Mudali vested in the Administrator-General. It has further been argued that in any case the Administrator-General had no authority to dispose of immoveables. Although in *Kadumbinee Dossee* v. *Koylash Kaminee Dossee*(1) it was considered that Letters of Administration applied only to moveables section 23 (*a*) has been introduced subsequently by Act IX of 1881 and makes it clear that there is no distinction to be made in India between real property and personalty, by declaring that Letters of Administration shall have effect over all the property and estates, moveable or immoveable, of the deceased throughout the Presidency.

A further difficulty has arisen in this case owing to the provisions of section 90 of the Probate and Administration Act having been embodied in the Letters of Administration (Exhibit Y) granted to the Administrator-General and printed on the reverse of the same. It appears from enquiries that we have caused to be made that it is the practice on the Original Side to print section 90 of the Probate and Administration Act on the last page of all Letters of Administration whenever they are granted under that Act. Whether this section, which restricts the power of the administrator to mortgage, or transfer by sale, the property of which he takes control, was added to the grant in this particular case by design or accident cannot now be ascertained. But in either case section 149 of the Probate and Administration Act destroys the effect of this addition. This section declares that "Nothing contained in this Act shall affect the rights, duties, and privileges, of the Administrator-General of Bengal, Madras or Bombay." Section 52 of the Administrator-General's Act permits Administrator-Generals of Bombay and Madras to retain a commission of 5 per cent. upon the amount or value of the assets which they collect and distribute in the due course of administration.

The administration cannot be treated as closed until every act necessary for its completion has been done, and such was not the case here as may be seen from Exhibit T, dated 18th August 1905. It therefore, appears that the Administrator-General had not, in the present case, been divested of his powers at the time

(1) (1877) I.L.R., 3 Calc., 431.

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when the sale to the second defendant was made, and therefore that he was acting within the scope of his authority in conducting the sale. In this view of the case, the plaintiff's appeal fails and must be dismissed.

The second and fourth respondents' costs (1 set) will be borne by the estate. Appellant will bear his own costs.

The third defendant, who took a mortgage of the suit house from first defendant, supports the plaintiff in this appeal and pleads that even if the legal estate was not divested by the first sale, yet the beneficial interest had already passed to him to the knowledge of the Administrator-General and that he is entitled to retain it in spite of the second sale.

In regard to this contention I am of opinion that the third defendant's case must stand or fall with the decision of the question of the property being vested in the Administrator-General at the time when first defendant entered into transactions with plaintiff and the third defendant.

The third defendant will bear his own costs of this appeal.

SANKARAN NAIR, J.

SANKARAN NAIR, J.—I agree.

Messrs. Short Bewes & Co. for the fourth respondent.

N.R.

APPELLATE CIVIL.

Before Mr. Justice Oldfield and Mr. Justice Seshagiri Ayyar.

1914. August 19, 20 and 25.

C. RAGHUNATHA ROW SAHIB (FIRST DEFENDANT), APPELLANT,

v.

VELLAMOONJI GOUNDAN (PLAINTIFF), RESPONDENT.*

(Madras) Estates Land Act (I of 1908), sec. 53 (2)—Distraint for a higher rent than legally due, good for the amount legally due.

Section 53 (2) of the (Madras) Estates Land Act (I of 1908) enables a Collector, in a suit to set aside a distraint, to uphold the distraint to the extent of the amount legally due to the landlord by the tenant under the patta tendered by the landlord. The application of the clause is not confined to the enforceability of the proper amount of rent, in suits for rent, only.

SECOND APPEAL against the decree of L. G. MOORE, the District Judge of North Arcot, in Appeal No. 200 of 1912,

* Second Appeal No. 2000 of 1912.

preferred against the decree of G. N. A. TOMLINSON, the Head-quarters Deputy Collector of Vellore, in Summary Suit No. 1 of 1912.

The plaintiff, a tenant, brought this suit to set aside the distress levied by the defendant (landlord) for realizing water-cess of Rs. 48-5-5 and for damages on the ground that the amount of water-cess entered in the patta alleged to have been tendered was excessive and that the said patta was therefore illegal. Both the lower Courts finding that the distraint was for an amount more than what was legally due, set aside the distraint altogether and awarded damages The defendant preferred this Second Appeal to the High Court on the ground that the distraint as a whole ought not to have been set aside but should have been upheld to the extent of the amount legally due.

The other facts appear from the judgment

K. N. Kumaraswami for *L. A Govindaraghava Ayyar* for the appellant.

T. R. Venkatarama Sastriyar for the respondent.

OLDFIELD, J.—The learned District Judge confirmed the decree setting aside the distraint on the ground that it was for an excessive amount. It is contended here with reference to section 53 (2), Estates Land Act, that the amount, in respect of which the distraint was excessive, should have been ascertained, and that the distraint should have been set aside in respect of that amount only and sustained in respect of the remainder of the demand. OLDFIELD, J.

Section 53 (2) is general in its wording. It refers to the patta as enforceable without qualification, to the extent to which it is found to be correct. On its merits appellant's contention would appear to be in accordance with convenience and justice.

Contra, it is urged first that a patta found incorrect as to the amount of the demand is not partially correct, but totally incorrect, a partially correct patta being for instance one found correct as to some only out of the items of the holding covered by it. No authority has been shown for this contention, and it does not commend itself on its merits.

Next it is urged that section 53 (2) deals only with the procedure by suit on the patta and provides only for the

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OLDFIELD, J.

enforceability of the patta by suit. This is supported on the ground that section 53 (1) refers to distraint and sale of moveables and to sale of the holding under Chapter VI and that section 53 (2) must therefore have been intended to regulate the remaining method of recovery provided by the Act, that by suit. This does not in my opinion follow. As observed above section 53 (2) contains no restriction of its effect to suits. The use in it of the word "nevertheless" is against the importation of that restriction. And finally such importation is in my opinion negatived by the fact that exchange of patta and muchilika is not under the Act a necessary preliminary to the institution of a suit, and a provision regarding errors in the former could therefore have no effect in connection with one.

We have been referred to the course of decisions under Act VIII of 1865, which contained nothing similar to section 53 (2). Those decisions therefore do not seem to me material. I observe, however, that up to 1908, when the Estates Land Act came into force there was authority for and against claims similar to that of appellant and that these cases therefore afford no reason for a decision against him.

In these circumstances the appeal must be allowed. The Lower Appellate Court's decision is set aside and it is directed to readmit the appeal and dispose of it according to law in the light of the foregoing after deciding what amount was lawfully recoverable by appellant by his distraint and after dealing with respondent's contention that tender of patta was not proved. Costs to date will abide the result of the rehearing.

SESHAGIRI AYYAR, J.

SESHAGIRI AYYAR, J.—I entirely agree. Mr. Venkatarama Sastriyar for the respondent argues that the word "enforceable" in clause (2) of section 53 of the Estates Land Act deals only with suits for rent and not with proceedings by way of distraint; I am unable to find any justification for this contention. Clause (1) makes no reference to suits. It makes the tender of patta a condition precedent to the adoption of the distraint proceedings. Clause (2) is by way of exception, the object being to enforce the distraint to the extent to which the patta is correct. If the history of the legislation is looked into, the meaning of the two clauses will be rendered clearer. By section 7 of Act VIII of 1865, the landlord was precluded from suing for rent or from distraining for it unless he had tendered a proper patta. Under

that Act even for suits for rent in Civil Courts, patta should have been tendered. The new Act has expressly enacted that in certain classes of cases, the landlord must sue for rent only in the Revenue Court; at the same time, it removed the restriction that there should be a tender of patta prior to suit. The general principle of the legislation is that in suits for rent, the landlord is not bound to tender a patta before he sues to recover it, but if he wants to adopt the exceptional remedy of distraint in which he takes upon himself the functions of the Court, although he has to conduct the proceedings with the assistance of the revenue officials, he must have tendered a patta in order that the subordinate revenue official may have some tangible proof of the landlord's claim. It would serve no purpose therefore to enact in clause (2) of section 53 that the landlord can enforce his claim for rent in a Revenue Court in so far as the patta correctly states it. If the decisions prior to the Estates Land Act can furnish any assistance, I feel no doubt that they would support this conclusion of mine. Prior to the passing of the new Act, the predominant view was that a distraint for an excess amount should not be avoided altogether. See *Ramachandra* v. *Narayanasami*(1), *Bhupatirazu* v. *Ramasami*(2), *Pichuiayengar* v *Oliver*(3) and *Periakaruppa Pillai* v. *The Manager of the Lessees of the Sivaganga Zamindari*(4). I do not refer to *Raja Venkata Narasimha* v. *Ravi Subbayya*(5), because that was after the Act. For these reasons, I agree in the conclusion at which my learned colleague has arrived.

N.R.

(1) (1888) I.L.R., 10 Mad, 229. (2) (1900) I.L.R., 23 Mad, 263.
(3) (1903) I.L.R., 26 Mad, 260. (4) (1908) I.L.R., 31 Mad., 22.
(5) (1912) I.L.R., 35 Mad, 139

APPELLATE CIVIL.

Before Mr. Justice Oldfield and Mr. Justice Seshagiri Ayyar.

1914. August, 19 and 26.

MEENAKSHI AND THREE OTHERS (PLAINTIFFS), APPELLANTS,

v.

MUNIANDI PANIKKAN AND ANOTHER (DEFENDANTS), RESPONDENTS.*

Hindu Law—Inheritance—Illegitimate children, right of, to—Prostitution, not destroying kinship by blood—Mitakshara—"Daughters", meaning legitimate daughters.

Except in the case of Sudras, among whom illegitimate sons have a right of succession, illegitimate children are not heirs under the Hindu Law, especially under the Mitakshara system, to succeed to the property of any kind left by either of their parents. Hence, a legitimate son of a Sudra woman, born in lawful wedlock, succeeds to the property acquired by his mother by prostitution after the death of his father and her illegitimate daughter born in prostitution is not an heir to such property.

Prostitution does not sever the tie of kinship by blood and does not bring the prostitute within the category of "dancing girls" whose children are allowed by custom and precedent in Southern India the right of succession to the property acquired by their mothers.

The word "daughters" in the rule of the Mitakshara which allows daughters to succeed to their parents' property in certain cases, means only legitimate daughters.

SECOND APPEAL against the decree of J. G. BURN, the District Judge of Madura, in Appeal No. 323 of 1911, preferred against the decree of K. V. DESIKACHARIYAR, the Principal District Munsif of Madura, in Original Suit No. 146 of 1910.

One Mookkayi, a Sudra woman, married one Viravan Panikkan (now deceased), and the first defendant was their son. After Viravan Panikkan's death she began to live with the second plaintiff in the case and acquired the property in the suit which represented her savings and to succeed to which the first plaintiff who was her daughter by the second plaintiff brought the present suit. On these facts both the lower Courts dismissed the plaintiff's suit on the ground that the legitimate son was entitled to succeed to the property in preference to the plaintiff, the illegitimate daughter.

* Second Appeal No. 427 of 1913.

P. S. Narayanaswami Ayyar for *C. V. Anantakrishna Ayyar* for appellants.

MEENAKSHI v. MUNIANDI PANIKKAN.

P. R. Ganapati Ayyar for *K. N. Ayya* for respondents

OLDFIELD, J.

OLDFIELD, J.—I have had the advantage of reading the judgment which my learned brother is about to deliver, and concur in it. I shall therefore merely state shortly the negative reasons, for which I think that the appellants' legal argument must be rejected.

The case, it seems to me, must be decided on the broad ground that it is for the appellants to show that the illegitimate daughter of a woman, who lived in adultery, inherits her stridhanam, over which she had full power, in preference to her legitimate son; and that they have neither produced any direct precedent for such succession nor established any principle justifying it. As it is not alleged that direct precedent is available, I turn at once to the principles put forward.

Firstly, the appellants contend for the application of the law of succession applicable to dancing girls to the offspring of a prostitute, such as they allege the first appellant's mother to have been. It is not necessary to decide whether, she was one, as the appellants contend with reference to *Annayyan* v. *Chinnan*(1), and the fact that her immoral life began after her marriage, or was a permanent concubine as the facts suggest. For the argument must fail, even as put forward. On the assumption that she was a prostitute, there is no authority in Madras for applying to her estate the law, which has been recognised as applicable to dancing girls solely in virtue of the established custom of their caste. [Vide *Venku* v. *Mahalinga*(2) and *Muttukannu* v. *Paramasami*(3).] And I observe here, as in connection with the appellant's other contentions, that there is no reason for a liberal construction, the effect of which would be to disappoint expectations founded on legitimacy.

It was then contended that references to "daughters" in the Mitakshara should be read as including all daughters, both legitimate and illegitimate, and that all alike should be preferred to the legitimate son, as heirs to their mother. But, firstly, that is not the primary sense of those references and is unauthorised

(1) (1900) I.L.R., 23 Mad., 366. (2) (1888) I.L.R., 11 Mad., 393.
(3) (1889) I.L.R., 12 Mad., 214.

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OLDFIELD, J.

by the rules of interpretation recognised by both English and Hindu law [vide *Bhimacharya* v. *Ramacharya*(1)]. And next it has not been shown how such a substitution can be carried out or logically limited, should it, for instance, be extended to the law relating to the daughter's right to inherit from the father in spite of the absence of any special provision in her favour, such as is available in the case of illegitimate sons?

Next, there is the argument based on the alleged severance of the first appellant's mother from her legitimate family owing to her unchastity and consequent degradation. It is based first on an opinion of the pundits in *Tara Munnee Dossea* v. *Motee Buneannee*(2), that the heirs of an unchaste and outcast woman are her daughters, born (as the report in the next case cited shows) in prostitution, who lived with her as prostitutes; not the sons of her daughter, who had married and lived respectably. The principle of severance is statedly relied on and no doubt justified the decision against the legitimate family, but it may be pointed out that it involved nothing affirmative in favour of the prostitute daughters, defendants, and that it was not necessary that it should do so, when the disqualification of their opponents was sufficient for the decision of the case. *Maynu Bai* v. *Uttaram*(3) dealt with competition between illegitimate children only, but contains an *obiter dictum* that "in Madras it has never been doubted that the children of the prostitute succeed to the property of their mother." The law however, as it now stands in this Presidency, must be taken to have been stated finally in the much more recent case of *Subbaraya Pillai* v. *Ramasami Pillai*(4). It no doubt does not appear that there was competition there between legitimate and illegitimate issue; for the report affords no description of the defendants. But the decision is against any severance of the degraded wife from her undegraded relatives and includes an expression of dissent from *Sivasangu* v. *Minal*(5), in which *Taramonee's* case was relied on. The actual decision in *Narumayya Chetti* v. *Tiruvangadathan Chetti*(6) is in accordance with this view, there being nothing in its reference to the rights of illegitimate children inconsistent with their postponement to all legitimate heirs.

(1) (1909) I.L.R., 33 Bom., 452.
(2) 7 Su Div. Ad. Rep., 273.
(3) (1864) 2 M.H.C.R., 196.
(4) (1900) I.L.R., 23 Mad., 171 at p. 177.
(5) (1889) I.L.R. 12 Mad., 277.
(6) (1904) 24 M.L.J., 223.

Lastly, reliance has been placed on the observation in *Subbaraya Pillai v. Ramasami Pillai*(1) that "in applying so much of the Hindu Law as without incongruity could be applied either with reference to those connected with the degraded person after his degradation or in their absence to those remaining undegraded, the Courts would at all events be administering those rules as rules of equity and good conscience which are the guides in cases not otherwise provided for" This seems to have been entirely *obiter*. For, as stated, it does not appear that any party to the case was connected with the degraded person after her degradation. And I therefore feel at liberty to express my respectful dissent from it. For, firstly, in the absence of any but an expressly limited recognition of the rights of illegitimate children in Hindu Law, it is not, I conceive, possible to apply its rules generally in their interest without incongruity, and next I cannot understand how the Court would be following any rule of equity, or good conscience in doing so or would be promoting any other result than the mitigation of the disabilities, which at present in some degree at least deter people from the formation of illicit relations.

The appeal is dismissed with costs.

SESHAGIRI AYYAR, J.—The suit relates to the property of one Mookkayi First plaintiff is her daughter by the second plaintiff, the second plaintiff is her paramour, first defendant is her son by her deceased husband Vairava Pannikkan. A feeble attempt was made to contest the finding that she was not the married wife of the second plaintiff. It was argued that the Courts below have not given sufficient weight to the presumption arising from continuous cohabitation for a long time. This contention is untenable. The Courts have come to a distinct finding upon the evidence on record. The finding that Mookkayi was only a concubine of the second plaintiff and that first plaintiff was her illegitimate daughter is correct.

It has not been disputed that the property in question represents the savings of Mookkayi after she began to live with the second plaintiff. The point for decision is whether the first plaintiff, the illegitimate daughter or the first defendant, the legitimate son, should succeed to this property. Mr. P. R. Ganapathi

(1) (1900) I.L.R. 23 Mad., 171 at p. 177.

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Ayyar who argued the case for the legitimate son very ably, contended that the ancient law-givers did not contemplate rights of succession or inheritance in favour of illegitimate children excepting in a special instance to which I shall refer subsequently. I agree with him. It is true that in *Brihat Parasara*, chapter V, the sage says: "The son, begotten by one of equal caste (the illegitimate son), is the offerer of *pinda* of his mother, and is (in every respect) a son to her; but he is nothing to the begetter, as he is born of lust." . . .

"The son by a slave of a Sudra is fulfiller of desire and offers the *pinda*. Twelve sons are mentioned by the Rishis. They are offerers of the *pinda*, one after another, in the order mentioned." From this Mr. GHOSE draws the inference, "that according to the rule of Brihat Parasara, chapter V, illegitimate as well as legitimate children inherit the estate of a woman, and if it is stridhana there is no reason to suppose that the ordinary rule of Hindu Law will not apply" (J. C. Ghose's "Principles of Hindu Law," page 343). I do not think this conclusion follows from the citation. It is well established that under the Mitakshara system of inheritance the offering of spiritual benefits is no index to rights of property or to preference. It is different under the Dayabagha. This may account for some of the decisions passed by the Calcutta High Court to which I shall refer later on. I am therefore of opinion that this text of Brihat Parasara is not indicative of the sage's view that illegitimate children inherit the property of their mother. The learned vakil for the appellant drew our attention to a text from Narada Smrithi in which a kamini's son was mentioned as entitled to succession. The passage in question enumerates the twelve classes of sons to which reference is made by every Smrithi writer. After the *dictum* of the Privy Council in *Thakoor Jeebnath Singh* v. *Court of Wards*(1) which says that these texts are no longer regarded as binding authorities except in the case of adopted sons, it would be fruitless to discuss the matter further. I entirely agree with what Mr. Ghose says in his book on the subject: "It appears that at the time of Rigveda, probably even before that, twelve kinds of sons were recognised, but the Rigveda says that they 'cannot be accepted.' It is at least fully three thousand

(1) (1875) 2 I A., 163 at p 165.

years when all these anomalous sons were prohibited, and the extreme purity of Hindu family life established."

The one apparent exception to this position is the rule regulating the rights of illegitimate children among Sudras This deviation from the ordinary rule is traceable more to the theory of marriage among Sudras entertained by the Rishis than to a desire to introduce a special law regarding illegitimate children. According to Manu it was permissible for the twice-born classes to take Sudra wives. The 'Nishada' as the offspring of this union was called, had certain rights of inheritance. Brihaspati's text says that such children were only entitled to maintenance. Finally at the time of most of the Smritis now recognised as giving us the law, they were not recognised as possessing any legal status. But in the case of Sudras, an exception was made. I am of opinion that this treatment was due to the idea that marriage among them was not so strictly formal and ceremonial as in the case of the higher classes. Continuous concubinage was regarded as equivalent to marriage, although the children of this irregular union did not rank equally with those with whose mother there was a formal marriage. The use of the term *Dasiputra* even in the case of Sudras is explicable on the ground that it is a relic of the days when the twice-born classes were allowed to take to them Sudra women as wives. This, I conceive, is the origin of the rule regarding the shares of illegitimate children among Sudras. It is open to question whether having regard to the advancement of the class known as Sudras, the law which owes its conception to these ideas should still be allowed to prevail. The point has never been raised whether they are not obsolete and the texts have been commented upon by the highest judicial tribunal as still in force. Whatever may have been the basis of the rule, it cannot apply to the present case. I have referred to this part of the case in some detail in order to show that illegitimate children of the class to which the first plaintiff belongs are not within the pale of Hindu law.

The main contentions of the appellant were twofold: (a) that the Hindu law did not cease to govern Mookkayi's property, notwithstanding her unchastity and (b) that the special rules relating to the devolution of *sridhanam* applied to the property in dispute, and consequently the daughter ought to be preferred to the son. The first ground is not contested by Mr. Ganapathi Ayyar. He

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argued that the unchastity of Mookkayi did not sever her relation with her legitimate child. He relied upon the analogy of *Bhagwan Koer* v. *J. C. Bose*(1), where the Judicial Committee of the Privy Council held in the case of a Sikh that strict conformity to rules of orthodoxy regarding diet and ceremonials is not a prerequisite for a person being regarded a *Hindu*. The same principle has been enunciated regarding Brahmos: vide *Kusum Kumari Roy* v. *Satya Ranjan Das*(2). Apart from analogy, we have a recent pronouncement of the Calcutta High Court in *Hiralal Singha* v. *Tripura Charan Roy*(3), that a woman who adopts the life of a prostitute does not sever the tie which connects her with her kindred by blood. See also *Sorna Moyee Bewa* v. *Secretary of State for India in Council*(4) and *Narumayya Chetti* v. *Tiruvangadathan Chetti*(5). This is the natural result of the earlier cases in this Presidency which have laid down that a fallen mother is entitled to inherit her son's property. See *Kojiyadu* v. *Lakshmi*(6), *Angammal* v. *Venkata Reddy*(7) and *Vedammal* v. *Vedanayaga Mudaliyar*(8). It must therefore be taken as established that Mookkayi's property will devolve according to the rules of Hindu law.

The second proposition that the first plaintiff being the daughter should be preferred to the first defendant, the son, cannot be supported. In the Mitakshara, chapter I, sections I and II dealing with inheritance, the words son, "grandson," and "great grandson" are used in their natural sense. In section XI of the same chapter *placitim* 2, the definition of a legitimate son is given. Then comes the special section XII dealing with the rights of illegitimate sons of Sudras. *Placitim* 2, speaks of the sons by the wedded wife and of the son of a female slave. It is thus clear that the author everywhere uses the term "son" in its natural and ordinary sense of *legitimate son*. The word "daughter" must be similarly understood. It is in Chapter II, section XI, that Vignaneswara treats of "the separate property of a woman." In this section the words "son" and "daughter" must have the same meaning as they have in the earlier sections.

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(1) (1904) I.L.R., 31 Calc., 11.
(2) (1903) I.L.R., 30 Calc., 999.
(3) (1913) I.L.R., 40 Calc., 650.
(4) (1895) I.L.R., 25 Calc., 254.
(5) (1913) 24 M.L.J., 223.
(6) (1882) I.L.R., 5 Mad., 149.
(7) (1903) I.L.R., 26 Mad., 509.
(8) (1905) I.L.R., 31 Mad., 100

That would be the rule of interpretation according to English law. See per Lord DENMAN in *Regina* v. *Poor Law Commissioners for England and Wales, in re Holborn Union*(1) and *In re Kirkstall Brewery Company, Limited, and reduced*(2). There is no difference in this respect between the English law and the Hindu Law. The rule of interpretation is thus stated in Adhikaranakaumudi, page 50 ("Mimamsa Rules of Interpretation," page 270). Multiplicity of sense to the same word must not be attributed. अर्थे अनेकार्थत्वाकल्पना If the words "son" and "daughter" are used in chapter II, section XI, *placita* 8, 9 and 19 in their ordinary and natural sense, it is clear that there is no foundation for the suggestion that an illegitimate daughter is within those rules. Illegitimate children have no place in Hindu law when there are legitimate heirs at least under the Mitakshara system, except in the special case already referred to.

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Another contention of the appellant was that a prostitute is a *dancing girl*, as that term is understood in Southern India and that as daughters among this class inherit their mothers' property, the first plaintiff is entitled to the same rights. It has been laid down in a series of decisions by the late Justice Sir T. MUTHUSWAMI AYYAR, that rights of inheritance among these women are not governed by the precepts of the sages, but by the custom which has grown among them; see *Venku* v. *Mahalinga*(3) and *Muttukannu* v. *Paramasami*(4). It has been held in a recent case—*Guddati Reddi Obala* v. *Ganapati Kandanna*(5)—that a married woman taking to bad ways does not become a dancing girl. I do not desire it to be understood that I am in agreement with all the observations of one of the learned Judges who took part in that decision. There is a fundamental difference between rulings which lead to the encouragement of prostitution and those which tend to preserve civil rights to those who are the unfortunate offsprings of immoral sexual connection. A custom is not immoral because it regulates rights of property among dancing girls. I need not pursue this topic any further. I am in agreement with the view taken in that case that the

(1) (1838) 6 A. & E., 56; s.c., 112 E.R., 21.
(2) (1877) 5 Ch.D., 535.
(3) (1888) I.L.R., 11 Mad., 393.
(4) (1889) I.L.R., 12 Mad., 214.
(5) (1912) 23 M.L.J., 493.

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unchastity of a married woman will not bring her within the class of dancing girls so as to enable her to exercise all the rights which by custom and precedent have been allowed to them. This contention also fails.

A further argument was based upon an *obiter dictum* in *Subbaraya Pillai* v. *Ramasami Pillai*(1), which says: "No doubt in *Sivasangu* v. *Minal*(2), *Narasanna* v. *Gangu*(3) and *In the Goods of Kamincymoney Bewah*(4) which is more to the point, it was said that prostitution severed the legal relation. But we are unable to agree in this statement though we think that the decision itself, that when there is a competition between a degraded person and an undegraded person to the property of a degraded person, the degraded person has the preferential right, may be supported on equitable principles referred to above." As regards the proposition that on equitable principles, the illegitimate offspring should be preferred to the legitimate, I must with great deference, differ from the conclusion. I do not see that any consideration of equity can arise in favour of the illegitimate offspring as against the legitimate. If one were entitled to resort to other systems of Jurisprudence regarding the rights of bastards, it would be clear that they have no legal claim upon the estate of their parents. The Hindu law contains no exception to this principle; and I fail to see how a right which is discountenanced by every civilised community can be regarded as being in consonance with equity, justice and good conscience.

I have come to the conclusion that the claims of the appellant to be preferred to the first respondent is not sustainable on any of the grounds stated by her vakil. I shall now, very briefly, refer to the cases cited before us. In many of these cases, there was no argument whether illegitimate children are heirs under the Hindu law. This is notably so with regard to *Krishna Rao* v. *Kamarajamma*(5), to which I was a party. There the conflict was between two illegitimate children—a son and a daughter—and we held that the daughter was to be preferred as the dispute related to *sridhanam* property.

(1) (1900) I.L.R., 23 Mad., 171 at pp. 177 and 178.
(2) (1889) I.L.R., 12 Mad., 277.
(3) (1890) I.L.R., 13 Mad., 133.
(4) (1894) I.L.R., 21 Calc., 697.
(5) Second Appeal No. 181 of 1911.

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The earliest case to which our attention has been drawn is *Tara Munnee Dossea* v. *Motee Buneanee*(1). In that case, the opinion of the pandits was that prostitution severed the tie of kinship. Acting upon this *vyavasta*, the Sudder Court held that the daughters who were born after the mother's fallen state and "who lived with the outcast mother and had all things in common with her," should be preferred to the legitimate daughter. This opinion of the *pandits* is no longer law and a decision based upon such an opinion cannot be regarded as an authority. In *Mayna Bai* v. *Uttaram*(2), there was no competition between legitimate and illegitimate children. Both the contending parties were illegitimate. The learned Judges accepted the dictum of the pandits in *Taramonee's* case *Tara Munnee Dossea* v. *Motee Buneanee*(1) as good law and decided that in the absence of preferential heirs they inherited the mother's property and to one another. This decision does not affect the present case. It may, however, be pointed out that the opinion of the Judicial Committee in this very case *Myna Boyee* v. *Oottaram*(3) is more qualified regarding rights of succession to the mother's property than the conclusion of the learned Judges of the High Court. *Subbaraya Pillai* v. *Ramasami Pillai*(4), expressly laid down that prostitution did not sever the pre-existing legal relation, and dissenting from the dicta contained in the earlier cases decided that a step son was entitled to succeed. In *Annayan* v. *Chinnan*(5), the learned Judges held that an illegitimate son by a Sudra widow whose re-marriage is forbidden had no right of inheritance. This is a distinct pronouncement in favour of the position that Hindu Law does not recognise the rights of illegitimate offspring to succeed to their parents' property. Much reliance was placed on the recent case—*Narumayya Chetti* v. *Tiruvengadathan Chetti*(6)—on behalf of the appellant. The actual decision in that case was that the daughter of the daughter of a prostitute born to her in wedlock is to be preferred to the sons she begot after she became a prostitute. That opinion is in entire accordance with the conclusion at which I have arrived in this case. The statement that the illegitimate

(1) 7 Sud. Diw. Adalat Reports, 273.
(2) (1864) 2 M.H.C.R., 19[illegible].
(3) (1861) 8 M.I.A., 400 at p. 425
(4) (1900) I.L.R., 23 Mad., 171.
(5) (1910) I.L.R., 33 Mad., 366.
(6) (1913) 24 M.L.J., 223.

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sons are entitled to succeed to their mother may be reconcilable on the ground that in the absence of preferential heirs and if the Crown does not intervene, they would succeed as blood relations. As I said before, the actual decision supports my view. In *Bhikya* v. *Babu*(1), it was held that in regard to ordinary property the divided brothers' son excluded the illegitimate daughter. I fully agree with the opinion of CHANDRAVARKAR, J., in *Jagannath Raghunath* v. *Narayan*(2), "that there is no authority whatever in the Hindu Law for the proposition which is contented for by Mr. Pradhan, that, when the competition is between the husband and a son born of the woman by adulterous intercourse, that son supersedes the husband as heir to the *sridhanam*." A Full Bench of the Calcutta High Court reviewed all the earlier authorities on the subject in *Hiralal Singha* v. *Tripura Charan Roy*(3), and arrived at the conclusion that prostitution did not sever the tie of blood previously existing. It is true there are cases in that High Court which seem to lay down that illegitimate children have rights of inheritance. This view may be traced to the prevailing theory in Bengal that the offering of oblations has to be taken into account in determining heirship. This principle does not affect those governed by Mitakshara, and consequently these rulings are not binding on us.

Upon a review of the texts bearing on the question and of the decisions based on them my conclusion is that the illegitimate children of a prostitute have no rights of inheritance under the Hindu Law as obtains in this Presidency as against legitimate heirs, that the first defendant is entitled to the property of Mookkayi and that first plaintiff's claim must fail.

I would dismiss the Second Appeal with costs.

N.R.

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(1) (1908) I.L.R., 32 Bom., 562. (2) (1910) I.L.R., 34 Bom., 553 at p. 559.
(3) (1913) I.L.R., 40 Calc., 650.

APPELLATE CIVIL.

Before Mr. Justice Sadasiva Ayyar and Mr. Justice Spencer.

KANTI VENKANNA (DEFENDANT), APPELLANT,

1914.
August 26.

v.

SRI RAJA CHELIKANI RAMA ROW GARU AND TWO OTHERS (PLAINTIFFS), RESPONDENTS.*

Madras Estates Land Act (I of 1908), sec. 3, cls. 2 (c) and (d), and 5—Landholder—Grantee of a portion of melvaram in an estate, a landholder—Cultivating tenant under the grantee, a ryot.

An alienee of a part of the melvaram due from the lands which form a part of an estate's ryoti lands is a "landholder" within the meaning of section 3, clause 5 of the Madras Estates Land Act (I of 1908), though what he thus owns may not be an "estate" under the Act; and the tenant holding ryoti land under him for purposes of agriculture is a ryot under the Act, hence a suit to eject such a tenant can be brought only in a Revenue Court and Civil Courts have no jurisdiction.

Brundavanachandra Horischandra Raja v. Ramayya (1914) 26 M.L.J., 600, followed.

SECOND APPEAL against the decree of A. SAMBAMURTI AYYAR, the temporary Subordinate Judge of Rajahmundry, in Appeal No. 178 of 1912, preferred against the decree of B. SUBBA RAO, the District Munsif of Peddapur, in Original Suit No. 605 of 1909.

This was a suit for ejecting a cultivating tenant and for damages brought in a Civil Court by the plaintiffs who were grantees under a grant in 1863 from the Zamindar of Jegampeta estate on condition of their paying to the zamindar a kattubadi of Rs. 175 per year. The plaintiffs asserted that they were ryots under the Zamindar of Jegampeta estate and that the defendant was only a cultivating tenant under them under an agreement for a fixed period without possessing any occupancy rights. The defendant asserted that what the plaintiff owned was an estate, that the plaintiffs were landholders, that he himself was a ryot within the meaning of the Act possessing occupancy right and that this suit in ejectment brought in the Munsif's Court was not maintainable owing to the provisions of the Estates Land Act

* Second Appeal No. 323 of 1913.

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which invested only Revenue Courts with power to try such suits. Both the Lower Courts held that the plaintiffs alone were the "ryots" under the zamindar, that the defendant was not a "ryot" but only a "sub-tenant" under them and that the plaintiffs were entitled to eject the defendant by a suit in a Civil Court and to get mesne profits. The defendant preferred this Second Appeal.

The other facts are given in the judgment of SADASIVA AYYAR, J.

M. O. Parthasarathi Ayyangar and *V. Ramesam* for the appellant.

P. Narayanamurti for the respondents.

SADASIVA AYYAR, J.

SADASIVA AYYAR, J.—We are of opinion that in construing Exhibit B as granting only the kudivaram interest in the lands to the plaintiffs' ancestor, the lower Court misconstrued that document.

That document clearly alienates in perpetuity 125 rupees of the annual melvaram income in favour of the grantee under it and that grantee had thereafter, not to pay the 300 rupees which was "the rent legally due upon it" (see definition of ryot in section 3, clause 15 of the Estates Land Act) but had to pay only the favourable kattubadi cist of Rs. 175. Being the owner of a part of the melvaram right in the lands which formed part of the estate ryoti lands, he became owner of part of the estate, though the part owned by him did not itself come under the definition of "Estate" in section 3, clause (2). The ratio of the decisions in *Suryanarayana* v. *Ballayya*(1), *Nukanna* v. *Sanyasi Naidu*(2), *Appalanarasimhulu* v. *Sanyasi*(3), *Brundavanachandra Horischandra Raja* v. *Ramayya*(4) and *Tungala Mallanna* v. *Gottumukkala Ramaraju*(5), is that a person may not be the owner of an "Estate" owing to the lands of which he is the owner not coming under the definition of the word "Estate" but he may yet be a "landholder" within the definition of section 3, clause (5), as owning the melvaram in a portion of an estate. In the case in *The Baptist Missionary Society* v. *Ratnakara Patro*(6), the definition of landholder is not referred to and considered in the judgment.

(1) Civil Revision Petition No 835 of 1910. (2) Second Appeal No 168 of 1912.
(3) (1915) I.L R , 38 Mad. 38 ; s.c., 17 I.C., 120. (4) (1914) 26 M.L J , 600.
(5) (1914) 23 I.C., 531. (6) (1911) 2 M.W.N , 517.

The plaintiffs being thus "landholders," tenants holding ryoti land under them for purposes of agriculture are ryots and cannot be ejected except by proceedings in a Revenue Court under the Estates Land Act (sections 151 to 153) The lower Court's decisions are reversed and the plaint will be returned to be presented to the proper Court. The plaintiffs must pay defendant's costs in all Courts

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SADASIVA AYYAR, J.

SPENCER, J.—It is clear from the grant (Exhibit B), and from the facts found by the lower Courts that the land in the enjoyment of the plaintiffs is not an estate falling under section 3 (2) (d) of the Estates Land Act as the grant had not been recognised by the British Government; and as it did not comprise one or more whole villages it further did not fall under the definition in clause (e).

SPENCER, J.

But it was undeniably a part of a permanently-settled estate and therefore if plaintiffs come within the definition of landholder in section 3 (5) the jurisdiction of the Revenue Court over a suit to eject a ryot was not ousted. Following *Brundaranachandra Horischandra Raja* v *Ramayya*(1), to which I was a party I agree with the order proposed by my learned brother.

N.B.

(1) (1914) 26 M.L.J., 600.

NOTE.—Appeal No. 277 of 1911 and Second Appeals Nos. 1503 to 1510 of 1912 decided on 8th September 1915 by WALLIS, C.J., and SESHAGIRI AYYAR, J., followed the above decision.—Ed.

APPELLATE CIVIL.

Before Mr. Justice Seshagiri Ayyar and Mr. Justice Kumaraswami Sastriyar.

1914. August 7, 11 and 27.

MUTHUKARUPPAN SAMBAN AND FOUR OTHERS (DEFENDANTS Nos. 1 TO 5), APPELLANTS,

v.

MUTHU SAMBAN (PLAINTIFF), RESPONDENT.*

Transfer of Property Act (IV of 1882), ss 4 and 54—Unregistered sale-deed for land of less than Rs. 100 in value, invalidity of, when no previous oral sale—Evidence, inadmissibility of, to prove adverse possession—Possession, change of, in cases of oral sale, how to be effected.

A sale of tangible immoveable property of the value of less than Rs. 100 effected by an unregistered instrument (without any prior oral sale) followed by delivery of possession is invalid and inoperative to pass the title to the property under section 54, Transfer of Property Act (IV of 1882).

A document which affects immoveable property, and which is required by law to be registered is, if it is not registered, inadmissible in evidence to prove the nature of possession of the person claiming under it, such as, the adverse character of the possession.

Per curiam.—If an oral sale is made of immoveable property of the value of less than Rs. 100 to a person already in possession of the property it is sufficient to pass title if the vendor converts by appropriate declarations or acts the previous possession into a possession as vendee and it is not necessary that to satisfy the section 54 of the Transfer of Property Act, the person in possession should give it up formally and take it afterwards as vendee.

Sibendrapada Banerjee v. Secretary of State for India in Council (1907) I.L.R., 34 Calc., 207, not followed.

SECOND APPEAL against the decree of J. G. BURN, the District Judge of Madura, in Appeal No. 163 of 1912, preferred against the decree of G. R. SUBBARAYA AYYAR, the District Munsif of Tirumangalam, in Original Suit No. 92 of 1912.

The necessary facts are given in the *judgment.*

G. S. Ramachandra Ayyar for the appellants.

K. Balamukunda Ayyar and *K. Jagannatha Ayyar* for the respondent.

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* Second Appeal No. 2349 of 1913.

MUTHU-KARUPPAN v. MUTHU.

SESHAGIRI AYYAR AND KUMARASWAMI SASTRIYAR, JJ

JUDGMENT.—Defendants Nos. 1 to 5 are the appellants. The plaintiff as the purchaser from one Alagur Samban sued to redeem an usufructuary mortgage, dated 8th December 1897, executed by Alagur Samban in favour of the first defendant. Defendants Nos. 1 to 5 plead a sale by Alagur Samban to the first defendant by an unregistered sale-deed, dated 6th April 1898, and state that they have been in possession as owners ever since that date and that the plaintiff's suit is barred by limitation. The District Munsif held that the plaintiff was aware of the sale-deed in favour of the defendants and the defendant's possession thereunder and that he was not entitled to redeem on the strength of the sale-deed. He held in effect that, though the plaintiff's deed was registered, and that of the defendant's unregistered, the plaintiff was entitled to no priority as he purchased with notice of the defendant's title. The District Judge on appeal reversed the decision of the District Munsif on the ground that as the defendants were already in possession as mortgagees at the date of the sale-deed (Exhibit II) and no fresh possession was given to them, they acquired no title under section 54 of the Transfer of Property Act. He also held that a mere assertion of title under an invalid sale-deed cannot create prescriptive rights. He was of opinion that it was not shown that the plaintiff had notice of the defendant's unregistered sale-deed when he purchased the property. It is contended for the appellants that the view taken by the District Judge is erroneous and that the fact the defendants were already in possession will not render the sale to them invalid. The District Judge relied on *Sibendrapada Banerjee* v. *Secretary of State for India in Council*(1), and was of opinion that the oral sale, even if true was invalid as the vendee was already in possession of the properties at the time of the oral sale. We are unable to see why an oral sale with a request by the vendor to the vendee to remain in possession in the capacity of vendee with absolute rights should not be sufficient to pass title without having recourse to the expedient of the vendee quitting the property one moment and entering upon it at another. An arrangement by which the legal nature and character of the previous possession is put an end to and subsequent possession

(1) (1907) I.L.R., 34 Calc., 207.

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treated as one by the vendee with absolute title is, in our opinion, sufficient to satisfy the requirements of section 54 of the Transfer of Property Act. In *Kannan* v. *Krishnan*(1), it was held that possession under a mortgage which was followed by an agreement to sell was equivalent to delivery of possession so as to satisfy the requirements of section 48 of the Registration Act. In *Palani* v. *Selambara*(2), it was held that an attornment by tenants was sufficient delivery of possession to satisfy the requirements of section 48 of the Registration Act, and in *Kannan* v. *Krishnan*(1), above referred to, HANDLEY, J., was of opinion that the same principle may be extended to cases where possession is already with the purchaser and he retains it under the agreement to sell. So far as the delivery of possession is concerned there seems to be no difference between the provisions of section 48 of the Registration Act and those of section 54 of the Transfer of Property Act. Section 48 of the Registration Act requires an agreement or declaration to be accompanied or followed by delivery of possession and section 54 of the Transfer of Property Act requires delivery of the property, such delivery being by putting the purchaser in possession of the property. In *Bai Kushal* v. *Lakhma Mana*(3), it was held that where one of several donees was in physical possession a declaration by the donor to the donee in occupation that he has parted with the possession is sufficient to validate the gift.

Unless there is something in section 54 of the Transfer of Property Act which compels us to do so, there is no reason for putting on this section a construction that would in effect require sales of properties below Rs. 100 to be only by registered instruments in the numerous classes of cases where the vendee is already in possession as tenant or mortgagee.

With due deference to the learned Judges who decided *Sibendrapada Banerjea* v. *Secretary of State for India in Council*(4), we are unable to accept that case as a correct exposition of the provisions of section 54 of the Transfer of Property Act. The conclusion we have come to is that, if there was an oral sale of the properties, the fact that the vendee was already in possession would not render the sale invalid if the vendor

(1) (1890) I.L.R., 13 Mad., 324.
(2) (1886) I.L.R., 9 Mad., 267.
(3) (1883) I.L.R., 7 Bom., 452.
(4) (1907) I.L.R., 34 Calc., 207.

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had by appropriate declarations or acts converted the possession of the vendee as mortgagee into one as purchaser. The difficulty in the present case, however, arises from the fact that no oral sale has been pleaded; on the contrary the case for the defendants has been that there was an unregistered document evidencing the sale which was accompanied by delivery of possession. No issue was raised as to any oral sale having preceded Exhibit II, but issues 1 and 2 are framed on the footing that the defendants' title is based on a deed of sale coupled with delivery of possession. Under these circumstances, we do not think that it is open to the appellants to set up an oral sale as to which there was no issue or any evidence.

The position, therefore is that the sale deed relied upon by the defendants is invalid for want of registration as section 54 of the Transfer of Property Act requires all sale deeds, if in writing, to be registered Section 4 of the Transfer of Property Act provides that section 54 of the Act shall be read as supplemental to the Registration Act. The effect, therefore, of section 4 read with section 54 of the Transfer of Property Act is to make all sale-deeds compulsorily registrable irrespective of the value of the property. There is, therefore, in this case no competition between a document which is optionally registrable and a registered document. The competition is between an invalid and a valid sale-deed. It is argued by the appellants' vakil that, as the defendants had possession for twelve years before the suit, they acquired title by prescription and that even assuming that the sale deed in their favour was invalid it must be taken that their possession was an assertion of absolute title as vendees. The difficulty in accepting this contention of the appellants' vakil is that, as the sale-deed (Exhibit II) is required by law to be registered it is not admissible in evidence even for the purpose of showing the nature of the appellants' possession. In *Subbayya* v. *Maddulétiah*(1), it was held that an unregistered document is inadmissible to prove the nature of the possession of the person claiming under it. So far as this Presidency is concerned the balance of authority is for holding that the establishment of title by adverse possession is a transaction affecting immoveable property. If the defendant's

(1) (1907) 17 M.L.J., 469.

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sale-deed cannot be looked into for the purpose of determining the nature of their possession, there are no materials for holding that their admitted previous possession as mortgagees was altered or that they acquired by prescription absolute title as purchasers.

The Second Appeal fails and is dismissed with costs.

N.R.

APPELLATE CIVIL.

Before Mr. Justice Oldfield and Mr. Justice Seshagiri Ayyar.

1914, September 2.

GANDLA PEDDA NAGANNA AND TWO OTHERS (PLAINTIFFS), APPELLANTS,

v.

SIVANAPPA AND TWO OTHERS (DEFENDANTS), RESPONDENTS.*

Civil Procedure Code (Act V of 1908), O. II, r. 2—Specific Relief Act (I of 1877), sec. 42—Suit for declaration—Previous decree between third parties—Plaintiffs not parties—Suit to declare that the decree is collusive and not binding on plaintiffs, if maintainable.

The plaintiffs sued for a declaration (1) that they were the owners of the suit properties as the reversioners of one *N*, who was the last male owner and (2) that a decree obtained by the first defendant against the second in respect of the properties in another suit to which the plaintiffs were not parties, was collusive and was not binding on the plaintiffs. The plaintiffs had already brought a suit in the same Court against the present defendants to recover possession of some other properties as the reversionary heirs of *N* but did not include therein the properties claimed in the present suit, though the defendants were in possession of them at the time of their previous suit. The plaintiffs alleged that they came into possession of the properties subsequently to the previous suit. The defendants contended that the suit was barred under *Order II, rule 2* of the Civil Procedure Code, and that the suit for a declaration that the decree passed in the suit between the first and the second defendants was collusive and not binding on the plaintiffs, was not maintainable.

Held, that the present suit was not barred under *Order II, rule 2* of the Civil Procedure Code.

Held further, that a suit for a declaration that a decree obtained by the first defendant against the second defendant was collusive and not binding on the plaintiffs was maintainable under section 42 of the Specific Relief Act.

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* Second Appeal No. 372 of 1913.

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SECOND APPEAL against the decree of Rao Bahadur T. V. ANANTAN NAYAR, the District Judge of Kurnool, in Appeal No. 162 of 1912, preferred against the decree of B. VENKATESWAR RAO, the District Munsif of Kurnool, in Original Suit No. 1041 of 1911.

The material facts appear from the judgment of OLDFIELD, J.

M. O. Parthasarathi Ayyangar for the appellants.

C. V. Anantakrishna Ayyar for the first respondent.

OLDFIELD, J.

OLDFIELD, J.—The lower Appellate Court has dismissed this suit on the pleadings on the grounds that (1) it is barred under Order II, rule 2 of the Code of Civil Procedure, (2) that it is not maintainable as framed.

The material facts are as follows:—The plaintiffs claim the suit property and are in possession of it as reversioners of the Nagisetti. The first and second defendants, husband and wife, have also been claiming it as reversioners, but under a different title derived from one Veeranna. In Original Suit No. 651 of 1910, the first defendant obtained a decree against the second defendant for a declaration of her title as Veeranna's reversioner, her mother having been the last person in possession of the property. In Original Suit No. 298 of 1911 the present plaintiffs obtained a decree against the present defendants, declaring their right as reversioners of Nagisetti to certain properties other than those now in suit. Original Suit No. 651 was pending, when Original Suit No. 298 was filed, but was decided before it.

The objection to the suit with reference to Order II, rule 2, is based on the fact that the properties now sued for were in the defendant's possession when Original Suit No. 298 was filed, but have, as the plaintiffs allege, come into their own possession subsequently. The plaintiffs' suit is for a declaration that the decree in Original Suit No. 651 was collusive and has no effect, so far as they and the suit properties in their hands are concerned, and the contention is that they should have asked for their relief in Original Suit No. 298 and therefore cannot ask for it now. The learned District Judge argued that, because they were out of possession of these as well as the other properties, for which they did sue, their cause of action was available for both, and they should have sued for possession of the whole estate. But they are not suing now on any cause of action directly connected with possession, since they have succeeded, in

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sale-deed cannot be looked into for the purpose of determining the nature of their possession, there are no materials for holding that their admitted previous possession as mortgagees was altered or that they acquired by prescription absolute title as purchasers.

The Second Appeal fails and is dismissed with costs.

N.R.

APPELLATE CIVIL.

Before Mr. Justice Oldfield and Mr. Justice Seshagiri Ayyar.

1914, September 2.

GANDLA PEDDA NAGANNA AND TWO OTHERS (PLAINTIFFS), APPELLANTS,

v.

SIVANAPPA AND TWO OTHERS (DEFENDANTS), RESPONDENTS.*

Civil Procedure Code (Act V of 1908), O. II, r. 2—Specific Relief Act (I of 1877), sec. 42—Suit for a declaration—Previous decree between third parties—Plaintiffs not parties—Suit to declare that the decree is collusive and not binding on plaintiffs, if maintainable.

The plaintiffs sued for a declaration (1) that they were the owners of the suit properties as the reversioners of one N, who was the last male owner and (2) that a decree obtained by the first defendant against the second in respect of the properties in another suit to which the plaintiffs were not parties, was collusive and was not binding on the plaintiffs. The plaintiffs had already brought a suit in the same Court against the present defendants to recover possession of some other properties as the reversionary heirs of N but did not include therein the properties claimed in the present suit, though the defendants were in possession of them at the time of their previous suit. The plaintiffs alleged that they came into possession of the properties subsequently to the previous suit. The defendants contended that the suit was barred under Order II, rule 2 of the Civil Procedure Code, and that the suit for a declaration that the decree passed in the suit between the first and the second defendants was collusive and not binding on the plaintiffs, was not maintainable.

Held, that the present suit was not barred under Order II, rule 2 of the Civil Procedure Code.

Held further, that a suit for a declaration that a decree obtained by the first defendant against the second defendant was collusive and not binding on the plaintiffs was maintainable under section 42 of the Specific Relief Act.

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* Second Appeal No. 372 of 1913.

SECOND APPEAL against the decree of *Rao Bahadur* T. V. ANANTAN NAYAR, the District Judge of Kurnool, in Appeal No. 162 of 1912, preferred against the decree of B. VENKATESWAR RAO, the District Munsif of Kurnool, in Original Suit No. 1011 of 1911.

The material facts appear from the judgment of OLDFIELD, J.

M. O. Parthasarathi Ayyangar for the appellants.

C. V. Anantakrishna Ayyar for the first respondent.

OLDFIELD, J.—The lower Appellate Court has dismissed this suit on the pleadings on the grounds that (1) it is barred under Order II, rule 2 of the Code of Civil Procedure, (2) that it is not maintainable as framed. OLDFIELD, J.

The material facts are as follows:—The plaintiffs claim the suit property and are in possession of it as reversioners of the Nagisetti. The first and second defendants, husband and wife, have also been claiming it as reversioners, but under a different title derived from one Veeranna. In Original Suit No. 651 of 1910, the first defendant obtained a decree against the second defendant for a declaration of her title as Veeranna's reversioner, her mother having been the last person in possession of the property. In Original Suit No. 298 of 1911 the present plaintiffs obtained a decree against the present defendants, declaring their right as reversioners of Nagisetti to certain properties other than those now in suit. Original Suit No. 651 was pending, when Original Suit No. 298 was filed, but was decided before it.

The objection to the suit with reference to Order II, rule 2, is based on the fact that the properties now sued for were in the defendant's possession when Original Suit No. 298 was filed, but have, as the plaintiffs allege, come into their own possession subsequently. The plaintiffs' suit is for a declaration that the decree in Original Suit No. 651 was collusive and has no effect, so far as they and the suit properties in their hands are concerned, and the contention is that they should have asked for their relief in Original Suit No. 298 and therefore cannot ask for it now. The learned District Judge argued that, because they were out of possession of these as well as the other properties, for which they did sue, their cause of action was available for both, and they should have sued for possession of the whole estate. But they are not suing now on any cause of action directly connected with possession, since they have succeeded,

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enforcing their right to it otherwise. Their present cause of action, the alleged cloud on their title, created by the decree in Original Suit No. 651, is a distinct grievance, which moreover arose, after Original Suit No. 298 was filed, and therefore could not have been pleaded in it. In these circumstances there can be no objection to the plaintiffs claiming now what they could not have claimed before. This objection accordingly is invalid.

This conclusion affects the learned District Judge's argument regarding the maintainability of the suit, because he explained plaintiffs' failure to ask for what he considered the appropriate relief, a general declaration of their title, by reference to his finding that Order II, rule 2, debarred them from doing so. This explanation would however have in any case been useless, because their suit, as brought, must necessarily have involved their establishing (1) their title since their right to sue must be conditional on their establishing it, and (2) other particular facts entitling them to have the decree declared of no effect.

The more serious objection to the suit is stated by the learned District Judge, as being that the "decree in Original Suit No. 651 cannot and does not purport to bind the plaintiffs and that they cannot ask the Court to grant a bootless declaration in respect of a matter, which is self-evident." Before dealing with the correctness of this conclusion I observe that no authority has been shown for treating it, as the learned District Judge has done, as negativing the right to sue directly and not merely as ground for the exercise of the Court's discretion to refuse the declaratory relief asked for. It is in fact relevant only as the latter.

That the decree in Original Suit No. 651 binds only the parties to it, the defendants, is of course, self-evident. But it does not follow that the declaration asked for by the plaintiffs regarding it will be without effect. For it will enable them, if they obtain it, to frustrate the efforts, which the first defendant may be expected to make to obtain delivery of the property in execution against the second defendant and prevent their being left, if the first defendant is successful, to regain possession by an application under Order XXI, rule 100 of the Code of Civil Procedure or perhaps eventually by a suit. It is relevant that the first defendant's pleading in no way disclaims his right to

take such action [vide *Thakurain Jaipal Kunwar* v. *Bhaiya Indar Bahadur Singh*(1)]. For he alleged the validity of his decree and of his title under Veeranna denying the validity of the plaintiff's title under Nagi Setti, and apart from this indication of the defendant's intentions the presumption must be against them, since they are in no better position than the holder of an instrument alleged to be void, of whom it has been said "If an instrument ought not to be used or enforced, it is against conscience for the party holding it to retain it, since he can only retain it for some sinister purpose" (vide Story's Equity Jurisprudence, 13th edition I, 10) And this is not to be *restricted to transactions*, to which the plaintiff is a party. For the learned author proceeds "If it is a negotiable instrument it may be used for a fraudulent and improper purpose to the injury of a third party." Most of the decisions relating to declarations deal with claims to relief in that form in order to the protection of an existing title against repetition of direct denials of it, which have already taken place, and turn on the plaintiffs' possession of an interest, entitling him to sue or on the possibility of his asking for consequential relief, and they are not of assistance here, where it must be assumed that the plaintiffs have title and possession and there can be no question of their duty to ask for the latter. Here the sole question is whether the possible danger to be averted by the declaration asked for is so clear and immediate that the Court should use its discretion to grant it. The cases do not suggest any test of general application but have been decided on the particular circumstances of each, and it is natural that this should be so. It is then possible only to consider how the Court's discretion was exercised in these the circumstances of which resemble must closely those before us. In *Rajah Nilmony Singh* v. *Kally Churn Bhattacharjee*(2), it was observed that plaintiff could not have a declaration for future use in consequence of a mere assertion, which might (for all that appeared) have been oral, but that one might have been granted if he had been applying for the cancellation of a deed impugning his title; and in *Kathama Natchiar* v. *Dorasinga Tever*(3) the Court, whilst refusing a declaration,

(1) (1904) 31 I.A., 67. (2) (1874) 2 I.A., 83

(3) (1875) 2 I.A., 169

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when the defendant had merely evinced hostility by granting power-of-attorney to an agent in order that he might assist in frustrating the plaintiff's claim to a zamindari, said that its decision would not preclude his impeaching any actual diversion of the succession to his prejudice. In *Chinnasami Mudaliar v. Ambalavana Mudaliar*(1) a declaration was granted regarding an adoption, though it had not been alleged by any party to it in any proceedings by or against the plaintiff. In *Harendra Lal Rai Chowdhury v. Nawab Salimulla Bahadur*(2) the Court made a declaration regarding a revenue sale though the plaintiff was not the defaulter and observed, "It has been suggested that plaintiff might have waited, till his title was challenged. In our opinion he was not bound to wait, till he actually found himself in jeopardy. . . . It is perfectly true that the cloud (on his title) must be cast, before he can ask for its removal, he must allege and prove hostility on the part of the defendants for no Court will move on purely speculative grounds" and held that the sale had been brought about to annul the encumbrances of the tenure-holders of whom the plaintiff was one and that he was therefore entitled to relief. None of these cases, in which the Court interfered or would have interfered was stronger than the present.

I refer next to two cases, in which the facts were very similar to those now in question. The defendants in each were the persons responsible for a sale under a mortgage decree, to which the plaintiff was not a party of property which he claimed and of which he was in possession. It is not a valid ground of distinction that in those cases the danger apprehended was a delivery after a sale, whilst here it is one under a decree. For in them also the delivery would be made without notice to the plaintiff. In one of these cases—*Deokali Koer v. Kedar Nath*(3)—it was said that "none of the declarations claimed were expressed as declaration of the plaintiff's right to property," and that "though the proposition, at which he aimed, might be in some measure involved in those declarations, that was not what is sanctioned by section 42." This would, it might have been supposed, have been reason for dismissing the suit for declaration alone. It was however treated as entailing only that the plaintiff

(1) (1906) I.L.R., 29 Mad., 48. (2) (1910) 12 C.L.J., 336.
(3) (1912) I.L.R., 39 Calc., 704.

had implicitly asked for an injunction and must pay Court-fee for that relief. In these circumstances it is not clear what the Court intended to lay down in the statement quoted, and I therefore prefer to follow *Shivram Chintaman* v. *Jivu*(1) in which it was held that, when the plaintiff's title was denied in proceedings, to which he was a stranger he was entitled to sue and need not wait till he was dispossessed.

Lastly *Vijiasamy Tevar* v. *Sasivarma Tevar*(2) has been much relied on by the defendants for the position that a declaration should not be granted, when the transaction to be declared invalid would on plaintiff's own allegations be but a *brutum fulmen* against him. That decision turned mainly on the vexatious nature of the plaintiff's suit and the Court's inherent right to prevent abuse of its process by dismissing it. But, so far as it proceeded on the ground referred to, it is distinguishable from the case before us. There the Court recognised that if the party alleging an adoption pretended that the conditions which would validate it, existed, the person affected by it should be allowed to impeach it, but it held that the adoption attacked by the plaintiff was so totally nugatory from his point of view that it would be futile to make it the subject of judicial investigation. Here the decree between the defendants will be in no way nugatory with reference to the plaintiff's right, notwithstanding that they were not parties to it, for, as already pointed out, the Court will have no choice but to order a delivery under it and will have no right to hear the plaintiff's objection before doing so. In the one class of cases it cannot be supposed that the Court would act on the transaction at all; in the other it is clear that it would be able and likely to do so to the prejudice of a third party, the plaintiff until it could hear him I may point the distinction by reference to *Gray* v. *Matthias*(3) and *Bromley* v. *Holland*(4) the Court observing in the latter. " It is not just to consider the instrument, merely having regard to the question whether the demand can be directly founded on it, for an instrument which apparently though not really (which must be shown by circumstances *dehors*) creates an incumbrance, may by being produced defeat the ends of justice. I do not go the length that, if it is clear

(1) (1889) I.L.R., 13 Bom., 34. (2) (1905) I.L.R., 29 Mad., 200.
(3) (1800) 5 Vesey. Jr., 286. (4) (1802) 7 Vesey. Jr., 3.

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that no use can be made of the instrument, that is ground enough for the equitable jurisdiction to take it out of the possession of the party, who can make no use of it beneficial to himself, but, if a use may be made of it prejudicial to another, I should have an inclination to transfer the possession of it."

The law standing thus I hold that the lower Court might properly on proof of the plaintiff's allegations, use its discretion to grant the declaration they claim. The appeal must therefore be allowed and the lower Court's decree set aside, the appeal being remanded for readmission and disposal on the merits in the light of the foregoing.

Costs in this Court will be costs in the case.

SESHAGIRI AYYAR, J.

SESHAGIRI AYYAR, J.—The facts in this Second Appeal are fully stated in the judgment of my learned colleague which I have had the advantage of reading. I shall deal very briefly with the two questions of law which were argued before us.

The first suit was based on the title of the plaintiffs to succeed as reversioners and it admittedly did not include the present property. If the plaintiffs sued upon the same title to recover possession of the plaint property there is no doubt that Order II, rule 2, would be a bar; but they got possession afterwards and their present complaint is that the defendants are setting up a false title to it which has necessitated their seeking the aid of the Court. If the contention of the respondents were to prevail, it would involve this, viz., that a plaintiff claiming to recover possession of the property must also pray that he should be protected against all possible violations of his right in future in respect of that property. It would be futile to file a suit of that nature, and the Court would have rejected it at once. The lower Appellate Court was therefore wrong in holding that the suit was barred by Order II, rule 2.

The more important question which the Judge has dealt with in less detail relates to the maintainability of the suit under section 42 of the Specific Relief Act. I do not agree with his view of the averments in the plaint. He is apparently inclined to hold that if the plaintiffs sued for a declaration regarding their title, the suit would lie; but he reads the plaint as not asking for such a declaration. Reading prayers (1) and (2) of the plaint, I have no doubt that the plaintiffs did ask for a declaration that the property in suit belongs to them as the

reversioners of Nagi Setti, that the defendants have no manner of title thereto, and that the decree collusively obtained behind their backs by the first defendant against defendants Nos. 2 and 3 is not binding on them. The real point for decision is whether a suit of this nature is competent. I shall refer very briefly to the history of the legislation which resulted in the enactment of section 42 of the Specific Relief Act, as that will show what classes of cases the legislature intended to bring within its operation. As was pointed out by WILSON, J., in *Bhujendro Bhusan Chatterjee* v. *Trigunanath Mookerjee*(1) under the English law, a suit for a bare declaration did not lie, unless the party suing could show that he was entitled to some further relief as a result of the declaration. This rule of English law was in force as a rule of equity and good conscience in this country until the enactment of section 15 of Act VIII of 1859; that section ran thus:—"No suit shall be open to objection on the ground that a merely declaratory decree or order is sought thereby; and it shall be lawful for the Civil Courts to make binding declarations of right without granting consequential relief." Even after this section, the earlier decisions were to the effect, following the principle of English law already referred to, that unless there was a right to some consequential relief which if asked for, might have been given by the same Court, or unless it was required as a preliminary to obtaining relief in some other Court, the Courts should refuse to grant a bare declaration. See *Kathama Natchiar* v. *Dorasinga Tever*(2), *Sheo Singh Rai* v. *Dakho*(3) and *Sreenarain Mitter* v *Sreemutty Kishen Soondery Dassee*(4). The Specific Relief Act was afterwards passed which undoubtedly widened the scope of the remedy. Under section 42 of that Act the plaintiff has only to show that he has some legal character or some right to property and that his opponent is either denying or interested in denying such legal character or title. The object of the section is really to perpetuate and strengthen the testimony regarding the title of the plaintiff so that adverse attacks upon it may not weaken it. The policy of the legislature is not only to secure to a wronged party possession of the property taken away from him, but also to see that he is allowed to enjoy that

(1) (1884) I.L.R., 8 Calc., 761. (2) (1875) I.A., 169.
(3) (1878) I.L.R., 1 All., 688, &c., I.L.R., 5 I.A., 87.
(4) (1873) 11 B.L.R., 171.

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property peacefully. In other words, if a cloud is cast upon his title or legal character he is entitled to seek the aid of the Court to dispel that cloud.

What we have to consider in this case is whether the decree obtained by the first defendant against the second defendant denies the plaintiff's title to his property. It has been said that it is not the function of the Court to enunciate abstract truisms of law. Following that reasoning it may be argued that as the fraudulent decree can in no way affect plaintiff's rights, the Court should not lend itself to the task of declaring what is obviously indisputable. But although the decree may not affect plaintiff's rights *in præsenti*, it is evidence which if allowed to stand may result at some future time in disturbing the plaintiff's title. I think that is a sufficient grievance which the Courts should remedy under section 42 of the Specific Relief Act.

Coming to decided cases, in *Nurdin* v. *Alavudin*(1) a patta was ante-dated and affixed to the plaintiff's house. The learned Judges held that this was not an infringement of the plaintiff's title and that he had no cause of action to sue. This case sounds as if it were an echo of the rulings under section 15 of Act VII of 1859. The decision in *Vijiasamy Tevar* v. *Sasivarma Tevar*(2) cannot be explained away on the same ground. It lays down that it is not every fabrication of evidence that would enable a plaintiff to come before a Court of law to claim a declaration. But the learned Judges who decided this case were parties to the decision in *Chinnasami Mudaliar* v. *Ambalavana Mudaliar*(3). In this latter case an adoption was set up which had not the immediate effect of injuring the plaintiff's title. The adoptee was creating evidence which might at some future time throw doubts upon the plaintiff's title. The learned Judges held that that was a proper case for granting a declaration under the Specific Relief Act. Thus so far as Madras is concerned, the latest authority is in favour of the position that wherever evidence is being created which might ultimately result in disturbing the title of the plaintiff he will have a cause of action to sue under section 42. The decision of the Judicial Committee in *Pirthi Pal Kunwar* v. *Guman Kunwar*(4) looks on the face of it as if it is opposed to the view taken in

(1) (1888) I.L.R., 12 Mad., 134.
(2) (1905) I.L.R., 28 Mad., 560.
(3) (1906) I.L.R., 29 Mad., 48.
(4) (1890) I.L.R., 17 Calc., 933.

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Chinnasami Mudaliar v. *Ambalavana Mudaliar*(1). In that case a *talukdar* died leaving a son and a widow, and this son afterwards died leaving a widow who succeeded to the estate. It was held by the Privy Council that the suit of the widow in possession for a declaration that an adoption made by her mother-in-law was invalid should be dismissed. SIR BARNES PEACOCK in delivering the judgment of the Committee referred with approval to the statement of law contained in *Sreenarain Mitter* v. *Sreemutty Kishen Soondery Dassee*(2) and stated that "All that is suggested by the learned counsel on the part of the appellant in support of a declaratory decree is this, that at some time or another after the death of the present plaintiff the person who according to the plaintiff's contention is not an adopted son may by some means, either by act of the Government or otherwise obtain possession as an adopted son" This was held not be a sufficient ground for granting the declaration prayed for. Reading the judgment carefully, I am of opinion that what the Judicial Committee intended to lay down was that it was a matter of discretion in such cases whether a declaration should be granted or not. The decision cannot be regarded as laying down that a suit to avert a possible apprehended danger will not lie.

I therefore agree in the conclusion of my learned colleague that the suit is maintainable.

K.R.

APPELLATE CIVIL.

Before Mr. Justice Sadasiva Ayyar and Mr. Justice Napier.

1914, September 8 and 9.

ARUNACHALA AIYAR AND TWO OTHERS (PLAINTIFFS Nos. 2, 3 AND 6), APPELLANTS,

v.

T. RAMASAMI AIYAR AND THREE OTHERS (FIRST DEFENDANT AND PLAINTIFFS Nos. 1, 4 AND 5), RESPONDENTS.*

Sale-deed—Covenant for title, breach of—Limitation Act (IX of 1908), art. 116—Transfer of Property Act (Act IV of 1882), sec. 55 (2).

A suit for compensation for breach of an express or implied covenant for title and quiet enjoyment in respect of a sale-deed executed after coming into force of the Transfer of Property Act is governed by article 116 of the Limitation Act.

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(1) (1906) I.L.R., 29 Mad., 48. (2) (1873) 11 B.L.R., 171.

* Second Appeal No. 658 of 1913.

ARUNACHALA v. RAMASAMI.

Case law reviewed.

Subbaraya Reddiar v. *Rajagopala Reddiar* (1914) M.W.N., 376, approved.

Covenant for title under section 55 (2) of the Transfer of Property Act is annexed to the contract of sale as well as to the conveyance.

SECOND APPEAL against the decree of A. F. G. MOSCARDI, the Acting District Judge of Tanjore, in Appeal No. 297 of 1911, preferred against the decree of P. G. RAMA AYYAR, the District Munsif of Tiruvadi, in Original Suit No. 45 of 1910.

In a suit filed in 1910 on a sale-deed dated 1904, the sale was found at the trial to be an invalid transaction. The sale in question was of property which purported to have been allotted to the first defendant in a family partition. It turned out that the partition was not a valid one and therefore at the time of sale the first defendant had no title to convey. The plaintiffs hence pressed their claim during the trial to recover the consideration money and an issue was framed on the first defendant's contention that the claim was barred by limitation. The Court of First Instance held that it was not barred and decreed the claim against the first defendant. The lower Appellate Court held that the sale was void *ab initio* for want of title in the vendor and that the period of limitation was three years and dismissed the suit. The plaintiffs preferred this Second Appeal.

C. V. Anantakrishna Ayyar for the appellants.

G. S. Venkatarama Ayyar and *G. S. Ramachandra Ayyar* for the first respondent.

SADASIVA AYYAR AND NAPIER, JJ.

JUDGMENT.—The learned District Judge has reversed the decision of the District Munsif who granted a decree for money against the first defendant personally. The District Judge held that the suit of the plaintiff (the vendee) so far as it prayed for recovery of compensation from the first defendant (the vendor) for the breach of the covenants for title and possession was barred by limitation, the period being three years under article 62 or 97 of the Limitation Act. The learned District Judge relied on *Kovvuri Basivi Reddi* v. *Tallapragada Nagamma*(1) in support of his decision.

It is contended before us that, as the sale-deed in this case was executed in 1904 long after the Transfer of Property Act came into force, the proper article to be applied in respect of a

(1) (1912) I.L.R., 35 Mad., 39

suit claiming compensation for breach of an express or implied covenant of title and quiet enjoyment is article 116 which allows a period of six years. We think that this contention must be upheld. It has been decided in a series of cases beginning in 1889 [see the two cases reported in *Kasturi Naicken* v. *Venkatasubba Mudaly*(1) and *Narayana Reddi* v. *Peda Rama Reddi*(2)] that in all registered conveyances executed after the Transfer of Property Act came into force, a covenant for title is implied by section 55, clause (2) of that Act, that the registered conveyance should be read as if it expressly embodied that covenant and that the breach of that covenant is the breach of a contract in writing registered within the meaning of article 116.

We need refer only to a few of the later cases, namely, those in *Chidambaram Pillai* v. *Sivathasamy Thever*(3), *The Zamindar of Vizianagaram* v. *Behara Suryanarayana Patrulu*(4), *Nageswara Row* v. *Sambasiva Row*(5), *Krishnan Nambiar* v. *Kannan*(6) and *Umchaman* v. *Ahmed Kutti Kazi*(7). It must, however, be admitted that the case in *Kovvuri Basivi Reddi* v. *Tallapragada Nagamma*(8) seems to throw some doubt on the decision in *Krishnan Nambiar* v. *Kannan*(6) which follows the current of the earlier decisions. The reasoning in *Kovvuri Basivi Reddi* v. *Tallapragada Nagamma*(8) is not quite clear and one of the two learned Judges who took part in it was also a party to the later decision which expressly followed the current of the earlier decisions [see the subsequent case *Nageswara Row* v. *Sambasiva Row*(5) distinguishing *Kovvuri Basivi Reddi* v. *Tallapragada Nagamma*(8), as "not in point."] In *Kovvuri Basivi Reddi* v. *Tallapragada Nagamma*(8), the correctness of the decision in *Krishnan Nambiar* v. *Kannan*(6) was doubted on the strength of the Privy Council ruling in *Hanuman Kamat* v. *Hanuman Mandur*(9), wherein their Lordships held that in the case of a conveyance executed in 1879 (before the Transfer of Property Act came into force) a suit for compensation for failure of consideration (that is for the recovery of the purchase-

(1) (1890) 1 M.L.J., 162.
(2) (1890) 1 M.L.J., 472.
(3) (1905) 15 M.L.J., 396.
(4) (1902) I.L.R., 25 Mad., 587.
(5) (1911) 1 M.W.N., 361.
(6) (1898) I.L.R., 21 Mad., 8.
(7) (1898) I.L.R., 21 Mad., 242.
(8) (1912) I.L.R., 35 Mad., 33.
(9) (1892) I.L.R., 19 Calc., 123.

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money paid to the vendor) through the failure of the vendee to obtain possession of the land sold fell under article 97 (three years' rule) and that the date of the cause of action was the date of the obstructions by the vendor's co-parceners. Their Lordships had no occasion to consider the effect of section 55, clause (2) of the Transfer of Property Act on a registered conveyance executed after the date of that Act. That case is therefore not an authority for the proposition that to a suit brought on the covenant added by the statute law to all registered conveyances executed after the Transfer of Property Act came into force. Article 116 did not apply but only article 62 or 97. In *Unichaman* v. *Ahmed Kutti Kazi*(1), a similar argument was addressed to a Bench of this Court, namely, that article 97 applied to such a suit because the Bombay High Court held that view in *Sawāba Khandapa* v. *Abāji Jotirav*(2). But as a Division Bench of this Court point out in *Unichaman* v. *Ahmed Kutti Kazi*(1), the Transfer of Property Act was not in force in Bombay when that decision in *Sawāba Khandopa* v. *Abāji Jotirav*(2) was given. This distinction seems not to have been in the minds of the learned Judges who decided *Kotturi Basivi Reddi* v. *Tallapragada Nagamma*(3). We might add that BENSON, J., who took part in *Kotturi Basivi Reddi* v. *Tallapragada Nagamma*(3) was also a party to the prior case in *Unichaman* v. *Ahmed Kutti Kazi*(1). Next it was contended that BAKEWELL, J., doubted the correctness of *Krishnan Nambiar* v. *Kannan*(4) in his judgment in *Ramanatha Iyer* v. *Ozhahoor Pathiriseri Raman Nambudripad*(5). In the first place, the observation is *obiter*. In the second place (with the greatest respect) we find difficulty in following the observation of the learned Judge that the Transfer of Property Act "may be construed as having annexed the statutory agreement" (that is the contract embodying the covenant for title and other covenants) to the *contract of sale* and not to the *deed of conveyance* itself. As said in Dart's "Vendors and Purchasers", Vol. I, page 597, these covenants are by the English Conveyancing Act, 1881, section 7 "implied in every *conveyance*" and we do not see why they should be

(1) (1898) I.L.R., 21 Mad., 242. (2) (1887) I.L.R., 11 Bom., 475.
(3) (1912) I.L.R., 35 Mad., 39. (4) (1898) I.L.R., 21 Mad., 8.
(5) (1913) M.W.N., 1029 at p. 1034.

held under the Transfer of Property Act to be attached only to the *contract of sale* and not to the conveyance. The other learned Judge MILLER, J., was prepared to follow *Krishnan Nambiar* v. *Kannan*(1). The respondent's vakil's argument that a covenant for title cannot be implied where the buyer knows the defect of title is opposed to the recent decision by SESHAGIRI AYYAR, J., in *Subbaraya Reddiar* v. *Rajagopala Reddiar*(2) with which decision we agree

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The learned District Judge has decided the case only on the preliminary ground of limitation raised in the ninth ground of the appeal memorandum presented to the District Court.

We are unable to agree with him in that finding and if article 116 applies, as we hold it to apply, it is not denied that the suit is not barred. The question whether plaintiff can be given a decree for recovery of the money due under the original hypothecation bond has also not been decided (see Order XLI, rule 33 of the Civil Procedure Code, and the wide powers of the Appellate Court).

We therefore reverse the District Judge's decision and remand the case for the disposal of the appeal preferred to the District Court on the other points arising in the case.

Costs will abide the result.

S.V.

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(1) (1898) I.L.R., 21 Mad., 8. (2) (1914) M.W.N., 376.

APPELLATE CIVIL.

Before Mr. Justice Sadasiva Ayyar and Mr. Justice Napier.

1914. July 28 and 29, August 6 and September 14.

A. THIRUVENGADATHAIYANGAR AND ANOTHER (DEFENDANTS NOS. 1 AND 2), APPELLANTS,

v.

R. PONNAPPIENGAR AND NINE OTHERS (PLAINTIFF AND DEFENDANTS NOS. 3 TO 5, 7 AND 9 TO 11), RESPONDENTS.*

Religious Endowments Act (XX of 1863), sec. 3—Temple falling under—Power of Temple Committee to appoint additional trustees in good faith and in the interests of the temple—Onus of proving bad faith, on person challenging the appointment.

For the better management of a certain Hindu temple which had no settled scheme of management and which was governed by section 3 of the Religious Endowments Act (XX of 1863) a Temple Committee appointed two trustees in addition to the three then existing.

Held:

(a) that the committee had power to appoint the additional trustees in virtue of their general power of superintendence over temples committed to their care as successors to the Board of Revenue, who had such power under section 2 of Regulation VII of 1817,

(b) that this power must be exercised reasonably and in good faith, in the interests of the temple,

(c) that the *onus* of proving that it did not exercise this power "reasonably and in good faith" lay not on the committee but on the person challenging the appointment of additional trustees, e.g., on the already existing trustee, as in this case, who sued to set aside the additional appointments, and

(d) that the power of appointing new trustees was not confined to filling up vacancies alone, but extended to creating additional trustees.

Sheik Davud Saiba v *Hussein Saiba* (1894) I.L.R., 17 Mad., 212, referred to.

Venkatachala Pillai v. *The Taluk Board, Saidapet* (1911) I.L.R., 34 Mad., 375, *Nelsyathakshi Ammal* v *The Taluk Board, Mayavaram* (1911) I.L.R., 34 Mad., 333, s.c., 20 M.L.J., 885 and *Ganapathi Ayyar* v. *Sri Vedavyasa Alasinga Bhattar* (1906) I.L.R., 29 Mad., 534, distinguished.

SECOND APPEAL against the decree of F. D. P. OLDFIELD, the District Judge of Tinnevelly, in Appeal No 275 of 1911, preferred against the decree of T. SRINIVASA AYYANGAR, the

* Second Appeal No. 2122 of 1912.

Temporary Subordinate Judge of Tuticorin in Original Suit No. 12 of 1909.

THIRUVENGADATH-AIYANGAR v. PONNAPPIENGAR.

The necessary facts are given in the judgment.

K. Srinivasa Ayyangar and *N. Rajagopalachariar* for the Appellants.—The temple concerned in this suit falls under section *3* of the Religious Endowments Act and the committee is entitled to appoint additional trustees whenever it considers such a step necessary. The District Judge has placed the *onus* of proving the validity and the necessity of appointing *the* additional trustees on the defendants, viz, the newly appointed additional trustees and the temple committee that appointed them. This is wrong—*vide Bhavanishankar* v. *Timmanna*(1). The temple committee being a statutory body its acts must be presumed to be reasonable and *bona fide;* compare section 47 of the Indian Trust Act (II of 1882) and *Sheik Davud Saiba* v. *Hussein Saiba*(2) and Godefroi on Trusts (3rd edition, page 330). The power to appoint additional trustees is one incidental to and included in the right of superintendence which originally vested in the Revenue Board under sections 2 and 13 of Regulation VII of 1817 and which thereafter descended to the temple committee under section 7 of the Religious Endowments Act. See *Ganapathi Ayyar* v. *Sri Vedavyasa Alasinga Bhattar*(3). Looking to facts of the case, these are not really appointments of additional trustees but only filling up of vacancies among the trustees whose number was at one time five.

T. Rangachariar for the respondent.—The powers of the committee are only those possessed by the Revenue Board under section 13 of Regulation VII of 1817. The Board had not under that section the power to appoint anybody as trustee except where there was a vacancy: see *Venkatachala Pillai* v. *The Taluk Board, Saidapet*(4) and *Nelayathakshi Ammal* v. *The Taluk Board, Mayavaram*(5) nor did section 2 of the Regulation empower the Board to appoint additional trustees. The existing trustees having a right of freehold in their office, the *onus* is on the authority appointing. This is really altering a scheme of management.

(1) (1906) I.L.R., 30 Bom., 5?8.
(2) (1894) I.L.R., 17 Mad., 212.
(3) (1906) I.L.R., 29 Mad., 531 at p. 536.
(4) (1911) I.L.R., 34 Mad., 375.
(5) (1911) I.L.R., 34 Mad., 333; s.c., 20 M.L.J., 555.

THIRUVENGA-PATH-AIYANGAR v. PONNAP-PIENGAR.

The District Judge has held on the evidence in this case that the additional appointments were not only not justified but were unnecessary either from an administrative point of view or as a punishment to the existing trustees, on the alleged ground of their incompetency or impropriety in the discharge of their duties. Hence the additional appointments are illegal.

SADASIVA AYYAR AND NAPIER, JJ.

JUDGMENT.—The Second Appeal arises out of a suit by one of five trustees of a temple against the members of the temple committee and the other four trustees, the relief asked for being a declaration that two of the trustees have not been appointed lawfully by the temple committee. The temporary Subordinate Judge of Tuticorin in whose Court the suit was filed dismissed the suit. The District Judge of Tinnevelly on appeal set aside the decree of the lower Court and granted a declaration that the appointment of the trustees by the temple committee was not legally valid, ordered the cancellation of the appointments and issued an injunction restraining the newly appointed trustees from interfering with the management of the temple.

It is argued before us that the appointment was valid and that the District Judge has misapprehended the powers of a temple committee and wrongly thrown the burden on them of justifying the appointment. For the respondents it was contended, first that the appointment of the two trustees was an addition to the constituted number and thereby amounted to an alteration of the scheme which, it was argued, was entirely beyond the power of the temple committee, and secondly, that even if the committee had power to make the appointment it lay on them to justify it and that the District Judge having found that it was not justified this Court could not interfere in Second Appeal.

We can dispose of the first point very shortly. There is nothing in the plaint to indicate that objection was taken on the ground that the appointment was a variation of the scheme nor was the view ever urged during the course of the protracted proceedings in both the Courts; nor does the District Judge base his judgment on that ground. Further it appears that there is no record of any scheme ever having been settled and it is clear on the evidence, the admissions of the plaintiff and the findings of the Original Court that at one time there were actually five

trustees, the number now constituted by the present appointments and that at the time of the plaintiff's own appointment there were actually four. This objection therefore fails on two grounds and the appointment could very fairly be justified as one filling up two vacancies which had improperly been allowed to exist for a considerable time. If these appointments are to be viewed as the filling up of vacancies they are clearly justified under the provisions of regulation VII of 1817 as applied by the Religious Endowments Act, Act XX of 1863. The temple in question was, at the date of the passing of Act XX of 1863, one covered by the language of section 3 of that Act and, by section 7 of the Act, a temple committee was constituted to exercise the powers of the *Board of Revenue* and the local agents vested in them by the regulation. Turning to regulation VII of 1817, it is clear that, under sections 12 and 13, the Board of Revenue had power to appoint suitable persons as trustees and to fill up vacancies from time to time. We are of opinion, however, that even if these were not vacancies the temple committee had power to appoint these trustees if they thought it advisable to do so in the interests of the endowment, the appointments, as we have already pointed out, not being a variation of an existing scheme. Reliance is placed by the respondents on *Venkatachala Pillai* v. *The Taluk Board, Saidapet*(1) and it is argued that that case is an authority for the proposition that the only powers of appointments recognised by the regulation are appointments to fill vacancies. That is, however, not the *ratio decidendi* of the case. What was done in that case was that a trustee, namely, the Taluk Board, had been appointed without the existing trustee being dismissed, and the Court held (*vide* page 385) that the Board of Revenue could not ignore the rights of existing trustees and appoint trustees to the prejudice of one who is in possession of the office under the instrument creating the trust. The duty of the Board was, first, to dismiss the trustee which could be done for good cause shown and, then, there being a vacancy, exercise the powers under sections 12 and 13 of filling up the vacancy. That case, therefore stands on an entirely different footing to the present. But it is to be noted that the power to dismiss a trustee was assumed to exist by virtue of section 2 although no specific

(1) (1911) I.L.R., 34 Mad., 375.

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power to that effect is to be found in the words of the regulation. This was on the authority of *Chinna Rangaiyangar* v. *Subbraya Mudali*(1), a case quoted with approval in *Seshadri Ayyangar* v. *Nataraja Ayyar*(2). Further, the Court points out that on the occasion of a vacancy various powers are given to the Board by section 13 in that they need not fill up the vacancy but may make such other provision for the trust, management or superintendence as may seem to them right and fit. Reliance was also placed on *Nelayathakshi Ammal* v. *The Taluk Board, Mayavaram*(3) for the proposition that there was no power in the Board to appoint trustees except on the occasion of a vacancy. It is true that the Court in that case does doubt whether this power can be found in the Regulation other than in section 13; but the judges express no decided opinion on the point which was not necessary for the decision of the case. What was decided there was that where the Taluk Board had taken over the management by virtue of section 51 of the Local Boards Act it could not divest itself of its duty of management by appointing an independent trustee. That case is, therefore, no authority for the broad proposition contended for and in our opinion it is untenable; we have no hesitation in holding that a power to appoint an additional trustee when such appointment is not a variation of the scheme is necessarily vested in the temple committee as successors to the Board of Revenue. It was specifically so held in *Sheik Davud Saiba* v. *Hussein Saiba*(4). The Judges there use language which seems to indicate that they base the right on section 13, though it is not clear from the somewhat short judgment that this is so. They certainly lay down, however that it is competent to the committee where there is no hereditary trustee, to add to the number of the existing trustees if, in their opinion, it is advisible to do so in the interests of the trust. We prefer to find this power in section 2 of the Regulation. *Chinna Rangaiyangar* v. *Subbraya Mudali*(1) which decides that the Board of Revenue has power to remove a trustee lays down that the Regulation does not contain any restriction on the performance of the duties of general superintendence and

(1) (1867) 3 M.H.C.R., 334. (2) (1898) I.L.R., 21 Mad., 179 at p. 190.
(3) (1911) I.L.R., 34 Mad., 333; s.c., 20 M.L.J., 855.
(4) (1894) I.L.R., 17 Mad., 212.

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management and that decision was followed in *Ramiengar* v. *G. Pandarasannada*(1) and in a later case *Virasami* v. *Subba*(2) it was assumed that, in cases falling within section 3 of Act XX of 1863, such a power as this, the power of dismissal existed just as the authority to suspend or remove *for* just cause was held to be properly incidental to other duties and responsibilities of the Board of Revenue and to have been impliedly given by the Court in *Chinna Rangaiyangar* v. *Subbraya Mudali*(3), so the power to add additional trustees for the purposes above mentioned must likewise be held to be properly incidental to the duties and responsibilities of the temple committee and to be inherent from their power of general superintendence. The last argument addressed to us was that there was a distinction between the exercise of this power for administrative purposes and for punitive purposes. We are unable to accede to the argument that there is anything punitive in appointing fresh trustees where a temple committee are not satisfied that the existing trustees are dealing with the work successfully or properly. This contention is one that found favour with the learned District Judge and is the basis of his judgment. He remanded the case to the lower Court for the trial of an issue whether the appointments were a reasonable and *bona fide* exercise of the committee's power and in consequence of certain admissions made by the temple committee's vakil held that the appointment was punitive. He then required the temple committee to justify the appointment and eventually set it aside on the ground "that no such punishment should have been inflicted, adding, however, that if it was made on purely administrative ground it could not be supported since it did not result and, so far as has been shown, would not necessarily result in any improvement in the submission of accounts." We are unable to find any authority for this distinction between a punitive appointment of additional trustees and administrative one. The learned District Judge seems to rely on *Ganapathi Ayyar* v. *Sri Vedaiyasa Alasinga Bhattar*(4). That, however, was a case where additional trustees were appointed in such a manner as to alter the scheme of management already

(1) (1867) 5 M.H.C.R., 53.
(2) (1883) I.L.R., 6 Mad., 54.
(3) (1867) 3 M.H.C.R., 334.
(4) (1906) I.L.R., 29 Mad., 534.

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settled by the Board. As pointed out above, there is no evidence of a scheme of management ever having been settled or what its nature was. We hold that where no person is deprived of his freehold there is no duty cast on the temple committee to show affirmatively that the appointment was for just and sufficient cause. In our view the only limit to be imposed on the temple committee in the exercise of their discretion is by an anology to section 49 of the Trusts Act II of 1882, "where a discretionary power conferred on a trustee is not exercised reasonably and in good faith, such power may be controlled by a principal Civil Court of original jurisdiction." This has been expressly held in *Sheik Davud Saiba* v. *Hussein Saiba*(1) in circumstances resembling the present case. The learned District Judge has cast a higher duty on the temple committee than he should have done and his finding on the issue based on his view of the burden of proof and on his limitation of the materials for justification cannot be supported. We do not think it advisable to send this case back after having carefully considered the case ourselves. We propose, therefore, to exercise, the powers conferred on this Court by Order XLI, rule 24 of the Civil Procedure Code of resettling the issues and finally determining the suit ourselves. The issue will be whether the Temple Committee has not exercised its power of appointment in this case "reasonably and in good faith."

Cur ad vult.

This Second Appeal coming on for final hearing, the Court delivered the following

SADASIVA AYYAR AND NAPIER, JJ.

JUDGMENT.—In the judgment pronounced by us on the 6th August 1914 we expressed our opinion that the real question for decision in this case was whether when the majority of the members of the temple committee appointed the defendants Nos. 1 and 2 as additional trustees at a meeting of the committee held on the 28th February 1909 (Exhibit A1), they did not exercise "reasonably and in good faith" the discretionary power vested in them by law to make such new appointments.

We have heard the learned vakil who argued for the plaintiff (first respondent) on this question at some length but we are not satisfied that the committee members who by a majority of four to two passed the resolution, Exhibit A1, did not act reasonably

(1) (1894) I.L.R., 17 Mad., 212.

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or in good faith in making the disputed appointments. Some of the reasons given by the said majority of the committee are that the plaintiff and the fourth defendant (who were two of the then existing three trustees) had been, in the opinion of the said majority of the committee, "very remiss in the discharge of their duty" and "have allowed the temple accounts to fall into arrears" and "have badly treated" those temple servants who did not belong to their faction. We see no sufficient grounds for believing that these four committee members (three of whom were not Sree Vaishnavas and had no interest in either of the two factions raging among the trustees) did not honestly believe in the facts on the truth of which they acted or did not honestly come to the conclusion that the additional appointments of trustees would be conducive to the interests of the temple, even though it is very probable that they knew that the additional trustees belonged to the faction opposed to that of the plaintiff and the fourth defendant.

In this view, the lower Appellate Court's decree is reversed and that of the Subordinate Judge is restored. The plaintiff will pay the costs of defendants Nos. 1 and 2 in this and in the lower Appellate Court while the other defendants will bear their own costs.

N.R.

APPELLATE CIVIL.

Before Mr. Justice Oldfield and Mr. Justice Tyabji.

1914. September 10, 11 and 16.

RAJAGOPALA NAIDU (DEFENDANT), PETITIONER,

v.

M. R. VIJAYARAGHAVALU NAIDU AND ANOTHER (PLAINTIFFS), RESPONDENTS.*

Court Fees Act (VII of 1870), sec. 7, cls. (iv) (c) and (v)—Suit for declaration of the invalidity of a decree as against the plaintiff or his properties and for possession of some of those properties sold under the decree—Relief for possession only consequential on grant of declaration—No liability to value the declaration as on the amount of the decree—Plaintiff's right to give a combined valuation for both reliefs

In a suit for (1) a declaration that a certain decree was of no legal effect against the plaintiffs or the properties in their hands and (2) possession of part of those properties, which had been sold in execution of the decree,

Held (1) that the two reliefs were connected and were to be taken together the relief for possession being consequential on the grant of declaration, (2) that the plaintiff was entitled to put in respect of both the reliefs a combined valuation for the purpose of court-fees, (3) that the whole suit was not governed by section 7, clause (iv) (c) of the Court Fees Act (VII of 1870), as there was a prayer for possession also which was to be valued as per section 7, clause (v), notwithstanding that the declaration was asked for, and (4) that the prayer for declaration was not liable to be valued for purposes of court-fees as upon the amount of the decree sought to be set aside as invalid.

PETITION under section 115 of the Code of Civil Procedure (Act V of 1908), to revise the order of C. G. SPENCER, the District Judge of Tanjore, in Civil Miscellaneous Appeal No. 18 of 1912, preferred against the order of S. C. RAMASWAMI AYYAR, the District Munsif of Shiyali, in Original Suit No. 139 of 1910.

The amended plaint in this case prayed for two reliefs (1) a declaration that a certain decree was of no legal effect against the plaintiffs or the various properties in their hands, and (2) possession of part of those properties which had been sold in execution of the decree and the reliefs were valued as follows:—

Court-fee for declaration	Rs. 10-0-0
Court-fee for possession of properties on Rs. 500 being five times the kist of the lands sought to be recovered.	Rs. 37-8-0

* Civil Revision Petition No. 401 of 1913.

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On objection by the defendants the District Munsif held that the prayer for the *declaration* of the decree was a substantial relief and that the plaintiffs must, *in addition to the* court-fee paid as per section 7, clause (v) of the Court Fees Act, value their relief for declaration at Rs. 2,400, i.e., the amount of the decree sought to be set aside and pay court-fee on Rs. 2,400 also. The District Munsif accordingly returned the plaint to be presented to the proper Court as the total valuation of both the reliefs exceeded his jurisdiction and came to Rs. 2,900.

On appeal by the plaintiffs, the District Judge holding that section 7, clause (iv) (*c*), of the Court Fees Act was applicable and that the plaintiffs' valuation of his reliefs must be accepted, set aside the order of the Munsif and directed him to dispose of the suit according to law.

Defendants preferred this *revision petition* against the order of the District Judge.

R. Kuppuswami Ayyar for the petitioner.

G. S. Venkatarama Ayyar and *G. S. Ramachandra Ayyar* for the respondents.

OLDFIELD AND TYABJI, JJ.

JUDGMENT.—The plaintiffs sued for (1) a declaration that a certain decree was of no legal effect against them or the various properties in their hands, (2) possession of part of those properties, which had been sold in execution of the decree. No distinction need be drawn between the rights of each of the plaintiffs to these reliefs, since they sued for them jointly without objection from the defendants. The learned District Judge held that section 7 (iv) (c) of the Court Fees Act applied and that therefore the valuation for purposes of jurisdiction was identical with the valuation for court-fee and the plaintiffs' presentation of the plaint in the District Munsif's Court was proper. The District Munsif had held that the valuation should be based on the value of the property sold in addition to the amount of the decree, in respect of which declaration was asked for, in all Rs. 2,995.

The learned District Judge was clearly mistaken in his statement that section 7 (iv) (c) regulated the valuation of the whole suit, since part of the relief claimed was possession and it had to be valued in accordance with section 7 (v), notwithstanding that a declaration also was asked for. That is recognised in one of the cases cited by the learned District Judge, Chinnammal

RAJAGOPALA v. VIJAYA-RAGHAVALU. — OLDFIELD AND TYABJI, JJ.

v. *Madarsa Rowther*(1). In the circumstances it cannot be argued that section 8, Suits Valuation Act, applies to more than the remainder of the relief claimed. The defendant contends here and the District Munsif has held that it is inapplicable even to that extent and that the remainder also is subject to *ad valorem* valuation on the amount of the decree, in respect of which declaration is asked for. The questions then are whether the two reliefs asked for are to be taken together, the one as consequential on the other, or, as the District Munsif took them, as independent of each other, and in the latter alternative whether the declaration is to be valued with reference to the amount of the decree.

Firstly, in the latter case it has not in our opinion been shown how such a valuation can be justified. The defendant's argument requires that the claim to declaration shall be valued without reference to its inclusion in a suit for another relief also. It has not been shown how, so regarded, the claim can be treated as involving a claim to further consequential relief also or what such further relief could be; and the case must on that ground be distinguished from *Achammal* v. *Achammal*(2). It is not suggested that it is covered directly by any section imposing an *ad valorem* valuation. The defendant contends for the application of some principle analogous to that relied on in the Full Bench decision, *Krishnasami Naidu* v. *Somasundaram Chettiar*(3) with reference either to the amount of the decree or the value of the property claimed, whichever is the less. But though the order of reference in that case assumed that section 7 (viii) was inapplicable, is clear that the opinion given was based on its application, since there is no other provision for such an alternative valuation. There the question was only whether the suit property was liable to attachment, as the property of the judgment-debtor, and the clause was in terms applicable. Here it is not, since an attachment is not in question. And there is no reason here for attempting to apply any analogous principle, when the dispute between the parties is different, relating only to the validity of the decree under execution. If the prayer for a declaration is to be regarded for the present purpose

(1) (1904) I.L.R., 27 Mad., 480. (2) (1910) 20 M.L.J., 731.
(3) (1907) I.L.R., 30 Mad., 335.

independently of that for possession, *Zinnatunnessa Khalun v. Girindra Nath Mukerjee*(1) is clear authority against the defendant's contention.

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But in fact we agree with the learned District Judge that the two prayers cannot be regarded separately. As he observes, the plaintiffs' failure to insert a prayer for a combined valuation is not conclusive, the Court's duty being to see whether they are connected. We think that they were so. Possession is not asked for on any other ground than that the decree, in execution of which it was lost, should be declared invalid; and it is therefore asked for consequently on the grant of declaration.

It is conceded that unless the two reliefs claimed can be valued independently and the prayer for declaration can be valued *ad valorem*, the petition must fail. Deciding against both these contentions we dismiss the petition with costs.

N.R.

APPELLATE CIVIL.

Before Mr. Justice Sankaran Nair and Mr. Justice Spencer.

DAVVUR SUBBA REDDI (PLAINTIFF), APPELLANT,

v

KAKUTURI VENKATRAMI REDDI *alias* VENKA REDDI AND ANOTHER (DEFENDANTS), RESPONDENTS.*

1914. September 15, 16, 18 and 24.

Hindu Law—Contract by father to sell family lands—Suit for specific performance against father—Son added subsequently as defendant—No necessity for contract—Contract not binding on son—Plaintiff's right to conveyance from father of his share only—Partial performance, meaning of—Specific Relief Act (I *of* 1877), *sec.* 15—*Contract by a co-parcener to sell his share in family property, and contract to sell specific family property, distinction between*

The plaintiff sued for specific performance of a contract for the sale of certain lands and for possession. The contract was entered into, by the first defendant, the undivided father of the second defendant who was subsequently added as a party to the suit. The first defendant pleaded that the contract was vitiated by undue influence and was a hard bargain that ought not to be enforced against him. The second defendant pleaded that the contract was entered into by the first without any legal necessity and was not enforceable in

(1) (1903) I.L.R., 30 Calc., 788.

* Appeal No. 240 of 1911.

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law. It was found that there was no undue influence or hard bargain and that there was no necessity to enter into the contract. The plaintiff offered to pay the full consideration for a conveyance of the lands which were the separate property of the first defendant and of his interest in the family lands.

Held, that the plaintiff was not entitled to a decree for specific performance of the contract against the first defendant or the second defendant.

Per SANKARAN NAIR, J.—A person is entitled to specific performance of a contract by a member of a Hindu family to sell his share of the family property.

If a junior member of a Hindu family agrees to sell any specific property belonging to his family, a decree cannot be passed against him to sell his share of that specific property.

Kosuri Ramaraju v. *Ivalury Ramalingam* (1903) I.L.R., 26 Mad., 74, *Srinivasa Reddi* v. *Sitarama Reddi* (1909) I.L.R., 32 Mad., 320, and *Poraka Subbarami Reddy* v. *Vadlamudi Seshachalam Chetty* (1910) I.L.R., 33 Mad., 359, referred to.

Nagiah v. *Venkatarama Sastrulu* (1914) I.L.R., 37 Mad., 387, dissented from.

Nanjaya Mudali v. *Shanmuga Mudali* (1914) 15 M.L.T., 186, followed.

Maharaja of Bobbili v. *Venkataramanjulu Naidu* (1914) 16 M.L.T., 181, referred to.

APPEAL against the decree of E. L. VAUGHAN, the District Judge of Nellore, in Original Suit No. 10 of 1909.

T. V. Venkatarama Ayyar and *T. V. Muthukrishna Ayyar* for the appellant.

P. Venkataramana Rao for the first respondent.

T. Prakasan for the second respondent.

SANKARAN NAIR, J.

SANKARAN NAIR, J.—This is an appeal from a decree of the District Judge of Nellore dismissing the plaintiff's suit for specific performance of a contract entered into between himself and the first defendant. The plaintiff's case is that the first defendant who had brought a suit for partition against his co-parceners for his two-sevenths share of the family properties, was in embarrassed circumstances and in order to get rid of his debts agreed to sell the plaint properties to him for a sum of Rs. 8,429 on 14th April 1904 (Exhibit I). The properties were to be sold soon after the disposal of the suit and after he had obtained his lands on partition. This agreement was renewed on 1st August 1907. The plaintiff states that after the decree was passed in favour of the defendant he was placed in possession of some of the lands but has not obtained possession of the rest. He accordingly prays for specific performance and for possession of the rest of the lands. The suit was originally brought only against the first defendant. His plea was that the agreement was really

entered into between him and the plaintiff's father-in-law, one Ramachandra Reddi, as a consideration for the latter giving evidence in the partition suit which was then pending. He also pleaded that Ramachandra Reddi threatened to place obstacles in the way of his obtaining a decree, that he was thus coerced into entering into this transaction and that it is, therefore, not binding on him. He pleaded that the sale price is inadequate and that there was no necessity for him into this agreement to sell his property. His son the second defendant was subsequently made a party to the suit. In addition to the pleas advanced by his father, he said that as there was no necessity to sell the lands the agreement is not binding on him and cannot be enforced against him under the Hindu Law

The District Judge found that there was no necessity to sell the lands and that there was no pressure by any of the creditors. He found also that the plaintiff was in debt himself and is not a person likely to be in possession of funds for the purchase of lands. It was also found by the District Judge that the plaintiff was not placed in possession of the lands but that the defendant's co-parcener who was in possession of these lands delivered them to the plaintiff's relative, plaintiff's first witness, who is now in possession He was apparently of opinion that the real beneficiary under the agreement was not the plaintiff himself but Ramachandra Reddi. Whether Rs 8,420 was a fair value for the land agreed to be sold he does not find. On these findings the suit was dismissed.

On appeal it is contended that the Judge is wrong in all his findings. It is argued that he does not find that there was coercion and the evidence does not support that plea. It is pointed out by the appellant's pleader that when Exhibit I was executed, the plaintiff was not the son-in-law of Ramachandra Reddi and when Exhibit II was executed, Ramachandra Reddi had already given his evidence. It is quite possible that the desire to secure the assistance of Ramachandra Reddi may have materially influenced the defendant in entering into this agreement. But if the consideration is not inadequate it is difficult to say that this fact will vitiate the transaction. The evidence as to the value of the lands is very meagre. The defendant's first witness, who is the first defendant's own son-in-law, states that the wet land is worth about Rs. 500 an acre and that the dry land

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is worth Rs. 450 an acre. According to this evidence the value of the lands will be about Rs. 20,000. On the other hand, his own second witness, who appears to be a comparatively wealthy man, admits that the lands in 1911 sold at Rs. 250 an acre and at the time of Exhibit I only at Rs. 150 an acre, and the plaintiff's first witness states that the price for which the plaint lands were to be sold is reasonable. Exhibit VIII shows that other lands in the vicinity sold at about Rs. 100 an acre. In these circumstances I am not prepared to say that the consideration has been proved to be inadequate. I must accordingly hold that so far as the first defendant is concerned there is no evidence of undue influence and that he has not proved that it was a hard bargain. But it is also quite clear that there was no necessity to sell the lands. The fact that for more than three years after the date of Exhibit I no creditor sued to enforce his claim, is itself strong evidence, and the defence evidence is that the first defendant has succeeded in paying off the other debts by selling other lands. The plaintiff's first witness admits that the defendant's family had about 200 or 240 acres of land, dry and wet put together. There is no evidence that any creditors were demanding payment of their debts. There is no evidence given by the plaintiff to show why it was necessary to enter into this agreement to sell the property at a future uncertain date while the lands were rising in value. There is absolutely no evidence, therefore, that it was necessary to enter into this agreement to sell. I must, therefore, hold that it is not binding on the second defendant.

It is argued before us on behalf of the appellant that he is entitled to obtain a decree for specific performance against the first defendant. A contract can be enforced against any person who was a party to it. The plaintiff was therefore right in bringing the suit only against the first defendant and if he alone had been a party to the suit he might have been entitled to get a decree against him without the question whether it was binding on the family of the first defendant being gone into. This was pointed out in *Kosuri Ramaraju* v. *Ivalury Ramalingam*(1) and in *Srinivasa Reddi* v. *Sitarama Reddi*(2). In

(1) (1903) I.L.R., 26 Mad., 74. (2) (1909) I.L.R., 32 Mad., 320.

Kosuri Ramaraju v. *Ivalury Ramalingam*(1), the suit was dismissed against persons other than the first defendant therein who alone was a party to the contract. In *Srinivasa Reddi* v. *Sivarama Reddi*(2) the son was not a party to the second appeal. In neither case, therefore, was the question, whether the agreement was binding on the family or not considered. Nor was the question decided whether, if the agreement was not binding on the family, the plaintiff was not entitled to get a decree for the managing member's share of the property on payment of the entire purchase money. That he was so entitled was conceded on behalf of the managing member in *Poraka Subbarami Reddy* v. *Vadlamudi Seshachalam Chetty*(3) In fact the argument was that he was entitled only to that relief. But in the case before us, the son has been made a party to the suit and I am not prepared to hold that after the trial of the case, we shall be justified in dismissing him from the suit, without a consideration of the pleas advanced by him. Moreover, the fact that the agreement is not binding on the family has been proved by the evidence let in to prove undue influence and the unconscionable nature of the bargain. On the finding, therefore, that the agreement is not binding on the family, the suit for a decree directing the first defendant to sell these lands must be dismissed. The plaintiff offers to pay the full amount for a conveyance to him of the lands which are the separate property of the first defendant and of the first defendant's interest in the family lands. This requires a determination of the question whether any of these lands form the separate property of the first defendant; and such a decree will only lead to litigation between the same parties to determine their rights. We think we should not be justified in passing such a decree in this suit. He is therefore not entitled to a decree for part performance. In this view it is unnecessary to consider certain *dicta* in *Nagiah* v. *Venkatarama Sastrulu*(4). But as the question has been argued before us I shall briefly refer to them.

A person is entitled to specific performance of a contract by a member of a Hindu family to sell his share of the family property. But there is no question of part performance in that

(1) (1903) I.L.R., 26 Mad., 74.
(2) (1909) I.L.R., 32 Mad., 320
(3) (1910) I.L.R., 33 Mad., 359.
(4) (1914) I.L.R., 37 Mad., 387 at p. 389.

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case. If the learned Judges intended to go further and lay down that if a junior member of a Hindu family agrees to sell any specific property belonging to his family, a decree may be passed against him to sell his share of that specific property, I am unable to agree with that view. Because the junior member is unable to perform the whole of his part of the contract by conveying the entire property agreed to be sold and for the same reason that he is not entitled to claim any specific property till partition, conveyance of a portion, is not a part of the contract "as he can perform" in the terms of section 15 of the Specific Relief Act. On the view that a co-parcener cannot alienate any specific property, no specific performance can be decreed. The opposite view rests on the principle laid down in some of the cases that a co-parcener is entitled to alienate any particular property. BAKEWELL, J., and myself have dissented from those cases in *Nanjaya Mudali* v. *Shanmuga Mudali*(1) and our judgment has been followed by the OFFICIATING CHIEF JUSTICE and KUMARASWAMI SASTRI, J., in *Maharaja of Bobbili* v. *Venkataramanjulu Naidu*(2). This question, however, does not arise in the appeal. I would dismiss the appeal with costs.

SPENCER, J.

SPENCER, J.—I concur.

K.R.

APPELLATE CIVIL.

Before Mr. Justice Sankaran Nair and Mr. Justice Spencer.

1914. July 27 and 28.

VENKATESHA MALIA (PLAINTIFF), APPELLANT,

v.

B. RAMAYA HEGADE AND TWELVE OTHERS (DEFENDANTS Nos. 1, 3 TO 5, 7, 8, 11 TO 17), RESPONDENTS.*

Religious Endowments Act (XX of 1863), ss. 14 and 18—Sanction to two persons jointly—Whether suit by one competent.

Where sanction to sue is given to two persons under section 18 of the Religious Endowments Act, one of them cannot sue alone.

Mahomed Athar v. *Ramjan Khan* (1907) I.L.R., 34 Calc., 587, explained.

Sanction granted under section 18 of the Act is a condition precedent to the exercise of the right of suit.

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(1) (1914) 15 M.L.T., 156. (2) (1914) 16 M.L.T., 181.

* Appeal No. 132 of 1910.

Venkateswara, In re (1887) I.L.R., 10 Mad., 98, referred to

It has to be construed strictly without enlarging its scope.

Sayad Hussein Miyan v. Collector of Kaira (1897) I.L.R., 21 Bom., 257, referred to.

Section 14 of the Act commented on.

APPEAL against the decree of H. O. D. HARDING, the District Judge of South Canara, in Original Suit No. 62 of 1906

The facts of this case appear sufficiently from the judgment.

K. Ramanath Shenai for the appellant.

B. Sitarama Rao for the first respondent.

K. Naraina Rao for the respondents Nos. 2 and 3.

K. Yagna Narayana Adiga for the fourth respondent.

SANKARAN NAIR AND SPENCER, JJ.

JUDGMENT.—Under section 18 of Act XX of 1863 the District Judge gave sanction to two individuals to sue for the removal of the respondents who are the moktessors of the Shri Anantha Padmanabha Temple of Perdur for misfeasance, breach of trust or neglect of duty.

Although the sanction was given jointly to both, only one of the individuals took action thereon and sued the trustees

When the suit came on for trial before the same Judge who gave the original sanction, a preliminary objection was taken that the suit was bad because the joint sanction-holder had not joined in the suit. The Judge upheld this objection and dismissed the suit holding that the plaintiff could not prosecute it alone. He further expressed a doubt as to the plaintiff's *bona fides* The question before us therefore is whether one man should be allowed to sue under section 14 of this Act upon the strength of a sanction given to two men. Such sanctions are a condition precedent to the exercise of the right of suit [*Venkateswara, In re*(1)], and it is open to the Court to amend the order of sanction at any time [*Srinivasa v. Venkata* (2)], but the plaintiff seems to have made no attempt to move the Court to alter the sanction by getting it granted in his name only.

In *Mahomed Athar v. Ramjan Khan*(3), this point was considered and the learned Judges held that when sanction had been granted to three persons and two of them withdrew and one of the three joining with him two new persons brought a suit under section 14 of the Act the suit was not defective by reason of two

(1) (1887) I.L.R., 10 Mad., 98. (2) (1888) I.L.R., 11 Mad., 148.
(3) (1907) I.L.R., 34 Calc., 537

VENKATESHA MALIA. v. RAMAYA HEGADE. — SANAKARAN NAIR AND SPENCER, JJ.

of the three plaintiffs being persons to whom leave to sue not been accorded. There no objection was taken at the t and no issue framed as to the maintainability of the suit.

It was observed by the High Court that as the same Ju who gave the leave under section 18 also entertained the s he must have tacitly given permission to the two new men become plaintiffs along with Ramjan Khan.

So here as Mr. Harding granted sanction to two petition in his order of January 8th, 1906, and subsequently on Ma 1st, 1910, he himself dismissed the plaintiff's suit because t Shivalli Brahman had not been joined as a party, and at t same time doubted the *bona fides* of the plaintiff, it may taken that he refused to allow the plaintiff to sue singly.

Such sanctions for instituting suits against trustees have be construed strictly without enlarging their scope (*Say Hussein Miyan* v. *Collector of Kaira*(1) the object of requiri sanction being to protect managers from vexatious su The words in section 14 of the Act "any person or perso interested in any mosque, etc., may without *joining as plaint with any of the other persons interested therein,* sue before t Civil Court the trustee, manager, etc.," seem to be enabling wor intended to give individuals a right to sue individually witho the necessity of all the worshippers of the particular temple religious institution joining as plaintiffs. With all respect to t learned Judges who decided *Mahomed Athar* v. *Ramjan Khan*(we do not consider that those words are intended to refer the persons who hold the sanctions granted under section 18.

Cases may occur in which it might be inadvisable to gra sanction to a particular individual either on account of h character, personal motives, or his solvency, and yet if he joine with some one whose very name would be a guarantee again the suit being improperly conducted, a Court would be justifi in granting a joint sanction where it would have refus leave to the single applicant.

We are therefore of opinion that this suit was right dismissed.

The appeal is dismissed with costs.

S.V.

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(1) (1897) I.L.R., 21 Bom., 257. (2) (1907) I.L.R., 34 Calc., 537.

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